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## Testing The 5th: Compelled Testimony From Foreign Regulators

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The circumstances of the prosecution of Anthony Allen and Anthony Conti exemplify how cross-border cooperation and parallel investigations can give rise to novel issues in a subsequent criminal trial. Allen and Conti were both UK citizens working for a Dutch bank in London. They were extradited and tried in a federal court in Manhattan, for their alleged part in a conspiracy to manipulate the LIBOR for the US Dollar and the Japanese Yen. At trial Allen and Conti argued that the proceedings had been tainted by statements they had been compelled to provide by the Financial Conduct Authority, pursuant to a regulatory investigation.<sup>1</sup> First, they argued that the evidence of a key witness had been affected, after he had seen the compelled statements, and that his decision to cooperate had been influenced by their substance. Second, they argued that both the original decision to indict, and the Grand Jury's decision, had been influenced by that witness' tainted testimony. Accordingly, they argued, the compelled statements had engendered a violation of their Fifth Amendment rights.<sup>2</sup>

Ultimately the Court, in an opinion dated 11 February 2016, determined that the US Government had discharged its burden (imposed by the principles enshrined in *US v Kastigar*, 406 U.S. 441 (1972)) to show that the evidence it presented was wholly independent of the compelled testimony. In so doing the Judge circumvented the need to resolve a more fundamental issue, which he acknowledged as "deeply interesting"<sup>3</sup> - whether the privilege against self-incrimination clause of the Fifth Amendment ("the Clause"), and therefore the requirements under *Kastigar*, applied at all in circumstances where compelled testimony is elicited by a foreign sovereign. The US Government argued that in such circumstances the Fifth Amendment offered no protection.

It is difficult to reconcile the Government's position with federal appellate authority. In replying to the Government's claim, the Defence identified several Circuit Court judgments which held that statements, obtained involuntarily abroad, could not be admitted in US proceedings. These decisions were rooted in the established principle that a violation of the Fifth Amendment occurs not when the involuntary statements are elicited, but when they are *used* in a US prosecution.<sup>4</sup> Accordingly, this line of decisions stood as authority for the proposition that, regardless of the origin of a compelled statement, whether domestic or foreign, it would not be admissible in a trial in the US.<sup>5</sup>

On what basis then did the Government invite the court not to apply the Fifth Amendment in Allen

and Conti's case? It relied almost exclusively on the Supreme Court opinion in *United States v. Balsys*, 524 U.S. 666 (1998) and the cases it cites.<sup>6</sup> Aloyzas Balsys had sought to invoke the privilege against self-incrimination, in a US court, on grounds that he risked being subject to a criminal prosecution in foreign states. The Court's decision turned on the construction of the Clause, which reads, "*no person shall be compelled in any criminal case to be a witness against himself*". The Court, in evaluating the scope of "any criminal case", considered the Clause in its context. It concluded that the Clause "*provid[es] a witness with the right against compelled self-incrimination when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise*". The Court referred to this as the "same-sovereign interpretation".

In adopting this approach the Court considered a number of authorities, decided before the ratification of the Fourteenth Amendment, when States were not bound to recognise the Clause. Drawing a reasonable analogy between foreign governments and pre-Fourteenth Amendment states the Court in *Balsys* determined that, where a witness is being compelled to give testimony, the protections of the Fifth Amendment are only available where both the compelling state and the state from which the individual fears prosecution are bound by the Clause.

Thereafter the Government concluded that, "*in adopting the same-sovereign rule where the United States is the compelling sovereign, the Supreme Court necessarily endorsed that rule in cases where the United States is the using party*".<sup>7</sup> This conclusion, expressed as a modest and natural extension of *Balsys*, warrants significant scrutiny. Effectively the Government relies on *Balsys* to suggest that, where evidence is elicited in circumstances where the Fifth Amendment does not apply, the Supreme Court has "*necessarily endorsed*" a rule that the evidence will always be shadowed from constitutional protection in a domestic trial. In this author's view, to make that leap against the stream of Appellate authority is unlikely to be sustainable. There are two principle reasons.

First, at its core, *Balsys* concerns the interpretation of the wording "any criminal case" within the Clause. The Court concludes that the application of the Clause is limited to prosecutions in the US (where the Clause applies).<sup>8</sup> This perspective reflects the principle, mentioned above, that a violation of the Fifth Amendment occurs not when the involuntary statements are elicited but when they are *used* in a US prosecution.

Second, *Balsys*, and all the cases it cites, concerns the scope of the protection offered by the Fifth Amendment when an individual is being compelled. The articulated 'same sovereign rule' is confined to this scenario. It is self-evident that the Fifth Amendment does not restrict the UK Government from compelling a person to give evidence - just as it did not restrict pre-Fourteenth Amendment states. Whether the resulting compelled testimony could subsequently be used in a criminal trial in the US is a different matter entirely.

The circumstances of this case are far less visceral than those for which the Court of Appeals has previously been asked to consider. The FCA did not obtain the statements through any impropriety or oppression. However, there is no reason why the underlying principle - that the Fifth Amendment applies notwithstanding the foreign nature of the involuntary evidence - should not still apply. As stressed by Justice Stevens, "*The Amendment prescribes rules of conduct that must attend any*

*deprivation of life, liberty, or property in our Nation's courts*".<sup>9</sup> A compelled statement, irrespective of the jurisdiction in which it is obtained, must be subject to the restrictions of those rules. Although the wave of investigations into financial institutions shows signs of recession, the international dimension of any underlying conduct will remain a common feature. Accordingly this issue is unlikely to remain dormant forever.

*\*This is an abridged version of an article, under the same title, that first appeared on the Law360 website on 11 April 2016.*

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<sup>1</sup> Under section 171 and 172 of the Financial Services and Markets Act 2000 ("FSMA").

<sup>2</sup> The Fifth Amendment of the United States Bill of Rights contains a number of rights relevant to both criminal and civil proceedings, one of which is the self-incrimination Clause.

<sup>3</sup> See footnote 8 of Judge Rakoff's opinion.

<sup>4</sup> The Defence relied on the Supreme Court opinion of *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

<sup>5</sup> See *In re Terrorist Bombings of the US Embassies in E. Africa*, 552 F.3d 177, 201 (2d Cir. 2008).

<sup>6</sup> Clearly the Supreme Court has not yet expressly adopted the principle espoused by the Circuit Court, in the opinions identified above. However, in the *Re Terrorist Bombings* case, having recognised the lack of Supreme Court authority, the Court relied on the equal application, to both US and foreign citizens, of the Fifth Amendment's right to due process of law (para. 16).

<sup>7</sup> Page 10 of the US Government's Memorandum in opposition to Defendants' motion to dismiss based on *Kastigar*.

<sup>8</sup> This is emphasised in the concurring opinion of Justice Stevens. "*The primary office of the clause at issue in this case is to afford protection to persons whose liberty has been placed in jeopardy in an American tribunal*".

<sup>9</sup> Justice Stevens' concurring opinion in *Balsys*.