


Fall 10-1-2018

## The (not-so) “Brave New World of International Criminal Enforcement”: The Intricacies of Multi-Jurisdictional White-Collar Investigations

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### Recommended Citation

Emily T. Carlson, *The (not-so) “Brave New World of International Criminal Enforcement”: The Intricacies of Multi-Jurisdictional White-Collar Investigations*, 84 Brook. L. Rev. (2018).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol84/iss1/24>

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# The (not-so) “Brave New World of International Criminal Enforcement”<sup>1</sup>: THE INTRICACIES OF MULTI-JURISDICTIONAL WHITE-COLLAR INVESTIGATIONS

“We are dealing with a new era of crime on a global scale”<sup>2</sup>

## INTRODUCTION

The United States is routinely involved in cross-border criminal investigations. The Department of Justice (DOJ) supports the enforcement of federal criminal laws domestically, and where authorized and appropriate, abroad.<sup>3</sup> Notably, within the DOJ’s Criminal Division, the Fraud Section has proven instrumental in combatting economic crime around the world.<sup>4</sup> It has the capabilities of “managing complex and multi-district litigation” and has the “ability to [position] resources . . . to address law enforcement priorities and respond to geographically shifting crim[inal]” investigations.<sup>5</sup> In the aftermath of the financial crisis in 2008, however, the DOJ has come under the scrutiny of commentators and practitioners in the financial and legal fields for the apparent decline in federal white-collar prosecutions.<sup>6</sup> In fact, there has been an ongoing decline in both these prosecutions and their convictions, reaching a twenty-year historic low in 2015.<sup>7</sup> This raises the question: how can there be a decline when prominent financial firms and their top executives were at the forefront of the

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<sup>1</sup> United States v. Allen, 864 F.3d 63, 90 (2d Cir. 2017).

<sup>2</sup> Leslie R. Caldwell, Assistant Attorney General, U.S. Dep’t of Justice, Remarks at the 26th Annual Association of Certified Fraud Examiners Global Fraud Conference (June 15, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-26th-annual-association> [<https://perma.cc/PC37-E7P9>].

<sup>3</sup> See U. S. DEPT OF JUSTICE, FRAUD SECTION (FRD), <https://www.justice.gov/criminal-fraud> [<https://perma.cc/WY42-KDEB>].

<sup>4</sup> See *id.*

<sup>5</sup> *Id.*

<sup>6</sup> See James Kwak, *America’s Top Prosecutors Used to Go After Top Executives. What Changed?*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/books/review/the-chickenshit-club-jesse-eisinger.html> [<https://perma.cc/BXZ9-SYWZ>].

<sup>7</sup> *White Collar Crime Convictions Continue to Decline*, TRACREPORTS (Apr. 7, 2016), <http://trac.syr.edu/tracreports/crim/421/> [<https://perma.cc/D29N-SYZX>].

financial crisis which “devastated the *global economy* and cost the United States almost nine million jobs?”<sup>8</sup>

Commentators have explained that the DOJ’s failure to prosecute corporations and their employees stems from the ever-growing social hierarchy within the DOJ itself.<sup>9</sup> The cultural shift at the DOJ since the early 2000s has brought in the top prosecutors from the most powerful law firms in the country.<sup>10</sup> Increasingly, DOJ prosecutors and defense attorneys come from the same collection of sophisticated and well-educated litigators, though at different stages in their careers.<sup>11</sup> The mindset, therefore, is that conducting a criminal investigation against heads of multimillion dollar global corporations is not only risky but “social[ly] uncomfortable” and career compromising.<sup>12</sup> Even with a seemingly flawless case, “going to trial is always [considered] a gamble.”<sup>13</sup> Not only are there career ramifications of having “a ding on [a prosecutor’s] record,” but “[l]os[ing] a white-collar criminal trial” is seen as “prosecutorial overreach.”<sup>14</sup> James Comey, a former United States Attorney for the Southern District of New York (SDNY), used the term the “Chickenshit Club”<sup>15</sup> to describe the members of the DOJ’s social structure. This club, he explained, is comprised of prosecutors who have never had an acquittal or hung jury because they do not want to jeopardize their pristine record, future career opportunities, and the “symbiotic relationship . . . between Big Law and the Department of Justice.”<sup>16</sup>

Similar to the social aspects driving the DOJ’s prosecutorial approach, professionals in the legal field have called into question its use of deferred prosecution agreements

<sup>8</sup> Kwak, *supra* note 6 (emphasis added); *Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations*, TRACREPORTS (Apr. 7, 2016), <http://trac.syr.edu/tracreports/crim/406/> [<https://perma.cc/X4Z3-LRU7>] (corporate prosecutions filed from 2004 to 2014 has decreased by over twenty-nine percent).

<sup>9</sup> JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* xi-xxi (2017).

<sup>10</sup> *See generally id.*

<sup>11</sup> *See id.* at 177–78.

<sup>12</sup> Kwak, *supra* note 6.

<sup>13</sup> Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail> [<https://perma.cc/JVX2-WD2C>].

<sup>14</sup> *Id.*

<sup>15</sup> EISINGER, *supra* note 9 at xii; *see also* CNN Library, *James Comey Fast Facts*, CNN (Apr. 17, 2018), <https://www.cnn.com/2017/05/03/us/james-comey-fast-facts/index.html> [<https://perma.cc/JQE8-GKKY>].

<sup>16</sup> Kwak, *supra* note 6; EISINGER, *supra* note 9, at 192; *see also* EISINGER, *supra* note 9 at 194 (“It became no longer clear whether the Department of Justice pushed investigations that turned out to be lucrative for the white-shoe big law firms or whether big law firms nudged prosecutors into conducting the types of investigation that required lucrative internal probes.”).

(DPA) and non-prosecution agreements (NPA)—a relatively new, “civilized” technique for charging corporations.<sup>17</sup> These agreements, the first of which was formed by Mary Jo White of the U.S. Attorney’s office for the SDNY in 1994,<sup>18</sup> require admissions of corporate wrongdoing as a whole but “avoid the ignominy of criminal [white-collar] convictions,” so long as a corporation fulfills its commitments under the agreement.<sup>19</sup> The DOJ’s Criminal Division has entered into these agreements “in more than two-thirds of the corporate cases it resolved between 2010 and 2012.”<sup>20</sup> Judge Jed Rakoff, a senior United States District Judge of the SDNY, at a New York City Bar Association presentation declared that not indicting individuals, but instead using DPAs to settle corporate cases, was “technically and morally suspect.”<sup>21</sup> In 2013, he further noted that the “DOJ ha[d] ‘not prosecuted any top Wall Street executive in relation to the financial crisis but [instead,] struck deals with companies using deferred prosecution agreement[s] over sanction violations and money laundering without charging any individuals.’”<sup>22</sup> What incentives, then, do corporations have to not engage in fraudulent transactions, or hold their employees accountable for engaging in financially motivated crimes, if the DOJ is essentially giving out a free pass?<sup>23</sup>

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<sup>17</sup> Elkan Abramowitz & Jonathan Sack, *The ‘Civil-izing’ of White-Collar Criminal Enforcement*, N.Y. L.J. (May 27, 2013, 12:00 AM), <http://www.newyorklawjournal.com/id=1202598915323/The-Civilizing-of-WhiteCollar-Criminal-Enforcement> [https://perma.cc/LG95-MV7Q].

<sup>18</sup> See EISINGER, *supra* note 9, at 93.

<sup>19</sup> David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U. C. DAVIS L. REV. 1235, 1237 (2016) (“In a deferred prosecution agreement, criminal charges are filed but eventually dismissed if the corporation complies with the terms of the agreement; in a non-prosecution agreement, criminal charges are never even filed if the company meets its obligations under the agreement.”) *Id.* at 1237 n.1; see also Abramowitz & Sack, *supra* note 17.

<sup>20</sup> Uhlmann *supra* note 19 at 1237; see also EISINGER, *supra* note 9, at 197 (“Through the 2000s—with the Enron reversals, the Arthur Andersen backlash, the Thompson memo rollback, the KPMG case, the Bear Stearns trial losses—prosecutors began to focus less on investigations of individual executives. All the changes moved in one direction: to help big corporations and their top officials.”).

<sup>21</sup> Thomas Fox, *Are Deferred Prosecution Agreements Morally Suspect?*, LEXISNEXIS LEGAL NEWSROOM CORP. (Nov. 20, 2013, 12:36 PM) <https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2013/11/20/are-deferred-prosecution-agreements-morally-suspect.aspx?Redirected=true> [https://perma.cc/Z5MK-YPE4]; see also *Hon. Jed S. Rakoff*, U.S. DISTRICT CT. SOUTHERN DISTRICT OF N.Y., <http://www.nysd.uscourts.gov/judge/Rakoff> [https://perma.cc/78YQ-EQDZ]. Judge Rakoff delivered the district court opinion in *United States v. Allen*, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) *rev’d*, 864 F.3d 63 (2d Cir. 2017).

<sup>22</sup> Fox, *supra* note 21.

<sup>23</sup> As early as the 1980s, the practical effects of white-collar prosecutions, or lack thereof, on corporate actors have played an important role in policy debates. John Keeney, the former Deputy Assistant Attorney General of the DOJ’s Criminal Division responded to a bill to amend the Foreign Corrupt Practices Act (FCPA) in 1986 as follows:

While the DOJ's cultural landscape and its monetary compliance agreements arguably offer troubling insight into the Department's growing leniency towards prosecuting financial corporations and their employees, a more fundamental concern has come into focus from a recent United States Court of Appeals for the Second Circuit decision, *United States v. Allen*.<sup>24</sup> On July 19, 2017, the court reversed the DOJ's first successful prosecution of two individuals in connection with the London Interbank Offered Rate (LIBOR) manipulation scandal of 2012.<sup>25</sup> In *Allen*, the court unanimously overturned a fraud conviction of two defendants, finding that the prosecution was tainted by the DOJ's reliance on a witness who had been exposed to the defendants' compelled testimony before a parallel government agency in the United Kingdom.<sup>26</sup> The court held that the Fifth Amendment prohibits the use and derivative use of compelled testimony in criminal proceedings in American courtrooms even if that testimony was legally obtained abroad.<sup>27</sup> Despite recognizing a growing interdependency on foreign agencies to aid in global financial investigations, the appeals court used the heavy *Kastigar* burden<sup>28</sup> to find the evidence presented at trial was tainted and to reverse the indictments.<sup>29</sup> Not only did the Second Circuit interpret the guiding legal precedent to extend to foreign-obtained evidence, it also confirmed that the burden of establishing an airtight fraud investigation from its inception fell on the DOJ<sup>30</sup>—offering little to no guidance on how to accomplish this feat.

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If the risk of conduct in violation of the statute becomes merely monetary, the fine will simply become a cost of doing business, payable only upon being caught and in many instances, it will be only a fraction of the profit acquired from the corrupt activity. Absent the threat of incarceration, there may no longer be any compelling need to resist the urge to acquire business in any way possible.

Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C DAVIS L. REV. 497, 529–30 n.97 (2015) (quoting Business Accounting and Foreign Trade Simplification Act, Joint Hearing Before the Subcomm. on Int'l Fin. And Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous., and Urban Affairs, 99th Cong. 149 (1986) (response to written questions of Senator D'Amato from John C. Keeney)).

<sup>24</sup> *United States v. Allen*, 864 F.3d 63, 101 (2d Cir. 2017).

<sup>25</sup> *See id.*; *see also* Sean Hecker & Karolos Seeger, *The Use of Foreign Compelled Testimony in Cross-Border Investigations—The Impact of the Second Circuit's Allen Decision*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: BUSINESS CRIME 2018, 9–12 (2018), [http://www.debevoise.com/~media/files/pdf/bc18\\_chapter%203%20%20debevoise%20and%20plimpton.pdf](http://www.debevoise.com/~media/files/pdf/bc18_chapter%203%20%20debevoise%20and%20plimpton.pdf) [https://perma.cc/58F9-UFFX].

<sup>26</sup> Hecker & Seeger, *supra* note 25, at 9.

<sup>27</sup> *Allen*, 864 F.3d at 101; Hecker & Seeger, *supra* note 25, at 9.

<sup>28</sup> *See infra* Section I.A.

<sup>29</sup> *Allen*, 864 F.3d at 87–88, 97; Hecker & Seeger, *supra* note 25.

<sup>30</sup> *See* Hecker & Seeger, *supra* note 25, at 13.

Although this note does not seek to argue that the DOJ should forgo upholding the values of the Constitution, notably the Self-Incrimination Clause under the Fifth Amendment, or that the Second Circuit erred in overturning the indictments in the *Allen* case, it does question an almost out-of-date approach to conducting international white-collar criminal investigations. Such a restriction to use testimony, either directly or indirectly, compelled lawfully in foreign jurisdictions creates an enormous hurdle for the DOJ to overcome.<sup>31</sup> The impact of the *Allen* case deters and provides little incentive for the DOJ to pursue international crime on a global scale, especially related to market manipulation, which was a factor in the financial crisis.<sup>32</sup> In an age of global markets and cross-border financial crime, the DOJ's failure to prosecute these crimes can be attributed to the challenges and complexity faced by prosecutors in investigating and prosecuting multinational corporations, which could very well be amplified by the *Allen* decision. This note argues that the ever-expanding, multi-jurisdictional aspect of prosecutions has created a need to establish a new overarching agreement, such as a Mutual Legal Assistance Treaty and taint team hybrid, between the United States and foreign jurisdictions who currently use legally obtained compelled testimony—an international approach to combat an international problem.

Part I of this note explores the background of the use and derivative use immunity statute and the Supreme Court's *Kastigar* standard that influenced the Second Circuit's decision in *Allen*, highlighting the decision's potential impact. Part II analyzes the breadth of international white-collar crimes and calls into question the Second Circuit's "solutions" for the DOJ moving forward. Part III proposes an international legal solution for prosecuting global financial crimes by implementing bilateral treaties between the DOJ and its foreign counterparts. This would essentially shift the overwhelming burden of obtaining taint-free testimony to all prosecutorial agencies involved, eliminating the constitutional question altogether.

## I. THE ALLEN DECISION AND ITS IMPLICATIONS

### A. *Derivative Use Immunity and the Kastigar Standard*

The *Allen* decision has significant implications if subsequent cases rely on its holding, and understanding the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

guiding legal precedent behind the decision provides insight on the constitutional concerns arising out of foreign-obtained evidence. In 1972, the Supreme Court in *Kastigar v. United States* adopted the use immunity statute as the constitutional standard for gathering testimony.<sup>33</sup> Specifically, it “upheld the constitutionality of compelling testimony in exchange for the ‘use and derivative use’ immunity under 18 U.S.C. § 6002.”<sup>34</sup> It reasoned that “the scope of the protection [the immunity statute] afforded was ‘coextensive with the scope of the [Fifth Amendment<sup>35</sup>] privilege.’”<sup>36</sup> The Court stressed that the “use and derivative use” that is implicit in the language of the immunity statute protects defendants and witnesses from the direct “use” of protected statements in trial and the “derivative use” of any immunized testimony and evidence gained as a result of those protected statements.<sup>37</sup> Therefore, the statute prohibits the use of “compelled testimony in *any* respect” to ensure that the testimony does not implicate the witness or violate the immunity provided under the Amendment.<sup>38</sup> The Court reaffirmed that the burden of proof was on the United States government to prove that its evidence used at trial is not based on immunized testimony or the fruits of such testimony.<sup>39</sup> This, however, cannot be established by a mere “negation of taint[ed]” evidence.<sup>40</sup> Rather, the prosecution has “the affirmative duty to

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<sup>33</sup> *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972).

<sup>34</sup> *United States v. Allen*, 864 F.3d 63, 91 (2d Cir. 2017) (quoting *Kastigar*, 406 U.S. at 453).

<sup>35</sup> U.S. CONST. amend. V. The Fifth Amendment of the U.S. Constitution in pertinent part provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Id.*

<sup>36</sup> *Allen*, 864 F.3d at 91 (quoting *Kastigar*, 406 U.S. at 453).

<sup>37</sup> *Kastigar*, 406 U.S. at 443, 459–60.

The use immunity statute (18 U.S.C. § 6002) allows the government to prosecute the witness using evidence obtained independently of the witness’s immunized testimony. Section 6002 provides: “[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”

OFF. OF THE U.S. ATT’YS, U.S. DEP’T OF JUSTICE, CRM 500-999, CRIMINAL RESOURCE MANUAL 718. DERIVATIVE USE IMMUNITY, <https://www.justice.gov/usam/criminal-resource-manual-718-derivative-use-immunity> [<https://perma.cc/A78A-K68F>] [hereinafter CRIMINAL RESOURCE MANUAL].

<sup>38</sup> *Kastigar*, 406 U.S. at 453 (emphasis in original); see also CRIMINAL RESOURCE MANUAL, *supra* note 37.

<sup>39</sup> *Kastigar*, 406 U.S. at 460; see also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 79 n.18 (1964).

<sup>40</sup> *Kastigar*, 406 U.S. at 460.

prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”<sup>41</sup>

This holding has led courts in subsequent white-collar cases, including multinational financial cases like *Allen*, to require a “*Kastigar* hearing” in which the prosecution must prove that its case is solely attributable to taint-free evidence.<sup>42</sup> A *Kastigar* hearing, conducted following initial briefings and oral arguments regarding a defendant’s *Kastigar* motion,<sup>43</sup> is used to “definitively resolve” the issues of whether the prosecution has met its burden.<sup>44</sup> This hearing is similar but not synonymous to an evidentiary hearing.<sup>45</sup> Its scope is limited to assessing the “illicit ‘use’ of compelled testimony” in the American courtroom.<sup>46</sup> More formulaically, the court overhearing the case must analyze whether the prosecution has violated a defendant’s or witnesses’ Fifth Amendment rights if one of the following is met: (1) the “immunized testimony has some evidentiary effect in a prosecution against the witness”; (2) “there is a recognizable danger of official manipulation that may subject the immunized witness to a criminal prosecution arising out of the investigation in which the testimony is given”; or (3) a “cooperating witness’s exposure to compelled testimony motivates that witness to cooperate and testify against the defendants.”<sup>47</sup>

### B. *The Second Circuit’s Decision in Allen*

The *Allen* case arose out of a United Kingdom investigation of two employees, Anthony Allen and Anthony

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<sup>41</sup> *Id.*; see also CRIMINAL RESOURCE MANUAL, *supra* note 37.

<sup>42</sup> See *Kastigar*, 406 U.S. at 461–62. The Second Circuit interpreted the *Kastigar* burden of proof as a preponderance of the evidence standard four years after the *Kastigar* decision, emphasizing that

[w]hile this formulation repeats rather than defines the word “derived,” it places a significant gloss upon it by putting the burden firmly on the prosecution to demonstrate that an indictment [and/or conviction] is the product of legitimate rather than tainted evidence, and by insisting that legitimate evidence be from a source “wholly independent of the compelled testimony.”

United States v. Kurzer, 534 F.2d 511, 516 (2d Cir. 1976) (emphasis added); see also United States v. Allen, 864 F.3d 63, 92 (2d Cir. 2017).

<sup>43</sup> United States v. Volpe, 42 F. Supp. 2d 204, 219 (E.D.N.Y. 1999) (“While the court has discretion to hold the [*Kastigar*] hearing before, during, or after the trial, it is the general practice in this circuit to defer such a hearing until after trial.”) (citations omitted); see also United States v. Allen, 160 F. Supp. 3d 684, 687 (S.D.N.Y. 2016) *rev’d*, 864 F.3d 63 (2d Cir. 2017).

<sup>44</sup> *Allen*, 160 F. Supp. 3d at 687.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 690.

<sup>47</sup> *Id.* at 691 (citing *United States v. Helmsley*, 941 F.2d 71, 82 (2d Cir.1991)); see also *United States v. Biaggi*, 909 F.2d 662, 689–90 (2d Cir.1990).



Conti, at Rabobank, a Netherlands-based bank, for their roles as the bank's U.S. Dollar LIBOR submitters in the suspected manipulation of the rate.<sup>48</sup> In 2013, the United Kingdom's Financial Conduct Authority (FCA), an equivalent agency to the DOJ, carried out compulsory interviews,<sup>49</sup> pursuant to its statutory authority, where both Allen and Conti were compelled to testify, potentially under penalty of imprisonment.<sup>50</sup> Adhering to U.K. law, the FCA granted the defendants direct use immunity but not derivative use immunity, a distinction allowed abroad but not domestically.<sup>51</sup> The FCA also conducted an interview with Rabobank's Japanese Yen LIBOR submitter, Paul Robson, for his suspected involvement in the manipulation

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<sup>48</sup> United States v. Allen, 864 F.3d 63, 67 (2d Cir. 2017). Manipulating benchmark interest rates, notably LIBOR, has grave consequences. "LIBOR [itself] is a benchmark interest rate based on the rates at which banks lend unsecured funds to each other on the London interbank market." James McBride, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN REL. (Oct. 12, 2016), <https://www.cfr.org/background/understanding-libor-scandal> [<https://perma.cc/NKB6-USAH>]. Worldwide, financial institutions use LIBOR as a base rate for setting interest rates on "hundreds of trillions of dollars in securities and [consumer and corporate] loans . . . including government and corporate debt, as well as auto, student, and home loans, including over half of the United States' flexible rate mortgages." *Id.*; see also *Allen*, 864 F.3d at 69.

<sup>49</sup> Interviews under compulsion may be conducted by the FCA under sections 171 to 173 of Financial Services and Markets Act of 2000. The relevant sections of the Act are as follows:

171. Powers of persons appointed under section 167.

(1) An investigator may require the person who is the subject of the investigation ("the person under investigation") or any person connected with the person under investigation—

(a) to attend before the investigator at a specified time and place and answer questions; or

(b) otherwise to provide such information as the investigator may require.

(2) An investigator may also require any person to produce at a specified time and place any specified documents or documents of a specified description.

(3) A requirement under subsection (1) or (2) may be imposed only so far as the investigator concerned reasonably considers the question, provision of information or production of the document to be relevant to the purposes of the investigation.

Financial Services and Market Act 2000, c.8 § 171 (UK), <https://www.legislation.gov.uk/ukpga/2000/8/section/171> [<https://perma.cc/8499-E9WT>].

<sup>50</sup> United States v. Allen, 160 F. Supp. 3d 684, 688 (S.D.N.Y. 2016), *rev'd*, 864 F.3d 63 (2d Cir. 2017).

<sup>51</sup> See Section I.A (discussing United States' treatment of "use and derivative use" immunity); see also Clients & Friends Memorandum from Cadwalader, Wickersham & Taft, LLP, US Second Circuit Finds Testimony Compelled by UK Regulators to be Inadmissible in Criminal Proceedings (July 26, 2017), <https://www.cadwalader.com/resources/clients-friends-memos/us-second-circuit-finds-testimony-compelled-by-uk-regulators-to-be-inadmissible-in-criminal-proceedings> [<https://perma.cc/ZU5K-XZZ8>] (describing the common law and statutory protection granted to defendants and witnesses under U.K. law).

scheme.<sup>52</sup> Later that same year, the FCA pursued a regulatory enforcement action against Robson and disclosed to him relevant testimonial evidence which included Allen and Conti's compelled statements.<sup>53</sup> Shortly after, however, the FCA stayed its action against Robson and gave all of its evidence overseas to the DOJ which had already begun pursuing its own criminal investigation.<sup>54</sup> In 2014, the DOJ charged Robson with bank fraud to which he plead guilty.<sup>55</sup> As part of Robson's plea package, he agreed to be a witness in the mounting case by both the U.K. and U.S. enforcement agencies against Allen and Conti.<sup>56</sup>

Aware of potential Fifth Amendment and tainted evidence issues, the DOJ advised Robson that he was not to provide any of the information he gleaned from Allen's and Conti's transcripts with U. S. prosecutors, since his testimony before the grand jury was to be solely based on his personal knowledge.<sup>57</sup> The DOJ coordinated with the FCA and held meetings to address the need to establish a wall between the two agencies.<sup>58</sup> It even used a "separate filter team" of attorneys from a different section of the DOJ to address issues related to the FCA's compulsory interviews.<sup>59</sup> Following Robson's testimony before the United States court, both Allen and Conti were charged with bank and wire fraud.<sup>60</sup> Allen and Conti's indictments rested solely on "certain material information [Robson] supplied to the grand jury."<sup>61</sup>

On appeal, Allen and Conti argued that the DOJ had violated their Fifth Amendment rights through the derivative use of their compelled testimony heard during trial when Robson was called upon to testify.<sup>62</sup> Arguing the standards for testimony gathering addressed in *Kastigar*,<sup>63</sup> they contended that the District Court erred in assessing whether Robson's testimony was tainted by his exposure to Allen and Conti's FCA-compelled testimony, that the DOJ did not meet its burden of showing that all testimony used during trial was untainted, and that the

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<sup>52</sup> *Allen*, 864 F.3d at 68, 72, 76.

<sup>53</sup> *Id.* at 76–77.

<sup>54</sup> *Id.* at 77.

<sup>55</sup> *Id.* at 68, 77.

<sup>56</sup> *Id.* at 68.

<sup>57</sup> *Allen*, 160 F. Supp. 3d at 694–95.

<sup>58</sup> *Id.*

<sup>59</sup> Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 2 n.1, *United States v. Allen*, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR), ECF No. 95.

<sup>60</sup> *Allen*, 864 F.3d at 68.

<sup>61</sup> *Id.*; see also Hecker & Seeger, *supra* note 25, at 9.

<sup>62</sup> *Allen*, 864 F.3d at 68, 79.

<sup>63</sup> *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972).

DOJ's use of Robson's testimony was "not harmless beyond a reasonable doubt."<sup>64</sup> The defendants filed a motion for a post-trial *Kastigar* hearing or to suppress Robson's testimony.<sup>65</sup> The motion argued that because Robson's review of the FCA transcripts violated the defendants' Fifth Amendment rights and ultimately tainted Robson's testimony in the United States proceedings, the indictments against Allen and Conti should be overturned.<sup>66</sup>

The Second Circuit confirmed that applying a *Kastigar* analysis to the evidence of the case exposed the DOJ's manipulation of foreign-compelled testimony and denied the defendants a fair trial domestically.<sup>67</sup> It concluded that "the Fifth Amendment's prohibition on the [derivative] use of [a defendant's] compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled [that] testimony."<sup>68</sup> Under American constitutional law, it reasoned that because the *Kastigar* decision correctly safeguarded a defendant's right to a fair trial, compelled testimony must be granted use *and* derivative use immunity—any amount or form of taint is prohibited.<sup>69</sup> While the Second Circuit did not go so far as the United States Court of Appeals for the District of Columbia in *United States v. North*<sup>70</sup> to require the DOJ to demonstrate that a witness's exposure to compelled testimony "did not in any manner subtly 'refresh his memory, focus or organize his thoughts,' or in some other traceless way influence his state of mind," it did hold that the DOJ is required to prove that a defendant's exposure "did not shape, alter, or affect the information that he provided and that the Government used."<sup>71</sup> This burden, while not as overwhelming as the one announced in *North*, creates a towering obstacle for the DOJ to confront in an already complex investigation.<sup>72</sup>

Despite the Second Circuit's firm decision to expand the use of the *Kastigar* standard to evaluate foreign-compelled

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<sup>64</sup> *Allen*, 864 F.3d at 79 (emphasis in original); see also Hecker & Seeger, *supra* note 25 at 10.

<sup>65</sup> *Allen*, 864 F.3d 63 at 78.

<sup>66</sup> *Allen*, 160 F. Supp. 3d at 691–92.

<sup>67</sup> *Allen*, 864 F.3d at 97.

<sup>68</sup> *Id.* at 68; see also Hecker & Seeger, *supra* note 25 at 10.

<sup>69</sup> *Allen*, 864 F.3d at 68; see also CRIMINAL RESOURCE MANUAL *supra* note 37.

<sup>70</sup> See *United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990).

<sup>71</sup> *Allen*, 864 F.3d at 93 (internal quotations omitted); see also Marc P. Berger & Yana Grishkan, *Second Circuit Rules Fifth Amendment Applicable to Statements Provided to Foreign Governments*, BLOOMBERG L. SEC. REG. & L. REP. (July 31, 2017), <http://www.ropeswealthadvisors.com/~media/Files/articles/2017/July/spRabobank%2073117%20SRLR.pdf> [<https://perma.cc/4XHU-QSEF>].

<sup>72</sup> See Peter J. Henning, *Libor And London Whale Cases Show Hurdles with Foreign Defendants*, N.Y. TIMES: DEALBOOK (July 24, 2017), <https://www.nytimes.com/2017/07/24/business/dealbook/fraud-prosecution-libor-london-whale-cases.html?mcubz=1> [<https://perma.cc/RHY9-VV3V>].

testimony, it did address the DOJ's concern that prohibition of foreign-compelled testimony on its use in United States courts could "hamper the prosecution of criminal conduct that crosses international borders."<sup>73</sup> It explicitly recognized that cross-border criminal investigations have become more prevalent in recent years and that foreign agencies are increasingly reaching out to the DOJ for cooperation and aid with fraud investigations.<sup>74</sup> The court noted, however, that the DOJ has recently taken steps to circumvent *Kastigar* issues by embedding DOJ prosecutors into foreign law enforcement departments, equivalent to "taint teams."<sup>75</sup> It commended the agency on taking this major step that goes beyond mere cross-border collaboration since there is currently "an increased emphasis in the United States on individual culpability as a component to, or even in place of, corporate resolutions."<sup>76</sup> The court concluded that while it "do[es]

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<sup>73</sup> *Allen*, 864 F.3d at 87–90 (quoting Brief for the United States at 123, U.S. v. *Allen*, 864 F.3d 63 (2d Cir. 2017) (Nos. 16-898 (L), 16-939 (CON))).

<sup>74</sup> *Allen* 864 F.3d at 89; *see also* Berger & Grishkan, *supra* note 71.

Acting Assistant Attorney General Blanco explained that, from the DOJ's perspective, "we increasingly find ourselves looking across the globe to collect evidence and identify witnesses necessary to build cases, requiring greater and closer collaboration with our foreign counterparts." In *Allen*, the Second Circuit recognized the same trend, noting that *cross border prosecutions have become more common and that "[t]he rise in non-prosecution agreements and deferred prosecution agreements between the U.S. and foreign entities for misconduct occurring abroad attests to this new reality."*

Hecker & Seeger, *supra* note 25, at 11 (quoting Kenneth A. Blanco, Acting Assistant Attorney General, U.S. Department of Justice, Speaks at the Atlantic Council Inter-American Dialogue Event on lessons from Brazil: Crisis, Corruption and Global Cooperation, Washington, D.C. (July 19, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1> [<https://perma.cc/PMK5-CM6L>] (emphasis added) (footnotes omitted)).

<sup>75</sup> *See* Latham & Watkins, *Latham & Watkins Client Alert Commentary Number 2153: DOJ Announces Secondment to UK's Corruption Prosecutor* (June 5, 2017), <https://www.lw.com/thoughtLeadership/DOJ-announces-secondment-UK-corruption-prosecutor> [<https://perma.cc/4F3Q-LX4U>].

On May 24, 2017, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden announced that the DOJ will send an anti-corruption prosecutor to work with the United Kingdom's Financial Conduct Authority (FCA) and Serious Fraud Office (SFO). The two-year secondment will mark the first time that the DOJ's Criminal Division has sent a prosecutor to work full-time with foreign agencies on regulatory and financial crime matters. . . . In his speech, McFadden highlighted the recent growth in foreign partners' requests for legal assistance. He noted a 147% increase in the number of foreign requests for US-based evidence for foreign bribery and corruption investigations and a 75% increase in the number of requests from the US government to foreign counterparts since 2012. The DOJ has expanded its Office of International Affairs and has set up additional units in response to this growth.

*Id.* (footnotes omitted); *see also* Berger & Grishkan, *supra* note 71; *Allen*, 864 F.3d at 89 (discussing embedding prosecutors with foreign law enforcement agencies).

<sup>76</sup> Berger & Grishkan, *supra* note 71.

not presume to know exactly what this brave new world of international criminal enforcement will entail,” it is, however, confident that trials conducted within the United States would continue to remain fair and constitutionally sound.<sup>77</sup>

Without a detailed solution to overcome the risk of compelled testimony and its Fifth Amendment implications infiltrating foreign-collected evidence, the court suggested that the DOJ, in addition to taint teams, “will need to be in [even] closer coordination with its foreign counterparts” and to advise parallel agencies that the United States will need to be part of white-collar investigations “at even earlier stages” than initially considered.<sup>78</sup> Once collaboration is established at the “onset” of an investigation, the DOJ will then have to be “even more vigilant in gathering evidence” to ensure that the witnesses with whom the prosecutors wish to confer testimony “do not become tainted in any way by compelled testimony.”<sup>79</sup> It further noted that the burden to ensure taint-free evidence, identical to the burden to prove that taint does not exist at trial in the *Kastigar* hearing, is *exclusively* the DOJ’s and “the risk of error in coordination [with a foreign authority] falls on the U.S. Government . . . rather than on the subjects and targets of cross-border investigations.”<sup>80</sup> Where two governments are not working perfectly in concert and where no international agreement exists concerning the use *and* derivative use of compelled testimony, a *Kastigar* hearing, therefore, seems like an inevitable practice for every cross-border investigation.

## II. NAVIGATING THE COMPLEXITIES OF PARALLEL INVESTIGATIONS IN A POST-ALLEN WORLD

The *Allen* decision presents an expansion of the burden the DOJ faces to avoid taint in a new world of interconnected systems of commerce and growing power of multinational corporations and its employees—an “unprecedented expansion”

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<sup>77</sup> *Allen*, 864 F.3d 63 at 90.

<sup>78</sup> *Id.* at 89–90; Berger & Grishkan, *supra* note 71.

<sup>79</sup> Berger & Grishkan, *supra* note 71. In response to the *Allen* decision, law firms across the country released “client alerts” with a common message that “lawyers representing clients in cross-border criminal investigations should immediately challenge the domestic use of any statements that were compelled—even lawfully so—in a foreign jurisdiction.” *See, e.g.*, King & Spalding, Client Alert: *A Constitutional Check on Cross-Border Enforcement Tactics: Takeaways from the Second Circuit’s Decision in United States v. Allen* (July 25, 2017) <https://www.kslaw.com/attachments/000/005/137/original/ca072517.pdf?1501010675> [<https://perma.cc/U3RP-VEPD>]. This further illustrates the underlying theme that the DOJ’s failure to prosecute white-collar crime, as a result of this decision, is exacerbated by international prosecutions and the use of compelled testimony.

<sup>80</sup> Berger & Grishkan, *supra* note 71 (alteration in original); *Allen*, 864 F.3d at 87–88.

according to the DOJ.<sup>81</sup> Although the Second Circuit did not articulate how to “measure taint from foreign-obtained” testimony, its decision has the ability to widely impact the “government’s legitimate law enforcement efforts” by thwarting promising international white-collar prosecutions.<sup>82</sup> In the DOJ’s petition for a rehearing en banc of the *Allen* case it opines that

[w]hether it is a foreign trader seeking to manipulate an interest rate that affects millions of Americans, a foreign computer hacker seeking to infiltrate U.S. government or corporate networks to steal the personal data of our citizens, or a foreign terrorist seeking to harm our national security, threats that originate overseas—and are carried out primarily abroad—demand an aggressive response by U.S. law enforcement.<sup>83</sup>

In the complex web of financial institutional structures and the new wave of cross-border cooperation, United States law enforcement and foreign authority counterparts have increasingly investigated the same criminal acts simultaneously, leading to joint enforcement actions and prosecutions.<sup>84</sup> As of 2017, the Criminal Division’s Fraud Division of the DOJ “[h]a[d] over 50 pending parallel investigations in over 40 different jurisdictions and involving over 50 different foreign regulatory and law enforcement authorities.”<sup>85</sup> Cross-border parallel investigations in the financial world alone are increasing “exponentially,” requiring a hard look into the process of financial investigations on an international scale.<sup>86</sup>

Essentially, if testimony is considered compelled under the Fifth Amendment, domestic prosecutors may be unable to “obtain[] admissible evidence sufficient to support charges.”<sup>87</sup> This could result in, and may be another explanation for, the DOJ “declin[ing] to bring charges in worthy cases that the United States would otherwise pursue.”<sup>88</sup> The *Allen* decision,

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<sup>81</sup> See Petition of the United States for Rehearing or Rehearing en Banc at 12, *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (No. 16-898), *reh’g denied*, No. 16-898 (Nov. 9, 2017), ECF No. 136.

<sup>82</sup> *Id.* The DOJ has “already elected to forgo worthy cross-border investigations that, absent the [Second Circuit’s] decision, it would have vigorously pursued.” *Id.* at 17; see also *infra* Part III (discussing possible repercussions of the *Allen* decision).

<sup>83</sup> Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 12.

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 14.

<sup>88</sup> *Id.* In 2015, former United States Deputy Attorney General Sally Yates delivered a memorandum, “Individual Accountability for Corporate Wrongdoing,” which set forth procedures in DOJ policy for corporate investigations. Steps two through five are below:

and future decisions if other circuits follow its lead, exposes the apparent difficulties the United States will inevitably face in multijurisdictional white-collar investigations. Since the FCA has no restrictions on the derivative use of testimony it compels, unless a parallel United States investigation is initiated in the “very early stages” as the court plainly suggests, there is “no opportunity to request that the FCA ‘wall off’ or refrain from exposing [a witness’s] compelled testimony.”<sup>89</sup> Similar to the United Kingdom, thirty-five other jurisdictions<sup>90</sup> have comparable “disclosure obligations that would prohibit [their law enforcement agencies] from ‘walling off’ compelled evidence from witnesses,” which could ultimately make the DOJ’s efforts to bring forth an indictment with untainted evidence “futile.”<sup>91</sup>

#### A. *Triviality of the Allen Court’s “Solutions”*

##### 1. It Is Nearly Impossible for DOJ’s Prosecutors to be First in Line for Every International Financial Investigation

As the DOJ noted in its en banc petition, the Second Circuit’s certainty that the United States can avoid taint through “intimate cooperation and coordination,” specifically through the DOJ’s involvement in every investigation’s

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2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
  3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
  4. Absent extraordinary circumstances, no corporate resolution should provide protection from criminal or civil liability for any individuals;
  5. Corporate cases should not be resolved without a clear plan to resolve related individual cases

*Individual Accountability*, U.S. DEP’T OF JUSTICE, FRAUD SECTION (FRD), <https://www.justice.gov/dag/individual-accountability> [<https://perma.cc/VBK5-S6CF>].

<sup>89</sup> Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 15.

<sup>90</sup> The thirty-six jurisdictions that can use compelled testimony which the DOJ regularly coordinate with in corporate fraud investigations include the following:

Australia, Austria, Brazil, Canada, the Cayman Islands, Croatia, Cyprus, the Czech Republic, El Salvador, Estonia, the European Union, France, Finland, Germany, Greece, Hong Kong, Hungary, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, Mexico, Poland, Russia, Singapore, Slovakia, Spain, South Africa, Sweden, Switzerland, Taiwan, Turkey, the United Arab Emirates, and the United Kingdom.

*Id.* at 14.

<sup>91</sup> *Id.* at 15.

beginning stages, does not consider the “practical realities of international [white-collar] investigations” and subsequent prosecutions.<sup>92</sup> The problem of exposure to tainted testimony cannot be blamed on the “United States law enforcement [failure] to coordinate with foreign authorities adequately to avoid taint, for example by ‘canning’<sup>93</sup> testimony ahead of time,” rather, it can be argued that it is a consequence of the lack of international agreements streamlining cooperation in parallel investigations.<sup>94</sup>

In *Allen*, the DOJ took precautions to avoid tainted evidence as soon as coordination with the FCA began.<sup>95</sup> However, since Robson did not become a witness for the DOJ until after the FCA’s compulsory interview and after he took the DOJ’s plea deal, “there was *no* opportunity for [DOJ] prosecutors to ‘can’ his testimony beforehand.”<sup>96</sup> Having to forgo an indictment after an investigation with one of DOJ’s “most cooperative allies” because of lack of continuity in how compelled testimony is, or should be, treated reveals the “grave risk of taint [occurring] in cases in far less favorable circumstances.”<sup>97</sup> While the *Allen* case may represent facts and an outcome that is case-specific,<sup>98</sup> it exemplifies the overarching vulnerabilities and difficulties that the DOJ faces when prosecuting a foreign white-collar defendant.<sup>99</sup>

In a recently decided case before the federal grand jury in the S.D.N.Y., *United States v. Connolly*,<sup>100</sup> U.S. District Judge Colleen McMahon was left with no choice but to push a criminal trial back a year to allow time for a *Kastigar* hearing to examine if taint was present during the investigatory process and subsequent proceedings.<sup>101</sup> Judge McMahon decided that she

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<sup>92</sup> *Id.* (citing *United States v. Allen*, 864 F.3d 63, 87, 90 (2d Cir. 2017)).

<sup>93</sup> “Canning” testimony refers to ensuring that the testimony is not influenced by any outside source, notably a source that has been compelled to testify. This “canned” testimony can be compared to subsequent testimony to prove that later testimony is or is not tainted. See Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1330 n.76 (2001).

<sup>94</sup> Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 15.

<sup>95</sup> See *supra* Section I.B.

<sup>96</sup> Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 15 (emphasis in original).

<sup>97</sup> *Id.* at 16.

<sup>98</sup> *United States v. Allen*, 864 F.3d 63, 89 (2d Cir. 2017).

<sup>99</sup> See Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 17.

<sup>100</sup> *United States v. Connolly*, 1:16-cr-00370 (CM), 2017 U.S. Dist. LEXIS 36759 (S.D.N.Y. filed May 31, 2016).

<sup>101</sup> Jody Godoy, *Ex-Deutsche Trader’s Libor Trial Delayed by Taint Inquiry* (Dec. 14, 2017, 5:36 PM EST), <https://www.law360.com/articles/994990?scroll=1> [<https://perma.cc/485Q-JL3>].



was “not going to make the same mistake” as Judge Rakoff made in *Allen*, which she described as “fatal.”<sup>102</sup>

In May of 2016, Matthew Connolly, a U.S. citizen, and Gavin Campbell Black, a U.K. citizen, were indicted with conspiracy to commit wire and bank fraud for participating in the manipulation of the LIBOR interest rate while working at Deutsche Bank.<sup>103</sup> Like the *Allen* case, however, the DOJ was not the first agency to retrieve the necessary information to begin the investigation itself,<sup>104</sup> and, after months of investigation by the FCA, the DOJ decided to join its efforts and ultimately prosecute the individuals.<sup>105</sup> Following the indictment, the defendants’ attorneys filed motions for a joint *Kastigar* hearing to determine if either defendant’s compelled testimony “infected” the prosecution.<sup>106</sup> The motions argued that key cooperators were exposed to Black’s testimony, the DOJ received assistance from not only the FCA but also the U.K.’s Serious Fraud Office and the Commodities Future Trading Commission that had access to the testimony, and the filter team (similar to a taint team) “compounded the possibility of taint by failing to redact its brief properly.”<sup>107</sup> During the *Kastigar* hearing, the court invoked the heavy burden on the DOJ to prove taint-free testimony as established in *Allen*.<sup>108</sup> After months of combing through evidence and analyzing the process the DOJ and FCA used to conduct the investigation, the court found, by a preponderance of the evidence, that the DOJ had not violated the defendant’s Fifth Amendment right and the indictment was upheld.<sup>109</sup>

Judge McMahon, however, fervently distinguished the Deutsche case from the Rabobank case, calling it a “sharp[]” contrast in records.<sup>110</sup> The witness in *Connolly*, the “Robson,”

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<sup>102</sup> Memorandum of Law in Further Support of Defendants’ Joint Motion for a *Kastigar* Hearing at 9–10, *United States v. Connolly*, 1:16-cr-00370-CM (S.D.N.Y. Sept. 25, 2017), ECF No. 142.

<sup>103</sup> Press Release, U.S. Dep’t of Justice, Two Former Deutsche Bank Employees Indicted on Fraud Charges in Connection with Long-Running Manipulation of Libor (June 2, 2016) <https://www.justice.gov/opa/pr/two-former-deutsche-bank-employees-indicted-fraud-charges-connection-long-running> [<https://perma.cc/9SUS-NRT>]; see also Godoy, *supra* note 101

<sup>104</sup> See Godoy, *supra* note 101.

<sup>105</sup> *Id.*; see also Decision and Order on Defendant’s Pretrial Motions, 1:16-cr-00370-CM, (Oct. 19, 2017).

<sup>106</sup> See Memorandum of Law in Further Support of Defendants’ Joint Motion for a *Kastigar* Hearing, *supra* note 102 at 2–4.

<sup>107</sup> Memorandum of Law in Further Support of Defendants’ Joint Motion for a *Kastigar* Hearing, *supra* note 102, at 2–3.

<sup>108</sup> See Order Denying the Pretrial Motion of Defendant Gavin Campbell Black to Dismiss the Indictment for Alleged Violations of *United States v. Kastigar*, *United States v. Connolly*, No. 1:16-cr-00370 (S.D.N.Y. May 29, 2018), ECF. No. 274.

<sup>109</sup> *Id.* at 16–18.

<sup>110</sup> *Id.* at 16–17.

never actually read either defendant’s compelled testimony, but instead was privy to the findings in the FCA’s Final Notice and was the “sole source of six specific items of information that were presented to the grand jury.”<sup>111</sup> The court concluded, however, that the witness had a “source independent of the FCA Notice”: “his own personal knowledge” as a seasoned trader at Deutsche Bank.<sup>112</sup> Similarly, the FCA had another source other than the defendant’s compelled testimony that could account for the six items of information given to the grand jury.<sup>113</sup> This personal knowledge and the FCA’s other source that proved taint was not present, it can be argued, saved the DOJ’s case. If either did not exist, the indictments could have very well been overturned—another *Allen* outcome.

## 2. Taint Teams Create More Challenges Than They Solve

The Second Circuit also erroneously offered the continued act of embedding prosecutors in foreign jurisdictions, similar to instituting taint teams, as a solution.<sup>114</sup> A taint team is defined as “a team of officials other than the case team, who sift [through] documents and information received from another jurisdiction and only pass on to the case team those which they have the right to see without compromising the integrity of the proceedings.”<sup>115</sup> While this might be promising on its face, the task of sifting through and evaluating every piece of foreign-obtained evidence for a hint of taint is daunting.<sup>116</sup>

The taint team procedure has a few structural flaws.<sup>117</sup> First, the taint team does not wall off the government from accessing and reviewing attorney-client privileged documents.<sup>118</sup> It simply “changes the identity of the government attorneys and

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<sup>111</sup> *Id.* at 17.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *United States v. Allen*, 864 F.3d 63, 87–90 (2d Cir. 2017).

<sup>115</sup> INT’L COMPETITION NETWORK, CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS 24 n.39 (2006), <http://ec.europa.eu/competition/international/multilateral/2006.pdf> [<https://perma.cc/8VTE-PNWP>].

<sup>116</sup> *Id.* at 24.

<sup>117</sup> Stephen Jonas & Robert Keefe, *Government “Taint Teams” May Open a Pandora’s Box: Protecting Your Electronic Records in the Event of an Investigation*, WILMERHALE (May 11, 2004), <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94347> [<https://perma.cc/N7XP-BCWV>]; see also Robert J. Anello & Richard F. Albert, *Government Searches: The Trouble With Taint Teams*, 256 N.Y.L.J., No. 108, Dec. 6, 2016, [https://www.maglaw.com/publications/articles/2016-12-06-government-searches-the-trouble-with-taint-teams/\\_res/id=Attachments/index=/Albert%20Anello%2012.6.16.pdf](https://www.maglaw.com/publications/articles/2016-12-06-government-searches-the-trouble-with-taint-teams/_res/id=Attachments/index=/Albert%20Anello%2012.6.16.pdf) [<https://perma.cc/96EW-2W9V>].

<sup>118</sup> Jonas & Keefe, *supra* note 117.

agents who first review that information.”<sup>119</sup> While what is considered attorney-client privilege in the United States is considered a “relatively straightforward” doctrine, “other jurisdictions [abroad] may apply different rules, or may not formally recognize privilege at all” (similar to the treatment of use and derivative use immunity).<sup>120</sup> These differences “pose vexing questions” and would require a DOJ taint team or embedded filter team to navigate through every case the parallel agency confronts, leading to an impractical use of resources.<sup>121</sup> A second inherent flaw is that “the prosecutors . . . who serve on taint teams cannot be expected to ignore evidence of other crimes they may potentially find” while reviewing, even if the government was not focusing initially on that issue.<sup>122</sup> Thus, the trial team would have an “opportunity to assert privilege only over [evidence] which the taint team has identified as being clearly or possibly privileged [and taint-free],” which could lead to relevant information being overlooked because of either the sheer volume of evidence or unrelated matters.<sup>123</sup>

Early access to an investigation and embedded taint teams, as suggested by the Second Circuit, have proven to be problematic solutions and are inherently flawed.<sup>124</sup> Determining which testimony violates the Fifth Amendment is complex on many levels, especially when multinational companies are involved.<sup>125</sup> To make this determination once an investigation is already underway requires analyzing every aspect of the testimony-gathering process conducted abroad and domestically.<sup>126</sup> This requires excess litigation and document review that expends

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<sup>119</sup> *Id.*; see also, e.g., *United States v. Neill*, 952 F. Supp. 834, 840–41 & n.14 (D.D.C. 1997).

<sup>120</sup> Patrick F. Linehan & Galen Kast, *Navigating Privilege Issues Across Multijurisdictional Investigations* FINANCIER WORLDWIDE, (Apr. 2017) <https://www.financierworldwide.com/navigating-privilege-issues-across-multijurisdictional-investigations/#.W-MzaaeZNN0> [<https://perma.cc/98PK-MR69>].

<sup>121</sup> *Id.*

<sup>122</sup> Jonas & Keefe, *supra* note 117.

<sup>123</sup> Anello & Albert, *supra* note 117; see also *In re Grand Jury Subpoenas* (04-124-03 and 04-124-05), 454 F.3d 511 (6th Cir. 2006) (“[T]aint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience.”).

<sup>124</sup> *United States v. Allen*, 864 F.3d 63, 87-90 (2d Cir. 2017).

<sup>125</sup> See *supra* Part I (analyzing direct use and derivative use immunity and its implications on foreign-born evidence).

<sup>126</sup> See *supra* Section I.A (articulating the *Kastigar* standard).

valuable resources.<sup>127</sup> The court in *Allen* urged the DOJ to take more initiative to combat this by entering the investigation stage earlier.<sup>128</sup> Without a standard of what constitutes “earlier,” the Second Circuit has created a gray area for the DOJ to interpret going forward.<sup>129</sup> A solution in the forefront is therefore necessary to avoid the constitutional question of tainted testimony and its Fifth Amendment implications altogether in LIBOR-specific and other international white-collar crimes. Not only does the *Allen* decision affect market manipulation cases, it also has ramifications for statutes that have been crucial in other international investigations.<sup>130</sup>

*B. Beyond LIBOR-Specific Cases—Possible Impact of the Allen Decision on Future Foreign Corrupt Practices Act Cases*

In an effort to curb general fraudulent corporation actions, the Foreign Corrupt Practices Act (FCPA) was enacted in 1977 to “prohibit[] . . . bribes to foreign officials to assist in obtaining . . . business.”<sup>131</sup> The DOJ has applied the FCPA to prohibited conduct across the world in which publicly traded companies (in other words, global financial companies) and their officers, directors, and employees are held accountable.<sup>132</sup> In 2016, the United States saw exponential “increases in international cooperation in anti-corruption enforcement” of the FCPA.<sup>133</sup> The DOJ saw “success[] in the fight against global corruption by coordinating with and leveraging the resources of their foreign counterparts,”<sup>134</sup> through a “landmark global resolution[]” reached with Odebrecht S.A., the largest Brazilian construction company in Latin America, “and the continuing investigation and prosecution of individuals involved in the

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<sup>127</sup> *Id.* (discussing the *Kastigar* hearing).

<sup>128</sup> *Allen*, 864 F.3d at 87.

<sup>129</sup> See Hartley M.K. West et al., *Cross-Border Criminal Investigations Just Became More Complicated*, RECORDER (Sept. 7, 2017).

<sup>130</sup> John Cornell Fuller, *Second Circuit Limits FCPA Enforcement Tools*, FOX ROTHSCHILD LLP (Aug. 25, 2017), <https://internationaltrade.foxrothschild.com/2017/08/articles/foreign-corrupt-practices-act-fcpa/second-circuit-limits-fcpa-enforcement-tools/> [https://perma.cc/C4U4-NYGZ].

<sup>131</sup> Foreign Corrupt Practices Act, U.S. SEC. & EXCH. COMM’N (Feb. 2, 2017), <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml> [https://perma.cc/3XF6-899L].

<sup>132</sup> *Id.*

<sup>133</sup> Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption Developments: 2016 Year in Review 13 (Jan. 20, 2017), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2016-year-in-review?id=23567> [https://perma.cc/86TE-LHE3].

<sup>134</sup> *Id.*

international soccer corruption scandal.”<sup>135</sup> Both cases prove the DOJ’s concern with working with parallel agencies and encouraging “foreign governments [to] tak[e] more aggressive stances through legislation and enforcement to attack the problem of international corruption.”<sup>136</sup>

In 2016, Odebrecht pleaded guilty to FCPA charges and agreed to pay billions to United States, Brazilian, and Swiss authorities.<sup>137</sup> The DOJ noted that the Odebrecht resolution is notable because it “implicat[ed] officials at the highest levels of government . . . and major Brazilian companies and their executives” which can be contributed to the invaluable aid of Brazilian authorities.<sup>138</sup> DOJ officials, in response, issued public statements highlighting that foreign coordination, “once a rare event in FCPA investigations and resolutions,” is becoming increasingly prominent and vital.<sup>139</sup> Further, the DOJ stated that “an international approach is being taken to combat an international criminal problem . . . [and] we are sharing leads with our international law enforcement counterparts, and they are sharing them with us.”<sup>140</sup>

Since Brazil is one of the thirty-six<sup>141</sup> countries that legally allows compelled testimony and its derivative use, would the Odebrecht case have had a different result if the DOJ was not the agency to first initiate the investigation? If the DOJ had joined the Brazilian agency later in the investigation, perhaps the DOJ would have had to deny prosecution due to issues of tainted testimony. And, if, because of taint, the DOJ could not have been involved in the case, the question of whether Brazil

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<sup>135</sup> *Id.* at 13, 15. On the International Soccer Corruption Scandal:

Since May 2015, U.S. authorities have charged over [forty-two] individuals and entities with racketeering, wire fraud, money laundering and other offenses in connection with a decades-long scheme to enrich themselves by awarding lucrative marketing contracts in exchange for bribes. To date, [twenty-two] defendants have pleaded guilty. In 2016, seven individuals pleaded guilty to criminal charges in the case, including the former president of Honduras and former officials of regional and national soccer federations.

*Id.* at 17–18.

<sup>136</sup> *Id.* at 13.

<sup>137</sup> *Id.* at 15.

<sup>138</sup> *Id.* at 15–16.

<sup>139</sup> *Id.* at 13.

<sup>140</sup> United States Department of Justice Memorandum on The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [https://perma.cc/VT49-TWP4].

<sup>141</sup> *See supra* note 90.

would have had the resources to prosecute these white-collar crimes without United States' aid is compelling.<sup>142</sup>

### III. SOLUTION: CHILLING EFFECT OF SECOND CIRCUIT'S DECISION CAN BE PREVENTED BY IMPLEMENTING MUTUAL LEGAL ASSISTANCE TREATIES SPECIFICALLY GEARED TOWARD CROSS-BORDER WHITE-COLLAR INVESTIGATIONS

The “international approach . . . to combat an international criminal problem” is the key language in which prosecuting international white-collar crimes must be handled.<sup>143</sup> The overwhelming burden on the DOJ to prove taint-free evidence to avoid constitutional questions and *Kastigar* hearings is nearly impossible in the new age of a global economy. The law itself must evolve with the times, and international cooperation is at the forefront of the twenty-first century. Multinational companies and their employees drive the global economy, and investigations to prosecute white-collar crimes are vital to maintain and protect a healthy financial system. It is essential that the United States is part of this movement and a specific international agreement can provide a platform which will allow prosecutions by the DOJ to be carried out effectively.

#### A. *Mutual Legal Assistance Treaties (MLAT)*

In the realm of international law, Mutual Legal Assistance Treaties (MLATs) allow law enforcement officials, including the DOJ, to make international requests for assistance by foreign parallel counterparts relating to evidence gathering activities.<sup>144</sup> Since they are legally binding negotiated agreements,<sup>145</sup> United States district courts are instructed to review incoming requests and may deny them if they do not comport with domestic law,

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<sup>142</sup> If the DOJ cannot avoid taint by being first in line for every financial investigation, white-collar crimes committed by individuals may unfortunately avoid prosecution, “unless pursued by foreign law enforcement authorities.” Unfortunately, “foreign authorities may not have the ability or resources—or the desire—to pursue enforcement proceedings that vindicate the interests of the United States.” See Petition of the United States for Rehearing or Rehearing en Banc, *supra* note 81, at 16–17.

<sup>143</sup> United States Department of Justice Memorandum on The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [<https://perma.cc/VT49-TWP4>].

<sup>144</sup> T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges*, FED. JUD. CTR. INT'L LITIG. GUIDE 6 (2014), <https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf> [<https://perma.cc/KZK2-5D2T>].

<sup>145</sup> *Id.* at 5.

including the protections granted under the Fourth and Fifth Amendments of the Constitution.<sup>146</sup>

In the United States, an MLAT is negotiated by the DOJ with approval of the U.S. State Department.<sup>147</sup> The Secretary of State then “formally submits the proposed MLAT . . . to the President of the United States for transmittal to the U.S. Senate.”<sup>148</sup> After Senate approval, “the President signs the treaty” to be enforced.<sup>149</sup> When participating countries have complied with entry-into-force provisions, the “MLAT becomes binding under international law.”<sup>150</sup>

When a foreign country’s agency, for example the FCA, requests United States’ assistance pursuant to an MLAT, the United States court must determine whether “(1) the terms of the MLAT prescribe practices or procedures for the taking of testimony and production of evidence, (2) the Federal Rules of Procedure and Evidence apply, or (3) the MLAT requires some sort of a hybrid approach.”<sup>151</sup> MLATs allow the United States to follow the outlined procedures of the requesting country, including the rules related to privilege and testimony gathering.<sup>152</sup>

#### B. *MLAT with the U.K.*

The United States already has a general MLAT in place with the United Kingdom (as well as bilateral MLATs with every member of the European Union and many other countries worldwide)<sup>153</sup> regarding taking testimony and producing evidence in the jurisdiction of the requested party.<sup>154</sup> In the relevant portion of the “Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters” it states:

1. A person in the territory of the Requested Party from whom evidence is requested pursuant to this Treaty may be compelled, if necessary, to appear in order to testify or produce documents, records, or articles of evidence by subpoena or such other method as may be permitted under the law of the Requested Party.

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<sup>146</sup> *Id.* at 6–7.

<sup>147</sup> *Id.* at 6.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Treaty on Mutual Legal Assistance, U.S.-U.K., Jan. 6, 1994, T.I.A.S. No. 96-1202. <https://www.state.gov/documents/organization/176269.pdf> [<https://perma.cc/Y5SD-DPJY>].

2. A person requested to testify or to produce documentary information or articles in the territory of the Requested Party may be compelled to do so in accordance with the requirements of the law of the Requested Party. If such a person asserts a claim of immunity, incapacity or privilege under the laws of the Requesting Party, the evidence shall nonetheless be taken and the claim be made known to the Requesting Party for resolution by the authorities of that Party.<sup>155</sup>

This MLAT agreement gives the United Kingdom (namely, the FCA) the ability to use compelled testimony, in accordance with their laws.<sup>156</sup> This does not, however, guard the United States from obtaining testimony that is in direct violation of the Constitution, leaving a gaping hole in foreign testimony-gathering procedure in accordance with U.S. law.<sup>157</sup>

### C. *MLAT and Taint Team Hybrid*

The United States along with its foreign counterparts should ratify a new MLAT that instills the principles that a taint team provides, as a way to close the gap and ensure that the DOJ can fully invest its resources into prosecuting white-collar crimes. Given the increase in financial fraud cases in the last decade, a new MLAT to address current issues of cross-border investigations is paramount. An amended MLAT, directed at all thirty-six jurisdictions where use and derivative use of compelled testimony is lawful, would circumvent the unfairness concerns of a taint team, obviate the need to address Fifth Amendment concerns, and also provide the United States with the necessary leverage to combat these financial crimes.<sup>158</sup>

In the past, there have been case-specific bilateral treaties between the United States and other governments on high-level criminal fraud cases.<sup>159</sup> Between 1976 and 1982, the DOJ created executive agreements with “[twenty-eight] countries for the purpose of facilitating the sharing and transfer of investigative information and evidence between law enforcement agencies of the respective countries in specific investigations and prosecutions.”<sup>160</sup> These, now considered “Lockheed Agreements,” were agreed upon based on the “seriousness and sensitivity of the investigations” and “the

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<sup>155</sup> *Id.* at 9–10.

<sup>156</sup> *Id.* at 10.

<sup>157</sup> *See id.*

<sup>158</sup> *See generally* Jonas & Keefe, *supra* note 117.

<sup>159</sup> MICHAEL ABBELL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES § 3-4, 99 (2010). “The majority of these investigations [concerned] alleged bribes paid to high-ranking foreign officials by [large] U.S. aircraft manufacturers.” *Id.*

<sup>160</sup> *Id.*



affected governmental authorities agree[ment] that the investigations had to proceed quickly.”<sup>161</sup> “Given the exigencies of the circumstances, [] the number of affected countries,” and expected time it takes for a general MLAT to be ratified, the United States and the twenty-eight affected countries “negotiate[d] a series of similarly worded, case specific, executive agreements.”<sup>162</sup>

One can argue that the 2008 financial crisis amounted to a grave situation in which a Lockheed-like MLAT would have been appropriate. Now, nearly ten years after the global economy suffered a major hit, an expedited agreement between affected countries is no longer necessary. Instead, the United States and countries that currently use compelled testimony in their criminal investigations in the aftermath of the crisis, should negotiate an agreement specifically geared towards evidence collection in white-collar financial crimes.

For example, the United States and the United Kingdom should implement an MLAT for “Testimony Gathering in Criminal Cases Involving Financial Corporations and Individual White-Collar Crimes within the United States and the United Kingdom.” The MLAT would address that before an investigation begins in either country, the government authorities (DOJ and the FCA) would establish which authority would be prosecuting. If the DOJ takes the lead on a case, the FCA cannot compel testimony related to that case. If the FCA is the primary authority assigned, it must notify the DOJ when compelled testimony will be taken or used, and both parties will agree upon its necessity. The “necessity” standard would be based on the likelihood in which the testimony will be used to implicate other individuals within the corporation.

This new specific MLAT form would essentially avoid the risk of taint from the beginning of the investigatory process without sending prosecutors to work full-time with foreign agencies<sup>163</sup> on financial white-collar crime matters and ultimately avoid litigating a *Kastigar* hearing. Further, the burden of taint-free evidence would not fall entirely on the

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<sup>161</sup> *Id.* at 100.

<sup>162</sup> *Id.* at 100–01 (“The first of these executive agreements, the [A]greement with Japan on Procedures for Mutual Assistance in Administration of Justice in Connection with the Lockheed Aircraft Matter, was concluded and entered into force within weeks of the initial public disclosure that payments may have been made by Lockheed to high-ranking Japanese government officials to induce the government’s purchase of Lockheed aircraft. Within the following nine months, the United States concluded similar agreements with nine other countries.”).

<sup>163</sup> See Latham & Watkins, *supra* note 75.

DOJ,<sup>164</sup> since the issue would be addressed upfront and both agencies involved would be required to fully cooperate and comply with the agreement.

## CONCLUSION

As we enter a “new era of crime on a global scale,” law enforcement agencies are navigating the complexities of the ever-growing “criminal enterprises and global corporate misconduct.”<sup>165</sup> Arguably, the international nature of crime is driven by “global expansion of the footprint and market participation of U.S. and foreign companies, and the growing interdependency of [the U.S.] economy and those of nations around the world.”<sup>166</sup> As a result, the DOJ has expanded its criminal investigations abroad while foreign enforcement agencies have continued conducting their own criminal cases. Often, however, the agencies are investigating the same misconduct, which has fostered cooperation in these investigations and subsequent prosecutorial proceedings. This cross-border coordination has created a new and valuable dimension in prosecuting white-collar crimes.

Despite the advances in pursuing crimes in a transnational setting, cases like *Allen* have exposed fundamental differences between the legal authority governing testimony gathering and the evidence that is allowed in the American courtroom. These differences, if not addressed, have grave consequences. Instead of expending resources to determine whether tainted evidence exists or reducing the cases that the DOJ hears altogether, an international legal remedy to circumvent constitutional concerns is necessary—an international solution to further the efforts of the DOJ and its foreign counterparts.

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<sup>164</sup> United States v. Allen, 864 F.3d 63, 92 (2d Cir. 2017).

<sup>165</sup> Caldwell, *supra* note 2.

<sup>166</sup> *Id.*

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