

Second Circuit Denies Rehearing on Decision Barring Testimony Compelled by Foreign Governments

Court denies the US government's petition for rehearing, despite argument the decision will hinder cross-border investigations and prosecutions.

Key Points:

- Second Circuit bars government's reliance on testimony compelled by foreign authorities.
- District court already imposing heavy burden on government to show all evidence derived from source independent of defendant's testimony compelled by UK regulatory authority.
- US and UK authorities may modify investigative strategies to account for Second Circuit's ruling.

The Second Circuit has denied the government's petition for panel or *en banc* rehearing in *United States v. Allen*,¹ which vacated two London Interbank Offered Rate (LIBOR)-related convictions and dismissed the underlying indictments based on a cooperating witness' exposure to statements from a defendant that a UK regulatory authority had compelled.² In July, a panel of the court had held that, pursuant to the Fifth Amendment, if a foreign power has compelled a defendant to provide testimony, the US government bears the "heavy burden" of proving that it has not relied on that testimony.³ For further analysis regarding the panel's decision, please see Latham & Watkins' [July 2017 Client Alert](#).

The government's petition for rehearing argued that the panel's decision "substantially impairs the ability of the United States to investigate and prosecute international crime" because foreign governments, intentionally or otherwise, will likely expose key witnesses to compelled testimony before US authorities could take protective measures.⁴ The government stated that it had already refrained from pursuing some cross-border investigations as a result of the panel's decision.⁵ The Second Circuit found the government's position unpersuasive and denied the petition for rehearing without dissent, despite the impact on cross-border investigations and prosecutions cited by the government.⁶ The government has until early-February 2018 to seek review by the Supreme Court.

Allen, which is now binding precedent in the Second Circuit, has already made a clear impact. In *United States v. Connolly*, for example, Judge Colleen McMahon of the Southern District of New York recently ordered the government to show that it did not rely, directly or indirectly, on a defendant's compelled testimony when securing the indictment.⁷

Connolly, like *Allen*, involves a LIBOR-related prosecution in which a defendant, Black, was compelled to give testimony before the UK's Financial Conduct Authority (FCA).⁸ The court found that a *Kastigar*

hearing was necessary because Black demonstrated that he was compelled to provide testimony and the government had access to such testimony.⁹ The court found it of no consequence that Black's testimony may only have contained exculpatory explanations for his actions because such statements could prove "incriminating in the 'false exculpatory' sense," meaning the government could contradict such statements at trial in order to prove them untrue.¹⁰

The court also refused to find that the government could satisfy its *Kastigar* burden through unsworn and/or equivocal representations, stating that a *Kastigar* hearing was necessary to address a litany of issues, including:

- Whether members of the government's prosecution team or government witnesses were exposed to Black's compelled testimony
- Whether Black's compelled testimony was read to the grand jury
- Whether the testimony of any person who appeared before the grand jury, including an FBI agent who summarized statements and testimony from a number of witnesses, was "shaped, altered, or affected" by exposure to Black's compelled testimony
- Whether the government had obtained any investigative leads via Black's testimony that produced evidence that was then produced to the grand jury.¹¹

The court clarified that as part of the *Kastigar* hearing the government would be required to make available for testimony an FCA attorney who had witnessed Black's compelled testimony and then later had contact with the prosecution team prior to the presentation of the case to the grand jury. The court went on to explain that the testimony of the FCA attorney was necessary to "rule out" the possibility that the attorney had provided information to the government derived from Black's compelled testimony of which it was not independently aware.

Latham & Watkins will continue to monitor both cases, while also considering how the government may seek to adapt its investigative strategies in light of *Allen*. The opportunity to align multilateral investigation strategy is certainly increasing amid enhanced cooperation between US and UK regulators — including the recent secondment of a Department of Justice prosecutor to the UK's FCA and Serious Fraud Office (SFO). (Analysis on this development is available in a Latham & Watkins [June 2017 Client Alert](#).) In fact, UK regulators have already shown signs that they are modifying their investigative strategies to account for the difficulties that compelled testimony poses for cross-border investigations.

The use of voluntary witness interviews, as opposed to compelled testimony, could offer a solution to the difficulties created by *Allen*. However, such a strategy also brings significant disadvantages by preventing the quick and efficient gathering of evidence. Any next steps will require a careful balancing act between such considerations.

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Endnotes

- ¹ Ord., *United States v. Allen*, No. 16-898 (2d Cir. Nov. 9, 2017), ECF No. 139.
- ² 2017 WL 3040201, at *27 (2d Cir. July 19, 2017).
- ³ *Id.* at *19-20.
- ⁴ Appellee's Pet. For Reh'g En Banc at 1, 12, 14, *United States v. Allen*, No. 16-898 (2d Cir. Oct. 2, 2017), ECF No. 136.
- ⁵ *Id.* at 13, 17.
- ⁶ Ord., *United States v. Allen*, No. 16-898 (2d Cir. Nov. 9, 2017), ECF No. 139.
- ⁷ Decision and Ord. at 13-25, *United States v. Connolly*, No. 1:16-CR-00370-CM-2 (S.D.N.Y. Oct. 19, 2017), ECF No. 145.
- ⁸ *Id.* at 1-3.
- ⁹ *Id.* at 16 ("Once the defendant demonstrates that he has been compelled to testify—and that the Government had access to that testimony—the defendant has no burden to prove that a [*Kastigar*] hearing is required." (citing *Kastigar v. United States*, 406 US 441, 460 (1972))).
- ¹⁰ *Id.* at 17.
- ¹¹ *Id.* at 17-22.