

CLIENT ALERT

Convictions Overturned: Fifth Amendment Prohibits Use of Testimony Compelled by Foreign Governments

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On July 19, 2017, the U.S. Court of Appeals for the Second Circuit overturned the convictions of two former London-based traders for conspiracy and wire fraud in connection with the manipulation of the interest rate benchmark known as LIBOR. The Second Circuit ruled that the use of compelled testimony in a U.S. criminal proceeding – even when a foreign government has compelled the testimony – constitutes a violation of the Fifth Amendment. [This decision](#) has potentially significant consequences for U.S. criminal cases that involve related investigations or prosecutions in foreign countries.

Facts and Procedural History

According to the charges, the two defendants were cash traders at the Dutch bank Rabobank and were directly involved in the bank's submissions for the London Interbank Offered Rate (LIBOR), a reference interest rate for the interbank borrowing market. In 2013, the U.K.'s Financial Conduct Authority (FCA) compelled the two defendants to testify about their involvement in the LIBOR submissions. Both individuals were given direct use immunity – meaning their statements could not be used directly against them – but not derivative use immunity – meaning their statements could be used to derive other evidence that could be used against them – in exchange for their testimony. Under U.K. law, they faced imprisonment if they refused to testify under such circumstances, whereas in the U.S., the government can only compel testimony by providing the witness with both direct and derivative use immunity.

Shortly thereafter, the U.S. Department of Justice began its own criminal prosecution. In October 2014, a grand jury returned an indictment charging the defendants with wire fraud and conspiracy. The defendants' compelled U.K. testimony was utilized against them at trial, and both were convicted on all counts.

Second Circuit's Decision

The defendants appealed, arguing that the government "violated their Fifth Amendment rights when it used...their own compelled testimony against them." The Second Circuit agreed and held that "the Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony."

The Second Circuit adopted the defendants' position that, to be admissible in a criminal case, a witness's statements – including those made to foreign law enforcement – must have been made voluntarily. The court emphasized that this requirement stems directly from the text of the Constitution; voluntariness is assessed under both the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

Furthermore, the Second Circuit rejected the government's argument that foreign governments are analogous to private employers, which may question employees under threat of termination without running afoul of the Fifth Amendment. The

court also rebuffed the government's assertion that the Fifth Amendment applies only if the same sovereign is both compelling and using the testimony against the defendant, also known as the "same sovereign" rule.

In addition to rejecting the government's arguments, the Second Circuit focused on the consequences of the government's position, namely that a defendant's compelled testimony might be introduced *directly* against the defendant in a criminal prosecution, in effect an end-run around the defendant's Fifth Amendment rights. The court hypothesized that the government's argument could lead to a situation in which the government proffers, "Your honor, we offer Government Exhibit 1, the defendant's compelled testimony." Notably, the government did not dispute this potential result.

The Second Circuit also rejected the government's concern that ruling for the defendants would allow foreign powers to inadvertently or negligently interfere with U.S. criminal prosecutions, noting that that "the risk of error in coordination falls on the U.S. government...rather than on subjects and targets of cross-border investigations."

Ultimately, the Second Circuit reversed both convictions, holding, *inter alia*, that the use of compelled testimony was not harmless error.

Impacts/Conclusion

This decision reinforces Fifth Amendment protections against the use of compelled testimony. Moreover, the Second Circuit now joins the Fourth, Fifth, Ninth, and Tenth Circuits in holding that "inculpatory statements obtained overseas by foreign officials must have been made voluntarily" in order to be admissible in U.S. courts.

Barring an appeal, DOJ will have to proceed with caution in its cross-border prosecutions where overseas testimony has been compelled by foreign governments. Mere compliance with the foreign sovereign's laws may not be sufficient to guarantee the admissibility of the evidence in U.S. criminal proceedings. Across the table, defense attorneys should continue to analyze the circumstances of foreign testimony, and in doing so, pay particular attention to any evidence of compulsion that might limit further use of that testimony against their clients.

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