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Globalization and Privatization of Federal Corporate Prosecutions: The Pressures Eroding Fifth Amendment Rights

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GLOBALIZATION AND PRIVATIZATION OF FEDERAL CORPORATE PROSECUTIONS: THE PRESSURES ERODING FIFTH AMENDMENT RIGHTS

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ABSTRACT

Over the past several decades, our society has continued to become even more globalized and interconnected. The dynamic put increasing pressure on the fairness of criminal trials in domestic courts. This Article discusses two recent phenomena that illustrate this evolution and their impact on the defendants' rights against self-incrimination: the globalization and privatization of the federal prosecutions. Globalization is understood as the United States' Government's increased reliance on foreign authorities in prosecution of cross-border crimes, while privatization denotes the Government's reliance on private actors in conducting investigations. Investigations conducted by private entities and foreign governments, and the evidence those investigations produce, raise significant constitutional questions. Accordingly, this Article positions these phenomena and recent case law side-by-side the Fifth Amendment precedent that interpreted the constitutional protections against self-incrimination expansively. To best preserve the values of the Fifth Amendment, federal courts should evaluate compelled testimony with a flexible evidentiary standard. This standard must be cognizant of the changing prosecutorial landscape creating new contexts where defendants may incriminate themselves, and of how can such confessions shape the direction of investigations.

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I. INTRODUCTION

The recent cases *United States v. Allen*[1] and *United States v. Connolly*,[2] both instances of federal prosecution of foreign citizens in the U.S. courts in connection with the global LIBOR scandal, demonstrated increasing pressures that the constantly evolving methods of federal prosecution places on the Fifth Amendment protections and evidentiary rules. The pressures include, but are not limited to, cooperation with foreign governments and enforcement agencies and outsourcing of the government's investigative functions to private actors. In *Allen*, the Second Circuit rejected the government's use of compelled testimonies of two British citizens obtained by the British enforcement authorities pursuant to their lawful power in the U.S. courts.[3] In *Connolly*, the Southern District Court for the District of New York found that the government "outsourced" its investigative powers to Deutsche Bank's private counsel.[4] The court found that the government substantially directed the investigation, including the requests to interview Connolly's co-defendant Black in the Deutsche Bank's London office.[5] Because these interviews were fairly attributable to the government, they were therefore compelled for the purposes of the Fifth Amendment.[6]

This Article argues that the Fifth Amendment privilege against self-incrimination is broad and inclusive of protections against the growing and changing landscape of federal prosecutions. Statistical data and recent caselaw demonstrate the growth of situations where the federal government cooperates with foreign governments or private actors, and gains access to potentially compelled testimony that had not been afforded constitutional protections against self-incrimination.[7]

These processes are driven by what this Article refers to as the globalization and privatization of federal prosecutions. To understand the changing prosecutorial landscape and content of these terms, the Article in Part II discusses the historical origins of the

[1] 864 F.3d 63 (2d Cir. 2017).
[2] No. 16 Cr. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).
[3] *See infra* notes 293-294 and accompanying text.
[4] *See infra* note 335 and accompanying text.
[5] *See infra* notes 327-330 and accompanying text.
[6] *See infra* note 335.
[7] *See infra* Part III.

privilege against self-incrimination. The Article then addresses the legal uncertainties about the scope of the permissible use of compelled testimonies. The contours of permissible uses of compelled testimony and the surrounding uncertainties become important and as new actors—such as foreign governments or private entities acting on behalf of the government described in this Article—became sources of evidence for and agents under the direction of the government.

The Article further points out that the self-incrimination privilege is insufficiently protected by judicial inquiry that categorically excludes certain types of compelled uses. A rigid judicial standard cannot capture the complexity and constant change that surround corporate prosecutions. Rather, this Article argues the inquiry of whether a particular use of a compelled testimony is permissible should be qualitative in nature, analyzing the instances of compelled testimony individually and with due effect given to the surrounding circumstances. This approach is more faithful to the historical and precedential understanding of the Fifth Amendment. Such an approach also allows the court to maintain the requisite flexibility to assess novel situations arising from ever-evolving globalized and privatized federal prosecutions.

In Part III, the Article explains how globalization increased U.S. prosecutions of complex cross-border corporate crime, and, in the process, strengthened the federal government's cooperation with foreign governments and corporations. When prosecuting complex financial crimes that span continents, federal prosecutors increasingly rely on cooperation with foreign governments and private businesses (including and especially the very businesses under investigation) in the process of gathering evidence. These trends have led to some remarkable changes in federal corporate investigations, including, for example, embedding federal prosecutors with foreign organizations, and the federal government directing private counsel to conduct internal investigations on behalf of the government.

Although cooperation with governments and corporations can bring benefits to society in terms of better and more efficient informational access and prosecution of guilty actors, it places increasing pressure on the Fifth Amendment rights of mid-level corporate employees who are often far removed from the corporate wrongdoing, but often the most likely to get implicated in an investigation. The recent caselaw introduced in Part IV shows that

the federal courts recognized that the trends in globalization and privatization of federal prosecutions have put pressure on the Fifth Amendment protections. Neither foreign governments nor private institutions are bound by the constraints of the U.S. Constitution on gathering evidence, including the Fifth Amendment's protection against self-incrimination. In this new regime, foreign governments turn over to the federal government testimony compelled abroad. Corporations, on the other hand, provide internal documents and interviews with employees that the government can use as a roadmap for the investigation.

The Fifth Amendment commands that a defendant compelled to testify must be granted an immunity that would put him in a position as if he chose to invoke his right against self-incrimination and not testify.[8] Yet both situations are examples of where a compelled testimony influences the direction of the federal prosecution, without the requisite Fifth Amendment privilege.

Accordingly, this Article offers a novel outlook on globalization and privatization of the federal prosecutions, viewing them as overlapping and mutually reinforcing phenomena that arose in response to the growth of complex multi-national financial crime and that are constantly evolving, demanding a continuous and close scrutiny to their effects on the employees' rights.

II. UNCERTAIN OUTER BOUNDS OF THE FIFTH AMENDMENT PRIVILEGE

Despite the importance of the Fifth Amendment's prohibition against self-incrimination in the American history and jurisprudence, the judicial precedent in the past century has brought uncertainty and confusion about the exact scope of the privilege. The history and early Fifth Amendment jurisprudence reveal the central place of the privilege in the American Constitution.[9] The privilege embodies the quintessential American values that protect an individual from an accumulation of power in the hands of the government.

However, towards the end of the twentieth century, the Supreme Court precedent on the scope of the privilege against self-incrimination created at least three relevant categories of unresolved

[8] *See generally* Kastigar v. United States, 406 U.S. 441 (1972).
[9] *See generally id.* at 444-45.

tensions concerning: (1) the reach of the protection; (2) the scope of permissible uses for compelled testimony in a grant of immunity; and (3) the contours of actions attributable to the government.[10] These jurisprudential lacunae are particularly fraught in an age of parallel international investigations and investigations that are closely coordinated with banks' private counsels. The courts developed categorical tests in the attempt of trying to outline the contours of permissible uses of compelled testimony uses under the Fifth Amendment, which however only added to the complexity of the inquiry.

The complexity and rigidity of the courts' Fifth Amendment inquiry, which focuses on categorizing uses of compelled testimony into evidentiary and non-evidentiary, make it unfit for the fast developing, continents-spanning, and multi-actor federal prosecutions that developed in the past thirty years.[11] Every year, there are more opportunities and novel avenues for a governmental exposure to compelled testimonies.[12] Neither a categorical inquiry that rules out a class of compelled uses nor the government's taint teams can sufficiently protect the Fifth Amendment privilege. To counteract the change, the courts need to be attentive to these changes in federal prosecutions that reach the American courtrooms and subject the instances of foreign and private cooperation to a heightened scrutiny. In this effort, the accompanying inquiry under the Fifth Amendment must focus on the effects of a governmental compelled testimony use, while considering the surrounding circumstances such as the powerful institutional and governmental actors informing the prosecution, and their relationship to the individual.

A. The History of the Fifth Amendment

The Fifth Amendment commands that "no person . . . shall be compelled in any criminal case to be a witness against himself."[13] The origins of the privilege are often dated by the scholars to the

[10] *See infra* Parts II, IV.
[11] *See infra* Parts II.C., II.D.
[12] *See infra* Part III (for a description of prosecutorial trends in the increasingly interconnected and globalized world).
[13] U.S. CONST. amend. V.

second half of the seventeenth century.[14] In those times, the English Court of Star Chamber and the ecclesiastical courts were known for extracting coerced confessions using a host of nowadays-illegal means, including torture.[15] The truth and falsity of the allegation were not as important to the English authorities as extracting a confession from the defendant—a process that attested to the oppressive and unbridled power of the sovereign against which the defendant had no protection.[16]

A defendant in the English courts of that era not only did not have rights against coercive self-incrimination, but often did not even know the charges he faced.[17] The need for a right against a coercive power of the state was ever so strong in a system where power of the state went unchecked. The individual was often powerless in the hands of the state. Such was the experience of "Freeborn John Lilburne" whom the scholars often credit with being the first to publicly advocate, on his own behalf, for his right against self-incrimination.[18] Lilburne was arrested under charges of importing "factious and scandalous books" into England and brought in front of the Privy Council of the Star Chamber in 1637.[19] He refused to take the ex officio oath that required him to answer questions asserting the recognized right of a freeborn Englishman not to accuse himself.[20]

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[14] *See*, *e.g.*, John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); Richard McMahon, Kastigar v. United States*: The Immunity Standard Redefined*, 18 CATH. LAW. 314 (1972).

[15] *See* Richard McMahon, Kastigar v. United States*: The Immunity Standard Redefined*, 18 CATH. LAW. 314, 317 (1972).

[16] Langbein, *supra* note 14, at 1048. The beyond reasonable doubt standard of proof necessary for a criminal conviction today was not articulated in English law until the last decade of the eighteenth century. *Id.* The government's and courts' assumption was not that the defendant is innocent until proven guilty, but perhaps something along the lines if innocent, then it will somehow show. *Id*. at 1057. Furthermore, the accused's defense was complicated by the fact that he or she had to spend almost all the time pending trial in jail. *Id*. at 1057-58.

[17] *Id.* at 1058. The English law forbade the defendant from obtaining a copy of the indictment pre-trial and at the trial. In fact, the court clerk merely summarized the indictment to the defendant at the trial. *Id.*

[18] Joseph L. Rauh Jr., *The Privilege Against Self-Incrimination from John Lilburne to Ollie North*, 5 CONST. COMMENT. 405, 405-06 (1988).

[19] *Id.* at 405.

[20] *Id*.

The English authorities did not take well to Lilburn's arguments and sentenced him to a punishment.[21] Lilburne continued to protest and publicly campaign against his sentence. He produced numerous tracts and pamphlets on the topic and eventually successfully asserted his right against coerced self-incrimination in 1649 before an Extraordinary Commission of Oyer and Terminer composed of many distinguished legal authorities of the day.[22] At last, Lilburne's life-long effort fighting against his sentence and defending the right of a freeborn man not to accuse himself bore its fruits. The English Parliament not only indemnified Lilburne in 1649, but also recognized the right against self-incrimination as a defense to the *ex officio* oath, but as an accepted principle in common law criminal procedure.[23] The privilege against self-incrimination since then became part of the English Common Law.[24]

But what does a privilege unused, or privilege designed to be used ineffectively amount to in a criminal trial? Not too much, according to early historical sources on the newly recognized right against self-incrimination. A seminal study of pamphlet reports of London trials from the 1670s—about 20 years after the recognition of the privilege against self-incrimination—to the mid-1730s did not show a "single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a

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[21] *Id.*

[22] *See* Neill H. Alford, Jr., *The Right of Silence*, 79 YALE L.J. 1618, 1621 (1970) (reviewing LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968)).

[23] *Id.* at 1621.

[24] *Id.* ("Lilburne had made the difference. From this time on, the right against self-incrimination was an established, respected rule of the common law, or more broadly, English law generally."). *See also* McMahon, *supra* note 14, at 317 n.17. The ideological foundation of the right against self-incrimination can be dated to earlier religious traditions. For example, Judaic law recognized the principle before modern times. *Id. See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 433-34 (1968). A maxim that "a man cannot represent himself as guilty, or as a transgressor" was an essential part of procedure in the Rabbinic courts in the ancient times. *Id. See Akhil Reed Amar* & *Renée* B. *Lettow*, *Fifth Amendment First Principles*: *The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 896 (1995). The medieval law of the Roman church equally adhered to the maxim *nemo tenetur prodere seipsum* or "no one is obliged to accuse himself." *Id.* This maxim was taken to mean that a duty to reveal sins at confession did not require having to come forward and accuse oneself in court. *Id.*

privilege against self-incrimination."[25] The explanation for the curious under-use of the newly recognized right is not obvious from what happened at trial, but rather from what happened before the trial. By the time the accused reached the courtroom, he would have, wittingly or unwittingly, implicated himself enough times to render the privilege worthless.[26] The criminal system that came into being by the end of the eighteenth century in England was marked by a "self-evidently schizophrenic criminal procedure."[27] In this system, legal and legislative authorities created a trial right that they destroyed in the pre-trial.[28] The lessons from the eighteenth century English attempt to embrace the right against self-incrimination remain pertinent even today. They speak of the importance of safeguarding the right at all stages of criminal procedures. Insufficient protection of the privilege in an early stage of investigation can lead to an incrimination of the accused that permeates the entire investigation and could therefore render any subsequent protective safeguards futile.

An additional factor inhibiting effective use of the self-incrimination privilege by defendants was the dearth of involvement of counsel and the structure of the criminal proceedings. An attorney could advise defendants how to be strategically invoke the privilege against self-incrimination. Thus, the defendant bore the double burden of having to testify and being his or her own defense counsel, which made use of the right against self-incrimination difficult, if not

[25] Langbein, *supra* note 14, at 1066. Other sources also confirm that there was still a presumption placed on the accused to say why he was not guilty. *See id.* at 1049 n.7, 1066 n.83 (citing J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800 (1986)). If the accused did not speak in his defense, the courts often held invocation of silence as admission of guilt. *Id*. at 1047.

[26] *Id.* at 1061. During this time, inquisitorial tactics were routine in pre-trial stages. *Id*. For example, the Marian pretrial procedure, named after The Marian Committal Statute of 1555, routinely included practices such as transcribing anything that the defendant said after apprehension as "material to prove the felony" and *required* an officer collecting evidence to testify *against* the accused. *Id*. at 1059-61.

[27] *Id*. at 1062.

[28] *Id*. at 1059-62.

impossible.[29] But the defense counsels over time became more involved with the court, gradually taking over the defense role previously carried by the defendant "speaking."[30] Importantly, the defense counsel also began to strategically silence the defendants and suppress their testimonial role in all stages of the criminal proceedings.[31]

The English legal tradition carried over across the ocean to the newly established colonies. By the end of the eighteenth century, the American colonies began adopting the privilege against self-incrimination.[32] The governors of the first American colonies brought to the New Continent European interrogation techniques and coercive practices—including torture.[33] The colonies looked into the English law for guidance, and adopted common law privileges against coercive self-incrimination as means of checking these governmental abusive practices.[34] Each of the original thirteen states recognized the privilege through common law or express constitutional provision, and the self-incrimination was also adopted as the fifth constitutional amendment in 1791.[35] Nowadays, all but two American states explicitly recognize the privilege in their state

[29] *Id*. at 1069-71. Several important transformations of the criminal law and related judicial proceedings occurred in the eighteenth century: (1) The concept of production burden, and that the prosecution bore it, slowly started to take hold; (2) at the same time, the presumption of innocence was formulated, which encouraged the defense counsel to silence the accused in order to have the prosecution build the case; (3) the law of criminal evidence formed, introducing objections against certain types of evidence and questions; (4) the judge decreased in importance as counsel for prosecution while defense took over witness examination; and (5) these developments cumulatively facilitated and further required greater use of defense counsels at trials. *Id.*

[30] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1092 (1994). The so-called "accused speaks" trial was prevalent in England in the fifteenth century. *Id.* at 1089. The model aimed at securing a defendant's confession and prohibited representation by counsel. The "accused speaks" trial model was also prevalent in the American colonies from the settlement until the end of the eighteenth century. *Id*. at 1091-92.

[31] Langbein, *supra* note 14, at 1071.

[32] Jefferson Keenan, *Nonevidentiary Use of Compelled Testimony and the Increased Likelihood of Conviction*, 32 ARIZ. L. REV. 173, 175 (1990).

[33] *Id.*

[34] *Id*.

[35] *Id*.

constitutions.[36] With this constitutionally recognized right it also became clear that the government retained the power to compel a testimony, but only upon a grant of an immunity that would wholly preserve the privilege against incrimination.[37]

The privilege against self-incrimination, as pointed out by the Supreme Court, reflects many fundamental American values and aspirations.[38] The Supreme Court held that the privilege stands for the "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt," as well as "fear that self-incriminating statements will be elicited by inhumane treatment and abuses."[39] According to the Supreme Court, the sense for fair play dictating "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."[40]

The values that buttress the policies are the "respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life," and that "the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent."[41] These values, albeit admittedly undefined,[42] became a part of the constitutional fabric despite the surrounding lack of clarity about how to best protect them, and contributed to proliferation of the Court's opinions and scholarly

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[36] McMahon, *supra* note 14, at 317. The two states that do not recognize the privilege against self-incrimination in their constitutions are Idaho and New Jersey, but both have statutes that recognize the right to the same effect. *Id.* at n.17 (citing ERWIN GRISWOLD, THE FIFTH AMENDMENT TODAY (1955)).

[37] *See* Keenan, *supra* note 18, at 176 (Congress enacted the first federal immunity statute in 1857, which provided the witness could not be prosecuted for any acts connected to his compelled testimony in exchange for providing the government with previously inaccessible testimony.).

[38] *See generally* Kastigar v. United States, 406 U.S. 441, 444-45 (1972).

[39] Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964).

[40] *Id.* (quoting 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 317 (McNaughton ed., 5th ed. 1961)).

[41] *Id* (quotations omitted).

[42] *See* Ronald J. Allen, M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 244 (2004) (stating that the values are "striking in their vacuity and circularity."). Justice Murphy, remarked on the topic that "the law and the lawyers . . . have never made up their minds just what [the Fifth Amendment] is supposed to do or just whom it is intended to protect." *Id.* at 245.

opinions without a resolution.[43] It is against these strong aspirations, but definitional uncertainty that the global and national events impacting the Fifth Amendment unfold.

B. Twenty-First Century Challenges to The Application of The Fifth Amendment

Maintaining the protections and furthering the values of the Fifth Amendment became increasingly challenging as national, international, and government-private interactions became more frequent and complex. The familiar situation in which a federal prosecutor interrogates a defendant who asserts her Fifth Amendment privilege became replaced by a foreign sovereign compelling a testimony sought to be used in a U.S. prosecution.[44] Alternatively, the prosecution may not even be carried out by a prosecutor.[45] Instead, a private institutional counsel appointed to carry out an internal investigation can subject an employee to an interview under a threat of job termination.[46] A government, often directing the private counsel in the course of a corporate internal investigation and conditioning the firm's and counsel's cooperation on favorable settlement terms, can subsequently use this compelled testimony in the domestic prosecutions.[47]

In the first instance, the U.S. enforcement authorities face a situation where a defendant was compelled by a foreign nation that conducts a parallel investigation. According to the Second Circuit in *United States v. Allen*,[48] the Fifth Amendment protections against self-incrimination extend to situations where a U.S. prosecuting authority uses a testimony compelled by a foreign sovereign.[49] The

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[43] *See id*. For example, Amar and Lettow remark that "[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights," while William Stuntz concludes that "[i]t is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory." Amar & Lettow, *supra* note 24, at 857.

[44] *See infra* Part IV.A (discussing United States v. Allen, 864 F.3d 63 (2d Cir. 2017)).

[45] *See* Part IV.B (discussing United States v. Connolly, No. 16 CR. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019)).

[46] *See id.*

[47] *See infra* notes 198-200 and accompanying text.

[48] 864 F.3d 63 (2d Cir. 2017).

[49] *Id.* at 101.

second instance applies to situations where the government engages and directs a private institution's investigations so that the actions of the institution become *de facto* the government's action. This occurred in *United States v. Connolly*,[50] where the court found that the government's lack of independent investigative action and substantial directing of the Deutsche Bank's private investigation through its counsel were attributable to the government.[51]

Both *Allen* and *Connolly* address novel situations surrounding application of the Fifth Amendment privilege. But even prior to *Allen* and *Connolly*, the courts have struggled with defining the exact scope of the privilege. In the past century, the United States' courts transitioned from an absolute requirement of immunity that forbade any subsequent prosecution to a limited immunity requirement.[52] The Supreme Court gradually restricted the absolute immunity established by *Counselman v. Hitchcock*[53] to apply only in the context of the interactions between the state and federal government.[54] In the second half of the twentieth century, the Supreme Court then abrogated *Counselman*'s absolute immunity in compelled testimony situations in *United States v. Kastigar*.[55] The Court in *Kastigar* allowed subsequent prosecution of a compelled witness provided that the prosecution did not rely on the witness's compelled testimony or on evidence directly or indirectly derived from such testimony.[56]

However, the Court in *Kastigar* did not clarify exactly what is the direct or indirect evidence that is prohibited or what evidence is admissible under the new immunity standard.[57] Lower courts and scholars differed in their views on the types of testimonial uses afforded protections under the Fifth Amendment as interpreted by *Kastigar*, resulting in uncertainties for defendants.[58] The uncertainties about the scope of the Fifth Amendment protections, including questions about the scope of the immunity in new contexts or permissibility of certain evidentiary uses, surrounded the recent

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[50] No. 16 Cr. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).
[51] *Id.* at *10.
[52] *See supra* notes 50-52; *see also infra* notes 53-55 and accompanying text.
[53] 142 U.S. 547, 586 (1892).
[54] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 77-78 (1964).
[55] 406 U.S. 441 (1972).
[56] *Id.* at 448-49.
[57] *See infra* notes 118-26.
[58] *See infra* Part II.D.

Allen and *Connolly* decisions.[59] To understand the decisions, one must consider both the current changing trends in global and national prosecutions involving the self-incrimination privilege and the historical context, and subsequent caselaw, in which the privilege developed.

The analysis of the current and historical trends coalesces around the central purpose of the of the Fifth Amendment privilege that seeks to prevent the government from using its power to place a witness into the "cruel trilemma of self-accusation, perjury, or contempt."[60] The Anglo-American legal tradition shows that the protections granted by the Fifth Amendment are essential to prevent governmental abuses and to honor a person's dignitary rights to lead a private life without unfettered interference by the government.

C. Government Immunity Grants and the Privilege Against Self-Incrimination Explained

The developments in the scope of the Fifth Amendment immunity were accompanied by a host of complex and confusing jargon. It is important to decipher the meaning of the shorthand to both understand the relevant court decisions and consider the overlapping, and often uncertain meaning of this terminology.

The most well-known immunity types recognized in criminal trials and statutes of the past century are (1) absolute immunity, also known as transactional immunity, and (2) use-plus-fruits immunity,[61] also referred to as use and derivative immunity.[62] The distinction between absolute and use-plus-fruits immunities can be illustrated by

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[59] *See infra* Part IV.

[60] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

[61] Harrison v. United States, 392 U.S. 219 (1968) (describing the use-plus-fruits doctrine in). In *Harrison*, the Court found that the Petitioners coerced testimony at an earlier trial was inadmissible in later proceedings because it was the "fruit of the illegally procured confessions." *Id.* at 221. To arrive at the conclusion, the Court perused language from the Fourth Amendment case, *Wong Sun v. United States*, to show that the Petitioner's testimony had not been "obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.'" *Id.* at 226 (quoting 371 U.S. 471, 488 (1963)). *See* Anonymous, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171, 174 n.19 (1972).

[62] *See generally* Hanah Metchis Volokah, *Congressional Immunity Grants and Separation of Powers: Legislative Vetoes of Federal Prosecutions*, 95 GEO. L.J. 2017, 2021-24 (2007) (discussing transactional, use, and derivative use immunity).

an example. Let's consider the following statement: "After the murder, I hid the gun under a tree in the park."[63] The broadest immunity standard — transactional or absolute immunity — would afford a witness immunity for any prosecution arising from the event. The prosecution cannot prosecute using the testimony or the gun they subsequently found. But the prosecution also cannot prosecute the witness based on accomplice testimony who the prosecution encountered *en route* to the crime scene. Any prosecution related to the occurrence is barred under transactional immunity.

On the other hand, under a use-plus-fruits conception of immunity in the murder and hidden gun situation, a prosecutor again cannot use against the witness the compelled testimony or the gun to which the testimony pointed. But if a prosecutor finds the gun in an unrelated way — say, for example, based on an information from a testimony of an accomplice or by stumbling upon it by walking her dog in the park—the gun becomes admissible evidence in a criminal case against the witness.[64]

The past hundred years was marked by developments in U.S. courts that changed the breadth of the protections under the self-incrimination clause. The courts shifted from viewing immunity grants as absolute or transactional, guaranteeing an individual freedom from subsequent prosecution. The majority of the courts view the Fifth Amendment as demanding only an undefined version of a restricted immunity. The more restrictive view, unlike at the beginning of the twenty first century, allows in certain circumstances for a subsequent prosecution of a compelled witness.[65]

The Supreme Court's landmark case that first defined the scope of the Fifth Amendment privilege was *Counselman v. Hitchcock*.[66] Counselman was a dealer in grain questioned in front of a grand jury about whether he obtained certain grain rebates in violation of Interstate Commerce Commission regulations.[67] Counselman refused to answer these questions on the ground that the answers would incriminate him.[68] The questioning authority, the

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[63] *See id*. at 2021.
[64] *See id*. at 2021-23.
[65] *See infra* text accompanying note 76.
[66] 142 U.S. 547 (1892).
[67] *Id.* at 549-50. The federal regulation made it a criminal offense for a railroad's officer or agent to grant shippers and dealers a lesser rate than the tariff or open rate. *Id*.
[68] *Id*.

Interstate Commerce Commission, offered Counselman a statutory immunity in exchange for his testimony.[69] This immunity, however, would not foreclose Counselman's future prosecution based on evidence indirectly obtained on the basis of the testimony.[70] The immunity grant would only disallow prosecutors from directly using Counselman's testimony—also known as use immunity.[71]

Given the limited protections offered by the statutory immunity, Counselman again refused to answer the court's questions.[72] Counselman's refusal led the court to adjudge him to be in contempt of the court and sentenced him to imprisonment and a fine.[73]

The Supreme Court on review considered whether the statutory immunity sufficed to safeguard Counselman's constitutional privilege against self-incrimination.[74] The Court critically observed that the immunity offered to Counselman "would not prevent the use of [Counselman's] testimony to search out other testimony to be used in evidence against him or his property." [75] Such immunity therefore could not prevent "the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion."[76] The Court found that the government's derivative use of Counselman's testimony may lead to a conviction where otherwise, if Counselman simply refused to answer, he could not be convicted.[77] Thus, the Court held that the

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[69] *Id.*

[70] *Id.* at 585-86.

[71] *Id.* at 560.

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

Id. at 560-61.

[72] *Id.* at 552-53.

[73] *Id*.

[74] *Id.* 564.

[75] *Id*.

[76] *Id*.

[77] *Id*.

statutory immunity allowing such use was not "co-extensive with the constitutional provision"[78] because it "does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . . ."[79]

However, the Court in *Counselman* did not hold that the use-plus-fruits immunity statute would suffice to protect the defendant's privilege against self-incrimination.[80] Instead, the Court held that for an immunity statute to survive a constitutional review, it must "afford *absolute* immunity against future prosecution for the offense to which the question relates."[81]

Not too long after *Counselman* and in direct response to the Court's holding, Congress enacted a statute that codified absolute, also known as transactional, immunity from prosecution in a compelled testimony situation.[82] The newly codified immunity was soon challenged and upheld by the Supreme Court in *Brown v. Walker*.[83] After *Walker*, absolute immunity came to be the standard for numerous federal immunity statutes,[84] and became an essential

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[78] *Id*. at 565.

[79] *Id*. at 586.

[80] *See id.* at 585-86.

[81] *Id*. (emphasis added).

[82] Compulsory Act of Feb. 11, 1893, ch. 83, 27 Stat. 443-44 (1893) provided:

> That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . .

Id.

[83] 161 U.S. 591 (1986). The Court split five-four with Justices Field, Shiras, Gray, and White dissenting. *Id.* at 610-38. Justice Field in a separate dissenting opinion wrote that "[t]he amendment also protects him [Walker] from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution." *Id*. at 631 (Field, J., dissenting). The Court refused to endorse the broader interpretation of the constitutional privilege against self-incrimination that would protect from infamy, disgrace and the expense of employing a counsel and providing a defense. *Id*. at 597.

[84] *See* J.A.C. Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A. L. REV. 549, 552-53 (1957). The language from the immunity statute enacted in response to *Counselman v. Hitchcock* became the standard for numerous federal statutes. *Id*. (discussing 142 U.S. 547 (1892)).

part of the Unites States' "constitutional fabric."[85] The *Counselman*'s immunity standard was not systematically revisited by the Court until the early 1970s.[86]

But new questions about *Counselman's* implications arose in 1964 when the Supreme Court considered the scope of immunity grants in a multi-jurisdictional context. There, the Court considered whether the Amendment applies to the states. Finding that it does, the Court next decided how much immunity is required in parallel state and federal prosecutions.

The case in question was *Malloy v. Hogan*,[87] where the Supreme Court held that the Self-Incrimination Clause of the Fifth Amendment is binding on the states through the Due Process Clause of the Fourteenth Amendment. [88] Malloy was arrested and jailed for gambling in Connecticut but he later pled guilty and was released on probation.[89] About sixteen months into his guilty plea, a Connecticut court ordered Malloy to testify about these gambling and other criminal activities, but Malloy refused to answer on the ground that the answers would violate his Fifth Amendment right against self-incrimination. [90] However, a Connecticut state court held that the Amendment's privileges do not extend to Malloy in a state proceeding.[91] The Supreme Court reversed the Connecticut's Supreme Court of Errors' ruling, holding that the Fifth Amendment privilege against self-incrimination is available to a witness in a state

[85] Ullman v. United States, 350 U.S. 422, 438 (1956).
[86] *Id.* at 424. Arguably, the transactional immunity doctrine withstood the greatest challenge in a McCarthy era espionage investigation. In *Ullman*, the Petitioner, Ullman, refused to answer questions before a grand jury about his membership in the Communist party. *Id.* Ullman claimed that such admission would lead to a potential risk of his job, passport, and union membership. *Id.* at 430. Yet the Supreme Court upheld the transactional immunity standard despite the potential grave consequence for Ullman. *Id.* at 439.
[87] 378 U.S. 1 (1964).
[88] Malloy v. Hogan, 378 U.S. 1, 3 (1964). *See* Harry T. Quick, *Constitutional Law—Self-Incrimination—A New State Standard*, 15 CASE W. RES. L. REV. 797, 797 (1964). The mechanism of expanding the constitutional rights protections through the Fourteenth Amendment was characteristic of the era when Malloy was decided. The decision followed reasoning outlined in a series of civil rights cases that include *Gitlow v. New York*, *Mapp v. Ohio*, and *Gideon v. Wainwright*. *Id.* (citing 268 U.S. 652 (1925); 367 U.S. 643 (1961); 372 U.S. 335 (1963)).
[89] *Malloy*, 378 U.S. at 1.
[90] *Id*. at 3.
[91] *Id.*

court.[92] In this holding, the Supreme Court stressed the essential values of the American legal system that is "accusatorial," not "inquisitorial," which compels the government to establish guilt by evidence independently obtained—be it compulsion to self-incrimination or compulsion by torture.[93]

But the decision in *Malloy* also opened previously unexplored questions about how immunity grants interact on the state and the federal prosecution levels.[94] On one hand, federal prosecutors could not ignore the state grants of transactional immunity, because that would render the attempted protection by state immunity grants futile. On the other hand, the authorities could not be prevented from prosecuting a party who was previously granted a state transactional immunity,[95] because such disablement would be arguably in violation of the Supremacy Clause.[96]

The Supreme Court addressed the problem of the overlapping federal and state sovereign authority grant on the very same day as *Malloy*.[97] Justice Goldberg, writing for the majority in *Murphy v. Waterfront Commission of New York Harbor*,[98] held that an immunity grant in one jurisdiction is binding on another. But the Court introduced a twist to the application of multi-jurisdictional immunity—the state and federal immunity grants differed in scope.

The Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless

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[92] *Id.*

[93] *Id*. at 7.

[94] *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956). Before Malloy, the Court consistently held that a federal statute is capable of granting immunity to state proceedings. *See also* United States v. Murdock, 284 U.S. 141, 150 (1931). But a state has no power to give immunity from federal prosecutions.

[95] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 92-93 (1964). Justice White summarized the Court's holding in *Murphy* by stating that "the constitutional privilege against self-incrimination is nullified 'when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each.'" *Id.* He also pointed to the undesirable consequences of requiring an absolute immunity. For example, an absolute immunity grant would invalidate immunity statutes in fifty states because the state authorities would lack the power to confer such immunity from federal prosecution. *Id*. at 93-94. The rule would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. *Id.*

[96] *See* Anonymous, *supra* note 61, at 173.

[97] *Id*.

[98] 378 U.S. 52 (1964).

the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."[99] The Court in *Murphy* also held that while the grant of immunity in the prosecuting jurisdiction is absolute, or transactional, the immunity in the parallel prosecuting jurisdiction is sufficiently use-plus-fruits.[100] This compromise protected an individual from a coerced game of catch with the parallel prosecuting state and federal authorities, where she would incriminate herself under an immunity grant in a state proceeding, only to be prosecuted on the basis of the testimony in the federal proceeding, and it also allowed for the existence of parallel state and federal proceedings.[101]

The Court in *Murphy* did not reject absolute immunity in the first instance, but it resolved that a non-compelling jurisdiction (in that case, a parallel federal prosecution) does not have to be held to the same high standard of immunity.[102] The non-compelling jurisdiction still cannot rely on the compelled testimony (use), or the fruits derived thereof, but it can prosecute on independently obtained evidence.

But the Court never answered what happens when the questioning and prosecuting jurisdictions are the same. Thus, readers and commentators of *Malloy* asked whether the decision foreshadowed the later restriction of the immunity requirement in a single jurisdiction context from a transactional immunity to a use-plus-fruits one, or whether it was merely a federalism compromise. Diverse and conflicting opinions surfaced about how to read *Counselman*, *Malloy*, and *Murphy* together. Some commentators questioned whether the ruling in *Murphy* plainly diluted *Counselman*'s rule that required that both federal and state legislation only grant use-plus-fruits immunity.[103] Others believed that there

[99] *Id.* at 79.
[100] *Id.*
[101] Justice White noted in *Murphy* that a grant of absolute immunity would lead to unwanted results in both state and federal prosecutions where either (1) widespread federal immunization would prevent States from having the power and means of obtaining information necessary for state law enforcement, and where (2) the Federal government would effectively become the only power with capacity to offer immunity in exchange for compelling testimony. *Id*. at 93.
[102] *See* Alan D. Singer, *State Grants of Immunity—The Problem of Interstate Prosecution Prevention*, 58 J. OF CRIM. L. & CRIMINOLOGY 218, 218 (1967).
[103] *See* Note, *Counselman, Malloy, Murphy, and the States' Power to Grant Immunity*, 20 RUTGERS L. REV. 336, 339 (1966).

was a one-directional difference in the state and federal immunity grants—state witness under state immunity grant does not receive absolute immunity from federal prosecution, but a federal witness under a federal immunity statute does.[104] The lower courts were no less perplexed about the type and the scope of constitutionally required immunity for compelled testimony.[105]

Until 1970, transactional immunity was the standard for federal immunity statutes.[106] But amidst the divergent interpretations of immunity coexistent with the Fifth Amendment in the aftermath of *Malloy* and *Murphy*, the Warren Court began to gravitate towards a requirement of use-plus-fruits standard instead of relying on the *Counselman*'s absolute immunity.[107]

Congress seized this opportunity where courts began to waver on the immunity standard and passed an act that would aid law enforcement by easing the requirements for evidence gathering.[108] The new statute—Title II of the organized Crime Control Act of 1970[109]—repealed the existing federal immunity statutes that mandated that a compelling authority grants a transactional

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[104] *Id*. at 340.

[105] *Compare* In re Korman, 449 F.2d 32, 37 (7th Cir. 1971), *rev'd*, 406 U.S. 952 (1972) (interpreting Murphy as not restricting Counselman and the scope of Fifth Amendment, but as "extend[ing] the fifth amendment's requirement that a defendant's involuntary statements never be used in any manner against him"), *with* Byers v. Justice Ct. for Ukiah Judicial Dist. of Mendocino Cty., 458 P.2d 465, 472 (1969), *vacated sub nom*. Gardner v Broderick, 392 U.S. 273, 276 (1968) (recognizing that "an individual raising a valid claim of privilege need not be given complete immunity from prosecution in order to be compelled to testify"). *See also* Anonymous, *supra* note 61, at 171 n.19.

[106] *See* Kastigar v. United States, 406 U.S. 441, 453 (1972) (recognizing Piccirillo v. New York, 400 U.S. 548 at 571 n.11 (1971) and Arndstein v. McCarthy, 254 U.S. 71, 73 (1920) as minor exceptions to this rule). Justice Brennan, in his dissenting opinion in *Piccirillo*, specified that Congress has written more than forty transactional immunity provisions into various federal statutes. *Piccirillo*, 400 U.S. at 571. Brennan also pointed out that the majority of the state immunity statutes provide for transaction immunity at that time, "even though the States were not subject to the full effect of the Fifth Amendment until 1964." *Id*. at 571-72.

[107] *See* Marchetti v. United States, 390 U.S. 39 (1968). For example, in *Marchetti*, Chief Justice Warren, writing for the Court, found the use-plus-fruits restriction to a federal registration statute is "in principle an attractive and apparently practical resolution." *Id*. at 58. *See also* Anonymous, *supra* note 61, at 174 n.19.

[108] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 222-23.

[109] 18 U.S.C. §§ 6001–6005 (1970).

immunity,[110] and replaced it with a statute that demanded use-plus-fruits immunity.[111]

Congress reasoned that the new statute codified the "use-restriction immunity concept of *Murphy v. Waterfront Commission*"[112] based on what "Congress judged to be the conceptual basis of *Counselman* . . . that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege."[113] But if the Constitution mandated that immunity be transactional, Congress could not lower the scope of the immunity grant to a use-plus-fruits protection barring a Constitutional amendment. Thus, facing this new statute, the Supreme Court had to reevaluate its decision in *Counselman* and consider once again whether the new immunity sufficiently safeguarded the Fifth Amendment privilege.

At the time when the Act was passed, Congress may have been reading between the lines of *Murphy* in claiming that use-plus-fruits immunity is constitutionally permissible. Only Justice White's concurring opinion in *Murphy* lends the Congress's view direct support. White argued that the privilege against self-incrimination is secured when federal officials are barred from introducing the testimony, or evidence derived from such testimony, in the evidence.[114] He wrote that "[t]he constitution does not require that

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[110] *See* Anonymous, *supra* note 61, at 174.

[111] 18 U.S.C. § 6002 in the relevant parts states that:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no 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.

18 U.S.C. § 6002 (emphasis added).

[112] H.R. REP. NO. 91-1188, 91ST CONG., 2d Sess. 4017-18 (1970).

[113] S. REP. NO. 91-617, at 51-56, 145 (1969); H.R. REP. NO. 91-1549, at 42 (1970).

[114] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 101 (1964).

immunity go so far as to protect against all prosecution to which the testimony relates, *including* prosecutions of another government . . . ."[115] Justice Douglas in his dissenting opinion in *Kastigar* disagreed with such interpretation of *Murphy*'s majority decision. Douglas argued that *Murphy* was a decision about federalism and not the scope of the immunity coexistent with the Fifth Amendment.[116] In Douglas's view, *Murphy* squarely aimed to solve the question of interjurisdictional immunity and it said nothing about the scope of the immunity within *the same* jurisdiction.[117]

But the *Kastigar* majority, the next important Supreme Court decision on the scope of the immunity, viewed *Murphy* and *Counselman* in a different light when addressing the Petitioners' challenge to Congress's new immunity statute. Just as in *Murphy*, the Petitioners in *Kastigar* were summoned to testify in front of a federal Grand Jury.[118] The Government granted the Petitioners a statutory immunity,[119] but the Petitioners claimed the immunity grant was insufficient to replace their constitutional privilege against self-incrimination—they demanded absolute immunity from prosecution.[120] The Supreme Court rejected Petitioners' demand, holding that the offered use-plus-fruits of immunity sufficiently protects their Fifth Amendment privilege against self-incrimination.[121] In so finding, the Court held that *Murphy's* dual-jurisdiction reasoning in adopting use-plus-fruits immunity applies to a single jurisdiction context, too.[122] Yet, the Court in *Kastigar* did not expressly overrule *Counselman*. Instead, the Court reasoned that *Counselman's* requirement of transaction immunity was merely an example of a statute that would sufficiently protect an individual's

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[115] *Id*. at 106 (emphasis added).
[116] *See* Lawrence Rubenstein, *Immunity and the Self-Incrimination Clause*, 2 AM. J. CRIM. L. 29, 32
(1973) ("The Murphy decision was a product of the Court's handling of a practical question of federalism; it did not broaden the duty to testify.").
[117] Kastigar v. United States, 406 U.S. 441, 464 (1972) (Douglas, J., dissenting).
[118] *Id*. at 442.
[119] 18 U.S.C. §§ 6001–6005 (1970).
[120] *Kastigar*, 406 U.S. at 449.
[121] *Id*. at 462.
[122] *Id*. at 453.

Fifth Amendment rights,[123] reducing *Counselman's* transactional immunity requirement to a mere suggestion and a dictum.[124]

The *Kastigar* Court specifically addressed the Petitioners' concern that derivative-use immunity will be inadequate to protect a witness from a host of potential incriminating uses of testimony.[125] The *Kastigar* Petitioners argued that "[i]t will be difficult and perhaps impossible . . . to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness . . . ."[126] The Court dismissed this concern noting that the language of the immunity statute mandated a sweeping proscription against direct or indirect use of a testimony, which prevents using a compelled statement as an investigatory lead.[127]

The differences between the lower courts post *Kastigar* concerning the scope of the prohibition against the derivative use of testimony suggests that the Court's conclusion may have been premature. The Court did not address the subtle, indirect, and often untraceable ways in which a compelled testimony may very well steer the direction of an investigation.[128] Does it matter that the

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[123] The Court in *Kastigar* recounted that the statute in question in *Counselman* only protected the defendant from direct use of the testimony, but not from evidence searched out on the basis of the testimony. *Id.* at 450. The Court reasoned that *Counselman*'s clear statement that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates" means something else than can be understood from the plan meaning of the statute. *Id*. at 451 (quoting Counselman v. Hitchcock, 142 U.S. 547, 586 (1892)). The Court in *Kastigar* reasoned that that the majority in *Counselman* stated that a statute "must afford absolute immunity;" they merely introduced one example of a statute that was sufficed to protect the Fifth Amendment privilege. *Id*. at 454.

[124] *Id*. at 455.

[125] *Id*. at 459.

[126] *Id*.

[127] *Id*. at 459-60.

[128] This use is referred to as "non-evidentiary." But the difference between indirect evidentiary and non-evidentiary is difficult to capture in practice. *See infra* Part II.D. The *Kastigar* Court suggested that any shaping of the investigation based on compelled evidence constituted indirect prohibited use. But what then constitutes non-evidentiary use that alters the shape of the investigation? Some scholars conclude that "a non-evidentiary use is really an indirect evidentiary use that is yet to be proven." *See* Douglas A. Turner, *Nonevidentiary Use of Immunized Testimony: Twenty Years After Kastigar and the Jury Is Still Out*, 20 AM. J. CRIM. L. 105, 130 (1992). Lower courts are usually divided on the issue of evidence admissibility along the lines of evidentiary and non-evidentiary. *See supra* note 114.

prosecution unfolds in a certain sequence because of a compelled testimony? What if the thought processes of a cross-examining prosecutor are shaped by an exposure to a compelled testimony and subsequently influence his line of questions? Furthermore, it remained difficult to discern the line between evidentiary and non-evidentiary use once an investigator was exposed to the evidence.[129] A prosecutor can easily work his way backward to establish independent ways of obtaining evidence.[130] In such instances, the prosecution's proof that evidence was derived from sources independent from the compelled testimony often becomes an exercise in prosecutorial good faith, rather than a reliable method of inquiry worthy of safeguarding a constitutional right.

But the Court in *Kastigar* did not find that construing use-plus-fruits immunity as sufficient to protect the Fifth Amendment privilege leads to an increased reliance on prosecutorial good faith.[131] The Court held that the burden placed on the prosecution was to show that the evidence came from sources "wholly independent of the compelled testimony."[132] According to the *Kastigar* Court, the prosecutorial burden provides sufficient safeguards against prosecutors "working backwards" to establish an independent source of evidence.

But the Court did not consider the relative ease with which a prosecutor can find the corroboration for a desired result despite the prosecutorial burden to establish an independent source of evidence. There is a strong informational asymmetry between the prosecution and the defendant. The prosecution controls and shapes the case, including selection of the relevant parties. The prosecution also has vast subpoena powers, and it can request oceans of evidence from almost unlimited sources. Once the prosecution knows what it is looking for, it is not hard to establish an alternative source of evidence amongst the copious evidence previously gathered.

It is thus an easier burden for the prosecution to shoulder to prove an alternative source for evidence once it knows of the evidence than it is for the defendant to establish that the prosecution worked its way backwards to establish an independent source of the evidence. Indeed, in this instance, there is no reliable way to

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[129] *See infra* Part II.D.
[130] *See infra* note 242.
[131] *Kastigar*, 406 U.S. at 460.
[132] *Id.*

distinguish what evidence was derived independently and what was arrived at under direct or indirect influence of a compelled testimony.[133]

D. The Dispute Over The Permissible Uses Of Compelled Testimony

In the decades after the ruling in *Kastigar*, the lower courts puzzled over the scope of *Kastigar*'s prohibition against any prosecutorial use[134] of immunized testimony "in any respect."[135] The *Kastigar* Court described the new immunity standard by contrasting it with the deficiencies of a use immunity standard[136]—use immunity only could not prevent derivative use.[137] *Kastigar*'s proscription against the use of compelled testimony appears to be sweeping at first blush—it prohibits "direct or indirect, [use] of the compelled testimony and any information derived therefrom."[138]

But *Kastigar's* prohibition on direct or indirect use, without more, does not provide precise guidance for where to draw the line in enforcing the standard. This is especially true of indirect evidence: at what point is evidence sufficiently removed from the testimony that it does not violate a witness's right against self-incrimination? Does reading a testimony by a prosecutor create a per se taint? Are strategic decisions influenced by a compelled testimony an impermissible use? Because of *Kastigar*'s ambiguities and the inherent difficulties in enunciating and applying the proscription

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[133] *See infra* notes 237-48 and accompanying text on the use of filter and taint teams.

[134] *Kastigar*, 406 U.S. at 460.

[135] *Id*. at 453.

[136] *Id.* The Court found that mere use immunity did not prevent the "use of [the compelled] testimony to search out other testimony to be used in evidence against him." *Id.* at 450. Nor did it prevent the "use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion . . . [or] use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." *Id*. at 454.

[137] "[B]ecause the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." *Id*. at 454 (quoting Ullmann v. United States, 350 U.S. 422, 437 (1956)).

[138] *Id*. at 460.

against indirect use in particular, the lower courts have struggled to consistently define the scope of *Kastigar*'s immunity. Accordingly, because the definition of the non-evidentiary use is vague, most courts define it by example.[139] Some examples of non-evidentiary use include prosecutors utilizing the testimonial knowledge to: (1) bring an investigation; (2) focus and general shaping of the investigation; (3) refuse to plea bargain; (4) interpret evidence; (5) plan cross-examination; or otherwise prepare trial strategy.[140]

The courts further divided on whether all or any of the types of non-evidentiary use are coexistent with the privilege against self-incrimination. The leading case that interprets *Kastigar* as proscribing non-evidentiary uses of a compelled testimony is *United States v. McDaniel*.[141] McDaniel was a president of a North Dakota bank who was subpoenaed to appear before both federal and state grand juries to answer questions about his work as a president.[142] He first testified in front of a grand jury under a grant of immunity, divulging a long list of his crimes.[143] A federal prosecutor later received an immunized copy of McDaniel's testimony unaware that it was, in fact, immunized, and[144] the he indicted and convicted McDaniel, who later appealed.[145] The Eighth Circuit Court of Appeals reversed McDaniel's conviction even though the evidence adduced against him at trial was, according to the prosecution, obtained from wholly independent sources.[146] The Court interpreted *Kastigar*'s proscription on "any use, direct or indirect," as prohibiting any prosecutorial use of testimony.[147] The Court noted that "if the immunity protection is to be coextensive with the Fifth Amendment privilege, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before

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[139] *See* Turner, *supra* note 128, at 113.
[140] *Id*. (citing United States v. Rivieccio, 919 F.2d 812, 815 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2852 (1991)). *But see* United States v. Byrd, 765 F.2d 1524, 1531-32 (11th Cir. 1985) (holding that government's incorporation of knowledge into indicting or the trial constitutes indirect use).
[141] 482 F.2d 305 (8th Cir.1973).
[142] *Id*. at 307.
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] *Id*. at 311.
[147] *Id*.

the jury."[148] The Court also remarked that the prosecutor's reading of the compelled testimony "could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case."[149]

The Court in *McDaniel* decided that *Kastigar* prohibits and non-evidentiary use of compelled testimony, including mere reading of the immunized testimony that shaped prosecutorial thought process.[150] The Court in *McDaniel* held that where, as in this circumstance, the prosecutor thoroughly prepared for a trial not knowing that the testimony is compelled, the prosecution's burden under *Kastigar* was "insurmountable."[151] But *McDaniel* stopped short of saying that that prosecutorial familiarity with a compelled testimony established *per se* taint. Other courts have since followed *McDaniel* in prohibiting non-evidentiary use that may have tangentially influenced the trial strategy or prosecutor's thinking.[152]

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[148] *Id*.

[149] *Id*. at 312.

[150] *Id.* According to the Court, non-evidentiary use includes "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." *Id*. at 311.

[151] *Id*.

[152] United States v. Semkiw, 712 F.2d 891, 895 (3d Cir.1983) (stating possible non-evidentiary uses, the Court concluded the record did not show that the prosecution and the defendant remained in substantially the same position as if defendant had never testified); United States v. Pantone, 634 F.2d 716, 722 (3d Cir. 1980) (suggesting that the prosecutor's access to the immunized testimony that provides psychological motivation he would otherwise lack could constitute impermissible use); United States v. North, 910 F.2d 843, 859-60 (D.C. Cir. 1990) (suggesting that a *Kastigar* violation occurs not when a prosecutor's limited exposure has a mere tangential influence on his thoughts about a case, but rather when he makes significant non-evidentiary use of the testimony); United States v. Hsia, 131 F. Supp. 2d 195, 201-02 (D.D.C. 2001) (holding that Kastigar and North prohibit non-evidentiary uses of immunized testimony); United States v. Smith, 580 F. Supp. 1418, 1421 (D.N.J. 1984) (stating that the government has an "'affirmative duty' of showing that it did not and will not exploit the immunized testimony in more subtle, elusive ways"). *But see* United States v. Slough, 641 F.3d 544 (D.C. Cir. 2011) (potentially distinguishing *North*). The Court in *Slough* held that "[n]either *Kastigar* nor *North* states that non-evidentiary uses of immunized statements are barred." *Id*. at 553. Rather, the Court stated that many uses that may have been lumped under "non-evidentiary use" in *North* or in the District Courts decision in *Slough*, such as refreshing memories of a witness with evidentiary testimony or evidence presented to the grand jury thar was discovered by the immunized testimony, were indirect uses prohibited by *Kastigar*. *Id*. at 554.

But several other courts rejected *McDaniel*'s proposition that non-evidentiary use of a compelled testimony falls within *Kastigar*'s proscription. These courts argue that immunity must only protect against evidentiary uses. The First Circuit rejected the view that "all non-evidentiary use necessarily violates the Fifth Amendment."[153] The First Circuit agreed with the Second Circuit that prosecution should be solely because "'immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial.'"[154] But at the same time, the Court did not foreclose the possibility that "certain non-evidentiary uses of immunized testimony may so prejudice the defendant as to warrant dismissal of the indictment . . . ."[155] The Second Circuit, on the other hand, explicitly rejected tangential non-evidentiary uses,[156] yet it never rejected other non-evidentiary uses.[157]

By contrast, the Eleventh Circuit, comparing its decision to those in *McDaniel* and *Semkiw*, held that "the privilege against self-incrimination is concerned with direct and indirect *evidentiary* uses of compelled testimony, and not with the exercise of prosecutorial discretion."[158] But the Eleventh Circuit's definition of "evidentiary" use is ambiguous—the court insisted that evidentiary use under *Kastigar* encompasses "investigatory" uses that could be reasonably considered non-evidentiary.[159] Just as the Eleventh Circuit, the Seventh Circuit, too, stated that "the mere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that

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[153] United States v. Serrano, 870 F.2d 1, 17 (1st Cir. 1989).

[154] *Id*. at 17-18 (quoting United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988)).

[155] *Id*. at 17.

[156] United States v. Mariani, 851 F.2d 595, 600 (1988).

[157] In *United States v. Schwimmer*, the Second Circuit cited with approval both the Eighth Circuit's decision in *McDaniel* and Third Circuit's decision in *Semkiw*, in warning the government about potential hazards of non-evidentiary uses that may "assist the prosecutor in focusing additional investigation, planning, cross-examination, or otherwise generally mapping a strategy for retrial." 882 F.2d 22, 26 (2d Cir. 1989) (citing U.S. v. McDaniel, 482 F.2d 305, 311 (8th Cir.1973) and *Semkiw*, 712 F.2d at 895).

[158] United States v. Byrd, 765 F.2d 1524, 1531 (11th Cir. 1985).

[159] *See* United States v. North, 910 F.2d 843, 859 (D.C. Cir. 1990) (citing United States v. Hampton, 775 F.2d 1479, 1490–91 n.53 (11th Cir.1985)).

information."[160] The Seventh Circuit further stated that "[t]here is no question that Kastigar bars not only evidentiary use of compelled testimony but also non-evidentiary, or derivative, use of the same."[161]

Even through the differences among the circuits as to what types of evidence fall within the constitutionally proscribed immunity grant are often described as a split,[162] there may be more similarities amongst the circuits than is apparent. The circuits that rejected the non-evidentiary standard did not do so categorically, but they left open the possibility that certain non-evidentiary uses could amount to a *Kastigar* violation. Second, the definitions of non-evidentiary uses are inconsistent across the circuits. Some circuits find certain evidence use that could be reasonable considered a non-evidentiary use, and thus outside the scope of *Kastigar*'s protection, an indirect use that is allowed.[163]

A review of circuits' practices shows that it matters more whether the use is merely tangential or whether it has a discernible bearing on potentially incriminating evidence, than whether use is "evidentiary" or not. The linguistic exercise of defining what use is direct or indirect, evidentiary or non-evidentiary, has not succeeded in producing a workable definition as to either type of uses. And no court was willing to completely foreclose itself from the possibility that no non-evidentiary uses will not be within *Kastigar*'s prohibition. Therefore, the courts' inquiry in determining the scope of the *Kastigar* immunity should move away from a categorical inquiry about whether a use is evidentiary or not to a functionalist and qualitative inquiry. The confusing categorization of what is evidentiary and non-evidentiary use should be avoided altogether.

Only a qualitative inquiry that considers the implications of a testimonial use can capture the most relevant question in *Kastigar* and *Murphy*—whether the witness is "in substantially the same position as if the witness had claimed his privilege in the absence of a

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[160] United States v. Bolton, 977 F.2d 1196, 1199 (7th Cir. 1992) (quoting United States v. Velasco, 953 F.2d 1467, 1474 (7th Cir.1992)) (internal quotation marks omitted).

[161] United States v. Cozzi, 613 F.3d 725, 730 (7th Cir. 2010).

[162] *See generally* CRIMINAL PRACTICE MANUAL § 89:10 (3d ed. 2021); CRIMINAL PRACTICE MANUAL § 8.11(c) (4th ed. 2020); *see also* Turner, *supra* note 128, at 116.

[163] *See Hampton*, 775 F.2d at 1490–91 n.53.

state grant of immunity."[164] *Kastigar* did not describe what particular types of evidence are excluded. Instead, the *Kastigar* Court asked what effect the use has on the foregone self-incrimination right. The immunity, according to the Court, is a mere exchange token, no more or no less protective than the scope of the Fifth Amendment itself. And given the important historical role that the amendment played in the history of the common law and the United States' substantive law,[165] the Court's protective measures to safeguard the right should always lean toward a greater margin of protection.

A broad view of the *Kastigar* immunity is consistent with the Supreme Court's holding in *United States v. Hubbell*.[166] In *Hubbell*, the Court determined that the scope of an immunity grant is large—it includes the production of documents in response to a subpoena where the defendant had to identify the documents, making extensive use of "the contents of his own mind."[167] The Supreme Court refused to separate the production of documents from its testimonial aspect, likening assembling of the subpoenaed documents to "telling an inquisitor the combination to a wall safe," and unlike "being forced to surrender the key to a strongbox."[168] The Court further regarded the Government's view of the "act of production as a mere physical act that is principally nontestimonial in character," and that can be "entirely divorced from its 'implicit' testimonial aspect," "anemic" and divorced from the realities of the act of production in this case.[169]

In *Hubbell*, the Supreme Court refused to separate the act of production from its testimonial character, emphasizing the qualitative aspects of the inquiry that determines the scope of the Fifth Amendment protection for an immunized testimony: "The testimonial aspect of respondent's act of production was the first step in a chain of evidence leading to this prosecution."[170] Justice

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[164] Kastigar v. United States, 406 U.S. 441, 457 (1972) (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964)).
[165] *See supra* Parts II.A, II.B.
[166] 530 U.S. 27 (2000).
[167] *Id*. at 43 (quoting Curcio v. United States, 354 U.S. 118, 128 (1957)).
[168] *Id*. A combination conveys the contents of one's mind and is therefore testimonial. On the other hand, a key, in these circumstances, does not reveal contents of one's mind and is therefore not testimonial and protected within the scope of the Fifth Amendment. *See* Doe v. United States, 487 U.S. 201, 210 n.9 (1988).
[169] Hubbell, 530 U.S. at 43.
[170] *Id*. at 28-29.

Thomas, joined by Justice Scalia, reaffirmed in his concurrence such broad reading of the self-incrimination privilege based on the historic use and precedent: "Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence."[171] The Justices went so far as to state that in a future case, they would be willing to reconsider the scope and meaning of the Self-Incrimination Clause.[172]

III. THE CORPORATE PROSECUTION TRENDS: WHO IS BEING PUNISHED?

The rise, peak, and aftermath of the financial crisis in the increasingly globalized world brought important changes to the way the government interacts with private institutions.[173] A decade of large-scale settlements was succeeded by an increased demand for individual prosecutions, tightening the link between the government and banks nationally and internationally. [174]

The increased cooperation between the government and corporations in turn increased the government's access to information about employees, without the corresponding increased protections for the corporate employees.[175] The government's individual prosecutions moreover did not punish the heads of companies.[176] Rather, they targeted the more ordinary rank-and-file employees,[177] who are becoming the least protected in the world where cooperation between large companies and governments strengthens.[178]

A decade after the financial crisis and despite increased financial regulation since the 2008 recession, the Department of Justice's ("DOJ") white-collar prosecutions fell to their lowest in twenty years, reflecting a broader steadily declining trend from the

[171] *Id*. at 49 (Thomas, J. & Scalia, J., concurring).
[172] *Id*.
[173] *See supra* notes 168-173 and accompanying text.
[174] *See infra* notes 185-90 and accompanying text.
[175] *See infra* notes 194-97 and accompanying text; *see also infra* Part IV.B.
[176] *See infra* notes 196-97 and accompanying text.
[177] *See infra* note 201 and accompanying text.
[178] *See infra* notes 196-99, 202-11; *see also infra* Part IV.B.

past few years.[179] But the trend is more complicated than a simple trend in the rise and the fall of prosecutions. The past three decades in corporate prosecutions were marked by many important changes. Starting in the 1990s, when prosecuting corporations was a relatively novel phenomenon, and progressing to the 2000s when the DOJ revolutionized using large-scale settlements in corporate prosecutions with deferred and non-prosecution agreements.[180]

At the same time, the number and scope of large-scale cross-border actions that drive the corporate investigations and subsequent settlements grew. The United States became increasingly involved with its foreign counterparts in investigating the multi-national crimes that affect the United States, often engaging in parallel cross-border investigations. The statistics show that in 2017 the Criminal Division's Fraud Division of the DOJ accrued "over 50 pending parallel investigations in over 40 different jurisdictions and involving over 50 different foreign regulatory and law enforcement authorities."[181] For example, "the U.S. Department of Justice revealed that bribery cases now routinely involve four or five countries."[182] The five largest bribery settlements in 2016 and 2017 not only concerned foreign companies, but were conducted in cooperation with foreign authorities.[183] The United States prosecutors are now additionally becoming embedded in international organizations and even within sovereign government's enforcement bodies.[184]

These large cross-border investigations exert great pressure on the companies under investigation to settle as evidence and witnesses become available internationally, and the governments'

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[179] *See White Collar Prosecutions Fall to Lowest in 20 Years*, TRACREPORTS (May 24, 2018), https://trac.syr.edu/tracreports/crim/514/. The declining trend continued in year 2019. *Id.*

[180] *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1-18 (2014) (providing an overview of the changing approach towards corporate prosecution during the 1990s through 2000s).

[181] 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. 299, 311 (2018).

[182] Evan Norris & Alma Mozetic, *How Enforcement Authorities Interact*, GLOB. INVESTIGATIONS REV. OF THE AMS. (Aug. 20, 2018), https://globalinvestigationsreview.com/insight/the-investigations-review-of-the-americas-2019/1173281/how-enforcement-authorities-interact#endnote-001.

[183] *Id.*

[184] *See infra* note 247.

forces join in targeting crime. Many of such large-scale prosecutions ended in even larger settlements. In 2015, an astounding number of banks—eighty to be exact—settled cases brought against them by the government using plea agreements or deferred–prosecution agreements.[185] Banks represented about half of all prosecution agreements in 2015, and these settlements paid the majority of the $9 billion of prosecutions' fees the government levied that year. The fees included some of the famously large settlements such as: $625 million paid by Deutsche Bank in an antitrust case, $641 million paid by Commerzbank, or $156 million paid by Crédit Agricole in money laundering and export violation cases.[186] The settlements appeared to be advantageous agreements between the government and the banks. The government collected large fees, and the companies, facing potentially ruinous lawsuits, eagerly cooperated and paid large settlements.[187]

Almost for a decade since the financial crisis, the government has been levying hefty financial fees through the official settlement policy.[188] Despite these penalties, the Department of Justice faced criticism for the lack of individual accountability in corporate prosecution cases[189] and for the recidivism committed by these financial institutions,[190] which signaled to the public that despite the penalties, little has changed inside the banks. This criticism

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[185] Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. 33, 37 (2016).

[186] *Id.*

[187] *See infra* Part III.A.

[188] In 2015, corporations paid record fines exceeding $9 billion in penalties to federal prosecutors; $7 billion from this sum was paid by banks. Overall, over $22 million in penalties have been paid to the federal prosecutors from 2011 to 2015 and over $15 billion was paid just in the last five years of the time period from 2011 to 2015. *See* Garrett, *supra* note 185, at 35-36.

[189] Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 112 (2020).

[190] *See* Garrett, *supra* note 185, at 42. For example, Barclays entered into a deferred prosecution agreement in 2010, a non-prosecution agreement in 2012, and a guilty plea pending. *Id.* Crédit Suisse signed a deferred prosecution agreement in 2009 and a plea agreement in 2014. *Id.* HSBC entered a non-prosecution agreement in 2001. *Id.* UBS entered into a deferred prosecution agreement in 2009, a non-prosecution agreement in 2011, a non-prosecution agreement in 2012, a guilty plea by a subsidiary in 2013. *Id.* Wachovia entered a deferred prosecution agreement in 2010 and a non-prosecution agreement in 2011. *Id.* Lloyds agreed to a deferred prosecution agreement in 2009 and a deferred prosecution agreement in 2014. *Id.*

prompted the former Deputy Attorney General Sally Yates to issue a Memorandum outlining a new focus on individual prosecutions.[191] This renewed concentration on individuals remained, according to the Trump Administration, a focal point of the DOJ's prosecutions.[192]

The increased focus on individuals brought greater cooperation with the banks, nationally and internationally, where on one side the government is hoping to convict culprits to assuage the public criticisms, and on the other side, the banks are trying to do anything that could win favorable treatment from the government.

Indeed, the DOJ emphasized the importance of "true" corporate cooperation that provides "evidence against" the "culpable individuals."[193] The incentives for the private institutions to cooperate to their utmost are also clear. The 2015 Yates Memorandum stated that "for a company to receive any consideration for cooperation . . . the company must completely disclose to the Department all relevant facts about individual misconduct.[194] The corporations are therefore incentivized to turn over the most information possible about their employees at the government's request with the hope of securing favorable settlement conditions.

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[191] *See* Memorandum from Sally Q. Yates, the Deputy Att'y Gen. on Individual Accountability for Corporate Wrongdoing, Dep't of Just. (Sept. 9, 2015).

[192] Matt Zapotosky, *Sessions: Focus on Violent Crime Doesn't Mean Lax Enforcement for White-collar Offenses*, WASH. POST (April 24, 2017), https://www.washingtonpost.com/world/national-security/sessions-focus-on-violent-crime-doesnt-mean-lax-enforcement-for-white-collar-offenses/2017/04/24/d36d4034-2906-11e7-be51-b3fc6ff7faee_story.html. Former Attorney General Jeff Sessions stated that individual white-collar prosecutions remain DOJ's priority despite widely advertised focus on violent offenses, and drug and immigration violations. *Id.* Subsequently, the Deputy Attorney General Rod J. Rosenstein re-iterated that prosecuting corporate individuals remains an important deterrent for wrongdoing. *See* Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) ("Under our revised policy, pursuing individuals responsible for wrongdoing will be a top priority in every corporate investigation. . . . But the deterrent impact on the individual people responsible for wrongdoing is sometimes attenuated in corporate prosecutions. Corporate cases often penalize innocent employees and shareholders without effectively punishing the human beings responsible for making corrupt decisions.").

[193] Marshall L. Miller., Principal Deputy Assistant Att'y Gen., Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018).

[194] *See* Yates, *supra* note 191, at 3.

The *Connolly* case from 2018, discussed later in this Article, was not the first case where the U.S. government offered lenient treatment in exchange for the company's zealous cooperation or waiver of an employee's privilege. Already in 2006 in *United States v. Stein I*,[195] Judge Kaplan of the Southern District of New York strongly reproached the government for coercing the accounting firm KPMG into interfering with its employees' Sixth Amendment right to counsel and the Fifth Amendment right against self-incrimination.[196] Kaplan found that the DOJ's policy memo followed in this case—the Thompson Memorandum—interfered with the defendants' Fifth Amendment right to due process and Sixth Amendment right to counsel because it allowed the government to judge KPMG's cooperation on its decision whether pay the attorneys' fees.[197] In the second opinion issued in *Stein*, the court held that the KPMG employees who had been threatened with termination of their jobs and payment of legal fees if they did not speak to the government, made their statements under coercion directly attributable to the government.[198]

Despite the government's resolve to prosecute individuals, the overall white-collar prosecutions declined, but the individual prosecutions amounted to a mere fraction of all government white-collar prosecutions. The composition of the convicted white-collar wrongdoers offers a telling picture of who is prosecuted. It is not the corporate chief executive officers ("CEOs") or executive managers.

From 2001 to 2014, the prosecutors in the United States entered into 306 deferred prosecution agreements with companies—only 104 included individual prosecutions, amounting to 414 individuals prosecuted.[199] Of the individuals charged, the majority did not consist of CEOs and other higher-up corporate officers, but rather middle managers and individuals with low-ranking corporate positions. Out of 414 individual prosecutions from 2001 until 2013, only one-third included individuals who held positions with

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[195] 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

[196] *See id.*; Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 54 (2007).

[197] Bharara, *supra* note 196, at 98.

[198] *Id*. at 98-99.

[199] The 104 criminal cases were accompanied by 414 individual prosecutions. *See* Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1802 (2015).

significant managerial responsibilities, twenty-six were CEOs, thirteen were presidents, twenty-eight were chief financial officers, and fifty-nine were vice presidents.[200]

Moreover, the growing cooperation between the banks and the companies created an environment where the prosecutors have a remarkable access to companies' internal information about the employees. But the government's access did not lead to holding the most powerful and the guilty individuals—corporate executives and top managers— accountable. On the contrary, the individuals who are often marched into courtrooms are not the ones directing misconduct, or even those with the most knowledge of the crimes. The higher-ups are valuable sources of knowledge who can aid the prosecutors to obtain several convictions, which could in turn dampen the public criticism. They are therefore more likely to receive a government plea offer for their cooperation. The arrangements also raise a separate concern that the higher-ups get favorable deals in exchange for throwing the mid-level employees "under the bus."

In addition to the settlement and cooperation policies, the courts have also aided the expansion of the government and corporate cooperation at the expense of the employees' rights. According to the Supreme Court's decision in *Upjohn Co. v. United States*,[201] the corporation, not the individual, retains attorney-client and work product privilege.[202] The corporation can lift this privilege when the government so demands and grant the government access to the information it otherwise could not reach.[203] And more often than not, the government rewards such helpful corporate cooperation.[204] The corporate employees often speak with a company's in-house counsel

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[200] *Id.* at 1802-03.

[201] 449 U.S. 383 (1981).

[202] *Id.* at 390. This is to the contrary of the Supreme Court's otherwise protective attitude towards the attorney-client privilege against government encroachment. *See generally* Swindler & Berlin v. United States, 524 U.S. 399, 403 (1998) (stating that the purpose of the attorney-client privilege is to promote public observance of the law by "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice" and refusing to pierce the privilege after the attorney's death).

[203] *Upjohn*, 449 U.S. at 394-95.

[204] *See* Yates, *supra* note 191; *see also* Garrett, *supra* note 199, at 1844-45.

[204] *Upjohn*, 449 U.S. at 394-95.

before the government comes knocking on the door.[205] In such interviews, the employee does not receive any constitutional protections, and she often has no legal representation, and may not even be aware that anything she will say may result in a criminal liability.[206] Frequently then, the individual unwittingly incriminates herself because the company's policies oblige her to speak with the corporate counsel, and the incriminating evidence is then turned over to the government.[207]

. Companies commonly have "talk or walk" policies that allow for termination of employees who do not follow them.[208] Such corporate interviews, however, may not adequately safeguard employees' constitutional rights where it is the government that directs the investigation. Instead, a corporation may be "bending over backward and kissing [the government's] tush to satisfy the government""[209] in a hope of a favorable settlement while the employee faces the catastrophic choice between being interrogated *de facto* by the Government without any self-incrimination guarantees or the termination. These pressures, together with the government's outsourcing of investigative powers, facilitate erosion of the Fifth Amendment rights of the employees caught in the middle, where the large banks settle, and the top management gets a favorable cooperation agreement.

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[205] Garrett, *supra* note 199 at 1824-25.

[206] *Id.*

[207] *Id.*

[208] *See* Garrett, *supra* note 199, at 1825. *See also* Sigal P. Mandelker et al., *Employee Rights: The US Perspective*, GLOB. INVESTIGATIONS REV. (Jan. 4, 2017), https://globalinvestigationsreview.com/chapter/1079306/employee-rights-the-us-perspective; *see also* United States v. Stein I, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (finding that the KPMG employees, who had been threatened with termination of their jobs and payment of legal fees if they did not speak to the government, made their statements under coercion directly attributable to the government).

[209] Judge McMahon's remark on account of Deutsche Bank's cooperative effort with the U.S. government in the LIBOR prosecutions. Transcript of Record at 361, l. 14-15, United States v. Connolly, No. 16 Cr. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

A. The Privatization of the Government's Investigations

The companies' cooperation with the government in hope of gaining a favorable settlement plays out against the backdrop of the enormous pressure that the United States government places on the companies to induce cooperation.[210] The potential costs for the government and the corporations are great. Subsequently, the settlement agreements between the government and companies create a co-dependent relationship between the government and the companies. The government faces public pressure to prosecute corporate individuals in a tumultuous era of financial scandals, and the companies are vigorously avoiding the "fatal prospect" of indictment.[211] Admittedly, potential losses of big corporations hardly elicit public sympathy. Still, the consequences for a business that fights a case all the way to a trial can be ruinous. Such consequences impact the companies' willingness to cooperate with aim to settle as soon as possible. Even though a trial may seem negligible for a multi-billion-dollar corporation, it is not so because a corporation is not affected solely by potential costs and fees associated with a trial. The good reputation of a firm amongst investors perpetuates its success. A dragged-out trial can result in irreversible damage to a company's stock price, rating, or client retention, before a case ever reaches the verdict.[212]

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[210] Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 312 (2007). Since at least the early 2000s, the government has adopted a strategy focused on punitive regulations and created the Corporate Crime Task Force which releases annual scorecards that tally the numbers of convictions, the total fines, and the number of corporate defendants charged. *Id.* The effect of this power to indict and levy destructive fines has been widely recognized. *See generally* George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 987 (2005) (describing corporate indictment as "lethal even for venerable institutions"); *see also* United States v. Stein II, 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006) (stating that by threatening KPMG with indictment—"the corporate equivalent of capital punishment"—the government left KPMG no real choice but to pressure its employees to waive their constitutional rights).

[211] United States v. Stein, 541 F.3d 130, 142 (2d Cir. 2008).

[212] Abbe David Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights,* 40 GEO. L.J. ANN. REV. CRIM. PROC. iii, vi (2011).

The post-Enron example of Arthur Andersen Co. stands as a cautionary tale of a financial services firm that did not cooperate with the government and went bankrupt[213] before the verdict was ever overturned.[214] And the government had not shied away from publicly predicting the consequences of Andersen's non-cooperation. At the time when Anderson picked a fight with the government, a different bank—Merrill Lynch—decided to instead enter into a settlement agreement.[215] The DOJ's Assistant Attorney General offered an insight on the two companies' standing: "There's a right way and a wrong way to respond when the government comes knocking at your door."[216] Clearly, Andersen picked the wrong way.

Unquestionably then, the government exerts pressure on the corporations to cooperate, but it is not the question of pressure *per se* that warrants caution. It is individual, not corporate, rights that are at stake. After all, criminal subjects are routinely exposed to pressure to expose wrongdoing.[217] It is the degree and type of coercion, particularly one that erodes constitutional rights of a third party, that may come in the shadow of such coercion-cooperation models. Recent caselaw—*United States v. Allen* and *United States v. Connolly*—suggests that federal courts found such infringements had already occurred.

B. The Mechanism of Attributing Private Action to Government in the Fifth-Amendment Context

There is a legal framework for attributing government action to that of a private actor if the private actor takes on a substantive function of the government. The Supreme Court's decision in *Garrity v. New Jersey*[218] extended the Fifth Amendment privilege

[213] Stein II, 440 F. Supp. at 337. Commentators noted finality of reputational damages of an indictment in a financial services industry is such that even a Supreme Court's unanimous reversal of the conviction could not resurrect the firm. *See* Ellard, *supra* note 162, at 211.
[214] *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005).
[215] Griffin, *supra* note 211, at 327.
[216] *Id.*at 327 n.80.
[217] *See* Bharara, *supra* note 196, at 88.
[218] 385 U.S. 493 (1967).

against self-incrimination to government employees.[219] But the guarantees against self-incrimination were not always extended to public employees, let alone the private ones. In *Garrity*, the Supreme Court held that "statements obtained under the threat of removal from office" could not be used in subsequent criminal proceedings against the defendant.[220] The Court found the choice between self-incrimination and job loss, or a threat thereof, coercive,[221] stating that "[t]he option to lose one's means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."[222]

The Court in *Garrity* based the decision on two constitutional grounds. First, it held that the coerced choice between job termination or potentially incriminating testimony violated the Fourteenth Amendment requirements.[223] Second, the Court found that the state's threat to fire the officers unless they provided

[219] *See* Donald P. Taylor, *Between the Rock and the Whirlpool: Compelled Statements by Public Employees*, 30 LAB. L.J. 148, 150 (2009).

[220] *Garrity*, 385 U.S. at 500. In *Garrity*, two police officers in the New Jersey boroughs were investigated for their ticket-fixing practices and eventually convicted in two trials of conspiracy to obstruct state motor traffic laws. *Id.* During the investigation process, the officers were brought for questioning by the district attorney, whereby they were each warned that their respective statements could be used against them in a criminal proceeding. *Id.* The officers were informed of their right to remain silent but they were also told that their refusal to answer questions could result in their removal from office. *Id*.

[221] *Id.* at 496. By applying a voluntariness test, the Court in *Garrity* found that the threat of loss of employment disabled the officers from "making a free and rational choice." *Id.* at 496-98. The Court described the circumstances under which the defendant was acting as "[w]here the choice is between the rock and the whirlpool, duress is inherent . . . it always is for the interest of a party under duress to choose the lesser of two evils. [This] does not exclude duress." *Id.* at 498.

[222] *Id.* at 497.

[223] *Id.* at 496. "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Id*. at 500.

statements was an unconstitutional condition.[224] Since then, all U.S. circuits that addressed the issue held that "a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings."[225]

The mechanisms for invoking the Fifth Amendment protection in situations where government acts through a third-party, such as corporate counsel conducting an internal investigation, mimics compelled testimony situations. As in compelled-by-the-government situations, the courts also held that, under the *Garrity* framework if a defendant shows she was compelled to testify by her

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[224] *Id*. Some commentators introduced the unconstitutional conditions doctrine as an avenue to understand *Garrity*. *See* Donald W. Driscoll, Garrity v. New Jersey *and Its Progeny: How Lower Courts Are Weakening the Strong Constitutional Protections Afforded Police Officers*, 22 BUFF. PUB. INT. L.J. 101, 111 (2003). The doctrine holds that state or federal government cannot offer a benefit on a condition that a recipient engages in or abstains from an activity that the Constitution prohibits or that the Constitution prohibits from demanding. *Id*. at 113 (citing Perry v. Sindermann, 408 U.S. 593, 587 (1972)).

[225] Sher v. U.S. Dep't of Veterans Affs., 488 F.3d 489, 501-02 (1st Cir. 2007); *see In re* Grand Jury Proceedings, 45 F.3d 343, 348 (9th Cir. 1995) (holding that statements obtained from an employee under a threat of dismissal were subject to use and derivative use immunity); United States v. Koon, 34 F.3d 1416, 1433 n.13 (9th Cir. 1994) ("[T]he Supreme Court has recognized that the Fifth Amendment protection against coerced statements extends to public employees who must choose either to incriminate themselves or to forfeit their jobs during an administrative hearing."); United States v. Veal, 153 F.3d 1233, 1256 n.4 (11th Cir.1998) ("The Fifth Amendment protection afforded by Garrity to an accused who reasonably believes that he may lose his job if he does not answer investigation questions is Supreme Court-created and self-executing; it arises by operation of law; no authority or statute needs to grant it."); Unifd. Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 426 F.2d 619, 627 (2d Cir. 1970) ("[T]heir right, conferred by the Fifth Amendment itself, as construed in Garrity, is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution."); Hoover v. Knight, 678 F.2d 578, 581 (5th Cir. 1982) (quoting Luman v. Tanzler, 411 F.2d at 167) ("At the administrative hearing [the officer] will have a free choice to admit, deny, or refuse to answer. This is full vindication of the fifth amendment privilege against self-incrimination."); Carney v. City of Springfield, 532 N.E.2d 631, 634 n.5 (Mass. 1988) (citing *Garrity* to affirm that "[i]nformal 'immunity' under the Fifth Amendment . . . can also arise where public employees are compelled to answer questions narrowly and specifically related to their job performance."). For a comprehensive survey of the courts' holdings, see also Steven D. Clymer, *Compelled Statements From. Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1318 n.32 (2001).

employer acting on behest of the government, the "government must show that any evidence used or derived has a legitimate source wholly independent of the compelled testimony."[226] Such increasingly common scenarios place employees "between the rock and the whirlpool" where the employee must choose between potential job loss if she does not answer her employer's question and possible self-incrimination if she does.[227]

The employee's protection against answering questions about his potentially damning conduct are not limitless. If there is no threat of termination, an employee can be still required to answer even potentially incriminating questions.[228] Companies and governments, in the case of public employees, have a strong interest in maintaining internal control and power to speak to their employees in order to correct mistakes and improve management. Such control need only be restricted in situations where such information is used for a potential indictment by a government.

Companies' counsels should therefore be wary of such cooperation with the government and strive to protect certain information. The government, on the other hand, will not be incapacitated when such protections are put in place. The government can always conduct parallel investigations or time the interviews so that it can speak with an employee before the in-house counsel, if the government wants to direct the investigations. If the government still decides to steer the private counsel and compel a testimony knowing that an employee will be compelled, that is he will answer under a threat of job loss—implicit or explicit, the government should simply consider coordinating an appropriate grant of immunity.

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[226] United States v. Motes, 551 F.3d 763, 766 (8th Cir. 2008) (quoting Kastigar v. United States, 406 U.S. 441, 457 (1972)).

[227] *Garrity*, 385 U.S. at 498.

[228] *See, e.g.*, Gardner v. Broderick, 392 U.S. 273, 278 (1968) ("If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal.").

C. The High Costs of Safeguarding A Compelled Testimony

There are significant costs and unproven efficacy associated with the current system of handling compelled statements domestically. Today, the United States' prosecuting authorities must grant a compelled witness a use-plus-fruits testimony—also known as the *Kastigar* immunity. The *Kastigar* Court settled on this immunity requirement to "rational[ly] accommodate[e] between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify."[229] A prosecution of a compelled witness therefore is not foreclosed, as was the case in the first half of the last century. But if the government decides to prosecute, it must meet the "heavy burden"[230] which is to "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[231]

The government's burden to prove the admissibility of evidence in compelled testimony situations is much like the coerced confessions cases. Once the defendant establishes that his testimony was coerced or compelled, the burden shifts to the government to establish that the evidence is derived independently from this confession.[232] The government can provide a direct proof to satisfy this burden—that is to show that the investigatory team has not been exposed to the compelled evidence.[233] But even if the prosecution's team was exposed to the evidence, the prosecution still gets a chance to prove to the court that this exposure did not "taint" the

[229] *Kastigar*, 406 U.S. at 446.
[230] *Id*. at 461. *But see* Justice Marshall's dissent in *Kastigar* that suggests that the burden may not be all that heavy for a governmental actor. *Id.* at 468-69 (Marshall, J., dissenting).
[231] *Id*. at 460.
[232] *Id*. at 461-62.
[233] United States v. North I, 910 F.2d 843, 872 (D.C. Cir. 1990) (finding that prosecution can discharge its *Kastigar* burden by showing that the witness was never exposed to the coerced confession).

investigation.[234] However, if the prosecution cannot affirmatively disprove taint, a court can, depending on the seriousness and timing of the violation, dismiss the case or reverse a conviction.[235]

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[234] United States v. Pantone, 634 F.2d 716, 722 (3d Cir. 1980). Many courts assert that a mere exposure to the compelled testimony does not taint the prosecuting team or the witnesses. *Id.* ("We do not believe that mere access to immunized grand jury testimony prevents the government from carrying its burden under Kastigar."); United States v. North II, 920 F.2d 940, 944 (D.C. Cir. 1990) ("Some [witnesses] might convincingly testify that their exposure had no effect on their trial or grand jury testimony."). But as pointed out in Section I.D. of this Article, there is an ongoing and unresolved dispute about the scope of the admissible evidence under immunity grant.

[235] The remedy for a violation of a *Kastigar* immunity depends on the seriousness of the violation. A majority of courts agree that where the use of immunized testimony was harmless, dismissal is not required. *See, e.g.*, United States v. Schmidgall, 25 F.3d 1523, 1528 (11th Cir. 1994); United States v. Serrano, 870 F.2d 1, 16 (1st Cir. 1989) (holding that dismissal is not warranted where the use of immunized testimony was "harmless, beyond reasonable doubt"); United States v. Byrd, 765 F.2d 1524, 1529 n.8 (11th Cir.1985) (same); United States v. Beery, 678 F.2d 856, 860 n.3 (10th Cir.1982) (same). The courts were split on the issue whether a grand jury's exposure to immunized testimony or derivative evidence warrants a dismissal of the indictment. *See, e.g.*, *North I*, 910 F.2d at 873 (holding that where tainted evidence is introduced to the grand jury, "the indictment must be dismissed"); United States v. Hampton, 775 F.2d 1479, 1490 (11th Cir.1985) (dismissing an indictment where the government failed to affirmatively show independent sources); United States v. Palumbo, 897 F.2d 245, 251 (7th Cir. 1990) (same); United States v. Garrett, 797 F.2d 656, 665 (8th Cir.1986) (same). *But see* United States v. Zielezinski, 740 F.2d 727, 729-33 (9th Cir. 1984) (holding that indictment by the same jury that was exposed to the compelled testimony or evidence derived thereof is not an automatic Fifth Amendment violation but instead requires an evidentiary hearing where the government can prove the evidence was derived from independent sources); United States v. Garrett, 797 F.2d 656, 663-65 (8th Cir. 1986) (same). The Second Circuit held in *United States v. Rivieccio* that the use of compelled testimony before a grand jury does not require dismissal. 919 F.2d 812, 816 n.4 (2d Cir. 1990). But this holding was recently overturned by in *United States v. Allen* where Judge Cabranes found that, pursuant to the Supreme Court's decision in *United States v. Hubbell*, where government made use of the compelled testimony, a dismissal was required. 864 F.3d 63, 99 (2017) (citing 530 U.S. 27 (2000)). The Supreme Court in *Hubbell* held that, under the framework in *Kastigar*, the respondent's motion to dismiss the indictment on immunity grounds must be granted unless the government proves the evidence used in obtaining the indictment and used in front of a grand jury or at trial was derived from legitimate and "wholly independent" sources. *Hubbell*, 530 U.S. at 45.

The government developed methods and procedures to carry the *Kastigar*-imposed burden and minimize a potential "taint" from a compelled testimony. For example, a prosecution can attempt to erect a "wall" around the immunized evidence, to shield the prosecutors from the contents of the testimony.[236] Independently or simultaneously with the walls, the government creates "taint" or "filter" teams—consisting of agents and prosecutors not on a given case—to segregate materials that contain potential taint.[237] Because of the rise of multi-national prosecutions and potential taint in foreign jurisdictions, as an alternative to a taint team, the DOJ has also embedded DOJ prosecutors into foreign law enforcement

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When a prohibited use of an immunized testimony occurs at trial or after trial, a court usually holds a *Kastigar* hearing to determine whether the prosecution can establish independent sources for its evidence. *See* United States v. Slough, 677 F. Supp. 2d 112, 130 n.29 (D.C. Cir. 2009) ("The Kastigar hearing may be held 'pre-trial, post-trial, mid-trial (as evidence is offered), or [through] some combination of these methods . . . .") (alteration in original) (quoting United States v. North, 910 F.2d 843, 872-73 (D.C. Cir. 1990)). Many courts however favor a pre-trial hearing because it gives defense broader pretrial discovery. *See* United States v. Smith, 580 F. Supp. 1418 (D.N.J. 1984); United States v. McDaniel, 482 F.2d 305 (8th Cir.1973); United States v. Byrd, 765 F.2d 1524 (11th Cir.1985). To be entitled to a hearing, the defendant must lay "a firm 'foundation' resting on more than 'suspicion'" that proffered evidence was tainted by exposure to immunized testimony. United States v. North II, 920 F.2d 940, 949 n.9 (D.C. Cir.1990) (quoting Lawn v. United States, 355 U.S. 339, 348–49 (1958)).

[236] *See*, *e.g.*, United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989) (suggesting the building of a "Chinese wall" to prevent taint in a subsequent trial). In recent years, critics increasingly view the term "Chinese Wall" as culturally insensitive. American Bar Association recommends using the term "screen" to denote the isolation of a lawyer from any participation in a matter. *See* MODEL CODE OF PRO. CONDUCT r. 1 (AM. BAR ASS'N 2021).

[237] Filter and taint teams are also frequently used to find and insolate attorney-client privileged materials. *See* Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L., POL. & ETHICS J. 15, 21 (2003). But federal courts expressed skepticism of the Government's use of taint teams to determine whether evidence is protected by the attorney-client privilege. *See* Eileen H. Rumfelt, *"Taint Team" or Special Master: One Recent Analysis*, AM. BAR ASS'N (Sept. 27, 2018), https://www.americanbar.org/groups/litigation/committees/criminal/practice/2018/taint-team-or-special-master-one-recent-analysis/. Additionally, the procedure has been criticized as "fox guarding the chicken coop" because of its frequent failures to safeguard the privilege. Robert J. Anello & Richard F. Albert, *Government Searches: The Trouble with Taint Teams*, 256 N.Y. L.J. 108 (2016).

departments to promote coordination and avoid inadvertent exposure to tainted testimony.[238]

The costs of the procedures that prevent potential taint increase exponentially with the complexity of the national and international investigations.[239] At same time, questions arise about the efficiency of the ever-complex procedures to prevent taint.[240] The proponents of transactional immunity argue that taint teams and taint hearings simply do not grant protections coexistent with the self-incrimination privilege because they allow prosecutors to rely on non-evidentiary uses of the compelled evidence.[241] They reason that these precautions cannot prevent a prosecutor from "working backwards" from what he or she learns in the immunized testimony to establish an independent source for the prospective evidence[242] or from "playing off" accomplices against each and using their respective testimonies as independent sources against each other.[243]

Lastly, the proponents of transactional immunity also maintain that mere use-plus-fruits testimony cannot prevent prosecutors from subconsciously taking the immunized testimony into account in planning the pre-trial and trial strategy.[244] On the other hand, the proponents of the use-plus-fruits immunity insist that the "heavy burden" a government must shoulder in a *Kastigar* hearing or a similar process is enough to safeguard against potential prosecutorial bad faith and "working backwards."[245] Equally, they

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[238] Carlson, *supra* note 181, at 309.

[239] Determining compelled testimony taint in a case of a multi-jurisdictional investigation or a large corporation requires early and complete access to a large, often seemingly immeasurable, number and types of documents. Such process requires large expenditures and significant cost-investment in the pre-trial stages. *Id*. at 316-17.

[240] *See* Amar & Lettow, *supra* note 24, at 878-79.

[241] *See* CRIMINAL PRACTICE MANUAL § 8.11(b) (4th ed. 2020).

[242] *See* State v. Soriano, 684 P.2d 1220, 1232 (1984), *aff'd*, 693 P.2d 26 (describing that "[i]t is unrealistic to give a dog a bone and to expect him not to chew on it.") (quoting State ex rel. Johnson v. Woodrich, 566 P.2d 859, 861 (1977)); Wright v. McAdory, 536 So. 2d 897, 903 (Miss. 1988) (explaining it is "inevitable" that prosecutors under a use/derivative use immunity "will receive incentives to work backwards from what they learn from the witness."). *See also* CRIMINAL PRACTICE MANUAL § 8.11(b) (4th ed. 2020).

[243] *See* CRIMINAL PRACTICE MANUAL § 8.11(b) (4th ed. 2020).

[244] Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 807-08 (1978).

[245] *See* CRIMINAL PRACTICE MANUAL § 8.11(b) (4th ed. 2020).

believe that non-evidentiary use can be avoided by guidelines that ensure that the prosecutor is not familiar with the testimony[246] and that prosecutors using immunized testimony against accomplices is no more than a hypothetical.[247]

In sum, the taint procedures are expensive, and often inefficient. And the complexity and costs of anti-taint procedures are only bound to grow as the examples of globalization of government prosecutions—such as in *Allen*—and the privatization of the government's investigations—such as in *Connolly*—profligate, reflecting the trend of growing international crime of super-national corporations. The applicability of the Fifth Amendment protections in these cases should not be questioned, nor restricted to certain types of evidentiary or non-evidentiary uses. If the government decides to rely on a foreign government or a private corporation in furnishing evidence it tends to use in the U.S. prosecutions, it needs to be held to a higher standard than routinely required to prove that any evidence was indeed obtained from independent sources, and that the fundamental Fifth Amendment privileges were not outsourced with its investigative powers.

IV. A CASE STUDY OF INCREASING GLOBALIZATION AND PRIVATIZATION IN THE U.S. PROSECUTIONS: THE GLOBAL LIBOR SCANDAL

The LIBOR prosecutions showcase the challenges and possibilities of modern regulatory enforcement, and their impacts on the employee's privilege against self-incrimination in the U.S. courts.[248] They are an example of cross-national prosecutions of transnational financial crime and of a close-knit cooperation between the prosecuting authority and the banks involved therein.[249]

The LIBOR scandal arose from the alleged rigging of the London Interbank Offered Rate ("LIBOR"). LIBOR is an influential benchmark estimate of the cost of short-term borrowing for large

[246] *Id.*
[247] *Id.*
[248] *See infra* Parts IV.A, B.
[249] *See infra* notes 268-71, 325-29 and accompanying text.

banks situated in London,[250] calculated daily by the British Bankers' Association ("BBA") using estimates of the banks' borrowing rates submitted by the banks.[251] The BBA's essentially unregulated rate-setting[252] came under scrutiny at the height of the financial crisis in 2008 when the rumors of LIBOR's inaccuracy erupted in a Wall Street Journal article that alleged that "[m]ajor banks [we]re contributing to the erratic behavior of a crucial global lending benchmark" by "reporting significantly lower borrowing costs for . . . LIBOR."[253] Soon the newspaper articles attracted public attention, which spurred the BBA to conduct its own investigation.[254] Shortly thereafter, the authorities around the world started their investigations in the face of mounting public fears of what a loss of credibility in an important benchmark rate could do to the already faltering financial markets.[255]

Because of the interconnectedness of the financial markets and global presence of the banks involved, LIBOR became the first truly global investigation: "[a]t least twenty-seven authorities from

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[250] Milson C. Yu, *LIBOR Integrity and Holistic Domestic Enforcement*, 98 CORNELL L. REV. 1271, 1272 (2013) (citing JOHN C. HULL, OPTIONS, FUTURES, AND OTHER DERIVATIVES 76 (8th ed. 2011)).

[251] For a detailed description and analysis of the methodology of LIBOR setting, see JOHN C. HULL, OPTIONS, FUTURES, AND OTHER DERIVATIVES 76 (8th ed. 2011).

[252] *See The Wheatley Review of LIBOR: Final Report*, WHEATLEY REV. (Sept. 2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_LIBOR_finalreport_280912.pdf. The Wheatley review was written by the newly appointed head of the UK's Financial services Authority, Martin Wheatly in which he concluded that LIBOR regulation needed to be subjected to statutory regulation, not the BBA's oversight, and suggested a host of reforms to verify and improve the reliability of submissions. *Id.*

[253] *See* Carrick Mollenkamp & Mark Whitehouse, *Study Casts Doubt on Key Rate*, WALL ST. J. (May 29, 2008, 12:01 AM), https://www.wsj.com/articles/SB121200703762027135.

[254] *See* David Enrich & Max Colchester, *Before Scandal, Clash Over Control of LIBOR*, WALL. ST. J. (Sept. 11, 2012, 8:08 AM), https://www.wsj.com/articles/SB10000872396390443847404577631404235329424#:~:text=LONDON%E2%80%94Four%20years%20before%20a,the%20world's%20most%20important%20number.%22.

[255] *See* Mollenkamp, *supra* note 254. An interest-rate strategist at Citigroup published a 2008 report on LIBOR in which he wrote about potential problems with LIBOR that "the long-term psychological and economic impacts this could have on the financial market are incalculable." *Id.*

twelve different jurisdictions" joined the investigative efforts.[256] The sprawling investigation posed new challenges to international cooperation and law enforcement in their joint and parallel prosecutions of a wide range of misconducts birthed by the LIBOR scandal—ranging from antitrust violations to fraud.[257]

The breadth of the investigation, the multitude of the actors involved, and the inevitably scattered evidence forced important probing of the rights and privileges of defendants involved in the LIBOR prosecutions. With these investigative efforts came new questions about the scope of the privilege afforded to the defendants in these complex, global investigations. There are two contexts that stood out in the LIBOR scandal. The first one was when a foreign power compels a testimony.[258] This occurred in *Allen* where the parallel British authority lawfully compelled testimony, and the U.S prosecuting authorities that had access to this testimony, simultaneously conducted their own investigation. The second question is national in scope, but it concerns the close cooperation between the banks and the government. The decision in *Connolly* highlighted the closeness of cooperation between the prosecuting authorities and private banks.[259] In such joint ventures, the government may outsource its investigative powers to private counsel. Any evidence obtained by the private counsel is therefore

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[256] Pieter J.F. Huizing, *Parallel Enforcement of Rate Rigging: Lessons To Be Learned From LIBOR*, J. ANTITRUST ENF'T, Nov. 2014, at 1-2 n.1 ("The European Commission, the US Department of Justice (DOJ), the US Federal Bureau of Investigation (FBI), the US Securities and Exchange Commission (SEC), the US Commodity Futures Trading Commission (CFTC), the US Federal Reserve, the Canadian Competition Bureau, the UK Financial Services Authority (FSA) (now the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), the UK Office of Fair Trading (OFT), the UK Competition Commission, the UK Bank of England, the UK Serious Fraud Office (SFO), the Swiss Financial Market Supervisory Authority (FINMA), the Swiss Competition Commission (COMCO), the German BaFin, the German Bundesbank, the Netherlands Authority for the Financial Markets, the Dutch central bank, the Dutch Fiscal Intelligence and Investigation Service, the Australian Securities and Investments Commission, the Japan Financial Services Agency (JFSA), Japan Securities and Exchange Surveillance Commission, the Monetary Authority of Singapore, the Securities and Futures Commission of Hong Kong, the Hong Kong Monetary Authority, the Chinese National Development and Reform Commission and the China Banking Regulatory Commission.").

[257] *Id*. at 2.

[258] *See infra* Part IV.A.

[259] *See infra* notes 325-29 and accompanying text.

subject to Fifth Amendment constraints.[260] Such threats may amount to compulsion and warrant Fifth Amendment protection.

A. United States v. Allen

The co-defendants in *Allen*—Anthony Allen and Anthony Conti—were British traders from the Rabobank's London office prosecuted in the Southern District of New York. The U.S. case against them, however, arose out of a United Kingdom conduct and a subsequent investigation by the Financial Conduct Authority ("FCA").[261] Allen and Conti were responsible for Rabobank's U.S. dollar LIBOR submissions and tried in the U.S. for crimes arising from the manipulation of the LIBOR benchmark rate that impacted the U.S. markets: wire fraud and conspiracy to commit wire fraud and bank fraud.[262]

Prior to their New York trial, the FCA, a British equivalent of the DOJ, carried out a series of compelled interviews of Allen and Conti pursuant to their statutory authority.[263] Unlike in the United States, where a compelled interview would be immunized from direct prosecution as well as prosecution based on the fruits of this testimony, the United Kingdom only immunized Allen and Conti from direct prosecution based on their interviews, not prosecution based on evidence derived thereof.[264]

The distinction became crucial during the testimony of Paul Robson, a former Rabobank colleague of Allen and Conti and Japanese Yen submitter. Robson, who pleaded guilty,[265] became a crucial cooperating witness for the Unites States' case against Allen and Conti.[266] Prior to the DOJ action, Robson also had been investigated by the FCA—an action that was dropped for unknown

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[260] *See infra* note 334 and accompanying text.
[261] United States v. Allen, 864 F.3d 63, 68 (2d Cir. 2017).
[262] *Id.* at 68 (citing 18 U.S.C. §§ 1343, 1349).
[263] Financial Services and Markets Act 2000, c. 8 § 171 (U.K.) (granting the U.K.'s Financial Conduct's Authority the power to compel testimony).
[264] *Allen*, 864 F.3d at 76.
[265] *Id*. at 77.
[266] *See id.* Robson was an important cooperator assisting the DOJ with developing the case. *Id*. at 68. For his cooperation, Robson was rewarded with a lenient sentence with no jail time—only two years of supervised release by U.S. District Judge Jed Rakoff. Nate Raymond, *Ex-Rabobank trader turned U.S. cooperating witness spared prison*, REUTERS (Nov. 14, 2016, 3:00 PM), https://www.reuters.com/article/us-rabobank-na-libor-idUSKBN1392CO.

reasons—[267] where he had learned of relevant testimonial evidence in the case against him that Allen's and Conti's statements were compelled by the United Kingdom.[268] Allen's and Conti's indictments were based solely on the materials that Robson supplied to the grand jury.[269] Robson's testimony in the U.S. trial was crucial for the conviction of Allen and Conti. Aware of the U.S.'s reliance on evidence provided by Robson, Allen's and Conti's lawyers moved under *Kastigar* to dismiss the indictments or to suppress Robson's testimony.[270] Judge Rakoff, however, decided to proceed with a trial and address the issues in a post-trial *Kastigar* hearing.[271]

The post-trial *Kastigar* hearing revealed that Robson extensively reviewed and annotated the compelled testimonies not only before the trial but also prior to giving a statement to the FBI.[272] When testifying at Allen's and Conti's trial, the FBI agent then relied on Robson's statements made after reading the compelled testimony.[273] Still, it was not clear how. The Second Circuit precedent was not settled on the question whether Fifth Amendment protections apply to testimonies compelled by a foreign sovereign.

To be clear, the DOJ took certain precautions against exposure to the testimony, predicting possible constitutional challenges against its cooperation with the FCA and knowledge of the existence of the compelled statements. According to what became more-or-less a standard operating procedure under circumstances that deal with coerced evidence,[274] the DOJ held meetings with the FCA about the need to establish a wall between the

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[267] *Allen*, 864 F.3d at 68.
[268] *Id*. at 77.
[269] *Id*. at 68.
[270] *Id*. at 78.
[271] A court can hold a *Kastigar* hearing pre-, post-, or mid-trial to determine whether a prohibited use of an immunized testimony occurred and whether the government can establish an independent source for the evidence introduced at trial. *See generally supra* text accompanying note 236.
[272] *Allen*, 864 F.3d at 78.
[273] *Id.* Citing the *Kastigar* Hearing Transcript, the Second Circuit wrote that Agent Weeks' testimony in front of the Grand Jury relied in certain part exclusively on Robson's testimony, including allegations that Allen "instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR and various currencies based on the means of those traders." *Id.*
[274] See *supra* notes 237-48 and accompanying text on the prosecutorial use of walls, prevention of taint, and their relative ineffectiveness.

two agencies to prevent any taint in the DOJ's case.[275] The series of meetings hashed out the specific procedures applied in the FCA's and the DOJ's parallel LIBOR investigations.[276] Moreover, the DOJ created a Filter Team— a team of attorneys from a different section of the Department who worked on warding off potential taint arising from the compelled testimonies.[277]

Judge Rakoff of the Southern District of New York issued a decision on the defendants' motion to dismiss the indictment or to suppress Robson's testimony without deciding the Fifth Amendment's applicability to statements compelled by a foreign power.[278] And even if *Kastigar* protections applied to testimony compelled by a foreign power,[279] Judge Rakoff found that the government had met its burden of proof to show that the evidence it used was derived from wholly independent sources.[280] The district court determined the scope of required *Kastigar* protections based on the Second Circuit precedent in *United States v. Nanni*.[281] Specifically, the court held that the DOJ proved its burden by establishing a "strict and effective wall of separation"[282] and showing an independent source "to wit, [Robson's] personal experience and observations,"[283] leading to the dismissal of the defendant's motion and their conviction.

The Second Circuit reversed Allen's and Conti's conviction on the very *Kastigar* grounds that the Southern District rejected.

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[275] United States v. Allen, 160 F. Supp. 3d 684, 694-95 (S.D.N.Y. 2016).

[276] *Allen*, 864 F.3d at 76 ("[T]he FCA agreed to procedures to maintain a 'wall' between its investigation and the DOJ's investigation, including a 'day one/day two' interview procedure in which the DOJ interviewed witnesses prior to the FCA.").

[277] 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.14-cr-00272-JSR).

[278] *See Allen*, 160 F. Supp 3d at 690 n.8 (stating in a footnote that there was no need to determine if *Kastigar* applied to a testimony compelled by a foreign sovereign, because even in the event it did apply, "the Government has met its Kastigar burden on the facts here determined").

[279] *Id*. (stating that although the question of applicability is "deeply interesting," the court has no occasion to resolve it here).

[280] *Id*.

[281] *See* 59 F.3d 1425, 1431-32 (2d Cir.1995) (requiring that the government must make a showing by a preponderance of evidence that the evidence presented at trial was derived from wholly independent sources).

[282] *Allen*, 160 F. Supp. 3d at 695.

[283] *Id*. at 697.

Judge Cabranes, writing for the majority, discussed in detail not only the alleged *Kastigar* violation, but also the applicability of the Fifth Amendment to evidence compelled by a foreign sovereign. The court in *Allen* stated that the imposition of a requirement that confessions obtained by foreign law enforcements are voluntary has a significant constitutional footing.[284] Relying on *Bram v. United States*,[285] the court held that in a criminal trial in the United States, "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [that] portion of the fifth amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[286]

The Court further devoted significant detail to distinguishing the protections guaranteed by the Self-Incrimination clause from exclusionary rules attached to unreasonable searches and seizures of the Fourth Amendment.[287] Even though courts have sometimes likened certain features of the Fifth Amendment jurisprudence to the Fourth Amendment one, the court pointed that the Fourth Amendment "prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial."[288] Quoting the Supreme Court, the Second Circuit pointed out that "the Fourth Amendment's exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[289] Because the exclusionary rules are "designed to prevent United States police officers from relying upon improper interrogation techniques,"[290] such exclusionary rules, according to the court, "have little, if any, deterrent effect upon foreign police officers."[291] The court then concluded that because the structures of the Fourth and Fifth Amendments are so different, the court did not apply the Fourth Amendment, inclusive of *Miranda* jurisprudence, to foreign authorities.[292]

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[284] United States v. Allen, 864 F.3d 63, 80-81 (2d Cir. 2017).
[285] 168 U.S. 532 (1897).
[286] *Allen*, 864 F.3d at 101 n. 70 (quoting Bram v. United States, 168 U.S. 532, 542 (1897)).
[287] *Id*. at 81-83.
[288] *Id*. at 82.
[289] *Id*. (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
[290] *Id*. (quoting United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972)).
[291] *Id*.
[292] *Id*.

The Second Circuit held that because a violation of the constitutional right against Self-Incrimination only occurs at a criminal trial, even if a conduct that may impair this right occurs before the trial, "it naturally follows that, regardless of the origin—whether domestic or foreign—of a statement, it cannot be admitted at trial in the United States if the statement was 'compelled.'"[293] Because the privilege against self-incrimination is derived from the Constitution and is not an exclusionary remedy, its protections apply in the American courtrooms regardless whether the statement was compelled by a foreign power and whether it was done lawfully. Accordingly, the Fifth Amendment's constitutional prerogative is clear and far-reaching—"compelled testimony cannot be used to secure a conviction in an American court."[294]

On appeal, the U.S. government introduced a "parade of horribles" that it claimed would ensue if the Fifth Amendment applied to testimony compelled by foreign sovereigns. The government argued that a foreign government could obstruct U.S. prosecutions by inadvertently divulging a compelled testimony to a witness or to the public.[295] Worse yet, the government worried, a hostile government could frustrate the U.S. prosecutions by a simple act of compelling a defendant and publicizing the testimony.[296]

The Second Circuit dismissed the government's concern of potential obstruction by foreign sovereigns. The court showed that the government's argument was deficient because it failed to account for the very same danger of obstruction that already exists within the federal system composed of "State and National Governments."[297] The court saw no difference between the dangers and benefits that come with state and federal prosecutions within the U.S. vis-à-vis parallel prosecutions conducted in private companies and in nation states.[298] Furthermore, the court explained that since the legitimacy of the United Kingdom's procedures are not in question in *Allen*, the holding in this case shall not foreclose possible prosecutions in instances where a foreign government indeed attempts to sabotage a

[293] *Id*. at 82 (quoting *In re* Terrorist Bombing of U.S. Embassies in E. Africa, 552 F.3d 177, 199 (2d Cir. 2008)).
[294] *Id*. at 82.
[295] *Id*. at 87.
[296] *Id*. at 88.
[297] *Id*. at 87 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971) (internal quotations omitted)).
[298] *Id*.

U.S. prosecution.[299]

The court remarked that even the government observed the existence of a need for closer cooperation between sovereign governments because of the perils of the Fifth Amendment.[300] Furthermore, the government was acutely aware that the FCA transmitted the compelled testimony to their key witness—Robson—and thus the risk of such coordination should be borne by the United States' government, should it decide to pursue the case.[301]

Lastly, the court in *Allen* remarked on trends in federal prosecutions—that cross-border prosecutions such as the one in this case became more common, making the self-incrimination concerns more urgent.[302] The court noted that cooperation between sovereigns became not only more frequent, but perhaps already ingrained within the institutions. For example, U.S. prosecutors are embedded in foreign law enforcement such as with Eurojust in The Hague and the International Criminal Police Organization in France, with a vision also to expand to foreign law enforcement.[303] Because of this new and expansive enforcement cooperation, the court foreshadowed that securing witness testimony will be a crucial part of this "brave new world of international criminal enforcement" because of the conduct, such as the one in the LIBOR case, that often sprawls continents.[304] However, the Second Circuit affirmed that this expansion shall not affect the "fairness of our trials at home."[305] In the court's words, marshalling foreign subjects to the U.S. courts "to fend for their liberty" should not be done without affording these men and women trial rights that the United States regard as "fundamental"[306] and "absolute."[307]

Allen signals the courts' recognition of the changing

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[299] *Id*. at 88.
[300] *Id*. at 90.
[301] *Id*. at 87-88.
[302] *Id*. at 89.
[303] *Id*. at 89 (introducing as an example the DOJ plan to embed anti-corruption prosecutors with the FCA in the UK, making it the first time in the history of the DOJ Criminal Division for a prosecutor to work in a foreign regulatory agency).
[304] *Id*. at 90.
[305] *Id*. (quoting United States v. Balsys, 524 U.S. 666, 700 (1998)).
[306] *Id.* (quoting United States v. Verdugo-Urquidez, 494 U.S.259, 264 (1990) (internal quotation marks omitted)).
[307] *Id*. (quoting Salinas v. Texas, 570 U.S. 178, 184 (2013) (internal quotation marks omitted)).

prosecutorial landscape.[308] The decision surely brings a hurdle to the international cooperation because the U.S. authorities now know that Fifth Amendment protections apply abroad.[309] Given, however, the extent of existing foreign cooperation and the various Filter Teams and taint-protections that the government used prior to *Allen*,[310] this decision will hardly add to the burden that the government already shoulders.

The government expressed concerns that it cannot get involved at the very early stages of every investigation in every country that may afford lesser protections than guaranteed by the Fifth Amendment,[311] as required by the Second Circuit.[312] But this concern again ignores the extent to which there already exists a close-knit coordination between the U.S. and other prosecuting authorities.[313]

It also simplifies the realities of international coordination. Foreign conduct so large that it impacts the U.S. market is unlikely to escape public attention once a foreign power commences prosecution. In addition to communication through official diplomatic channels, the magnitude and publicity surrounding events impacting global markets, such as the LIBOR scandal, make it unlikely that the United States government would not notice when a foreign prosecution commences.

Furthermore, as in federal and state prosecutions, the government in a foreign prosecution also has an opportunity to evaluate the merits of the case before it decides to engage, whether to seek out evidence and witnesses from a parallel investigating entity, or whether to commence an investigation at all.[314] The U.S.

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[308] *See supra* notes 297-301 and accompanying text.

[309] *See infra* note 311.

[310] *See supra* Part III.C.

[311] Petition of the United States for Rehearing or Rehearing en Banc at 15, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898), *reh'g denied*, (Nov. 9, 2017), ECF No. 136.

[312] *Allen*, 864 F.3d at 89 (stating that "intimate cooperation and coordination will be needed between U.S. prosecutors and foreign authorities (or, perhaps the U.S. prosecutors and U.S. prosecutors on detail to foreign authorities)" to secure witness testimony).

[313] *See supra* Parts II.D, IV.B; *see also supra* notes 188-94.

[314] *See generally* Lisa L. Miller & James Eisenstein, *Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, L. & SOC. INQUIRY 239, 241-44 (describing the evolution and trends in federal and state prosecution and cooperation and federal prosecutorial discretion).

government is sophisticated enough to know which cooperating countries and authorities have procedures inconsistent with rights that need be afforded in the U.S. trials.[315] The government can plan ahead how to cooperate and properly secure an investigation from such taint.

The Second Circuit in *Allen*, however, did not decide the scope of the taint created by a testimony compelled abroad. The court addressed instances when a witness's taint formed the basis of an indictment, but the court did not rule on the extent of the protections if the taint was less direct, or perhaps non-evidentiary in nature, such as occasions where the taint shapes the trial strategy or cross-examination. An earlier review of the law in different circuits suggests that there is confusion surrounding the exact difference between indirect evidentiary taint and non-evidentiary taint.[316] But, given the "fundamental" and "absolute" regard for the fundamental trial right embodied in the Fifth Amendment,[317] the courts should not be drawing a hard-and-fast line between evidentiary and non-evidentiary uses.

It is the effect of the use, not the category of the information, which should determine whether the defendant is placed in the same position as if she chose not to testify. Therefore, agencies engaging in foreign prosecutions should, as advised by the Second Circuit in *Allen*, carefully examine potential compelled testimony at the very outset of an investigation and adopt necessary precautions to minimize, if not eradicate, the potential of any exposure — direct or indirect.

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[315] For example, in Canada, a witness cannot refuse to answer a question on the ground of self-incrimination. The witness receives "a full evidentiary immunity in return," but is not guaranteed that this testimony will not be handed over to the prosecuting authorities in the United States. In the United Kingdom, the chief financial regulator can compel a witness's testimony. And in Australia, a witness receives only use immunity when the prosecuting agency compels her to testify. *See* Neal Modi, *Toward an International Right Against Self-Incrimination: Expanding the Fifth Amendment's "Compelled" to Foreign* Compulsion, 103 VA. L.R. 961, 965-66 (2017).

[316] *See supra* Part II.D.

[317] *See supra* text accompanying note 249; *see also supra* Part II.A.

B. United States v. Connolly

The 2019 *Connolly* decision from the Southern District of New York resembles the Second Circuit's decision in *Allen*. The *Connolly* case involved foreign subjects implicated in the LIBOR scandal — a U.K. citizen, Gavin Campbell Black, and a U.S. citizen, Matthew Connolly, working for Deutsche Bank's London and New York offices, respectively. Similar to the defendants in *Allen*, Connolly and Black were indicted in the Southern District in 2016 for conspiracy to commit wire fraud, bank fraud, and substantive counts of fraud alleging a scheme to manipulate the LIBOR interest rate for personal gains.[318]

The United States' investigation into Deutsche Bank and LIBOR submitters' Commodity Futures Trading Commission ("CFTC"), which commenced at the height of the LIBOR scandal, long preceded Black's and Connolly's eventual indictment.[319] On April 19, 2010, the CFTC sent a letter to Deutsche Bank's General Counsel, Joseph Polizzotto, advising Deutsche Bank that it "'expect[ed]' the Bank to 'cooperate fully' with its investigation."[320] Attached to the letter to Mr. Polizzoto, and consistent with the government's strong incentivizing of cooperation,[321] was a CFTC Enforcement Advisory Memorandum.[322] The Memorandum advised that a corporation may receive a cooperation credit if it makes "employee or other relevant corporate documents available in a timely manner."[323]

The Deutsche Bank's counsel complied with the demands.[324] Looking back at this cooperation, the counsel for Paul Weiss testified at Black's and Connolly's trials that there was nothing "voluntary" about the investigation that followed the receipt of the government's letter.[325] To avoid penalties, and possible irreversible damage from an indictment, Deutsche Bank broadened the scope of Paul Weiss's

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[318] No. 16 Cr. 0370, 2019 WL 2120523, at *8-9 (S.D.N.Y. May 2, 2019).
[319] *Id.* at *1-2.
[320] *Id.* at *2.
[321] *See supra* notes 188-94 for an overview of the federal government's settlement policy.
[322] *Connolly*, 2019 WL 2120523, at *2.
[323] *Id.*
[324] *Id.*
[325] *Id.*

representation to include investigating allegations in connection to LIBOR which "was demanded (not requested) by the CFTC."[326]

The cooperation between Deutsche Bank's counsel and the government agencies—including the CFTC, the SEC, and eventually the DOJ—was so extensive[327] that it raised questions as to what extent, if at all, did the government conduct its investigatory job of Deutsche Bank at the outset of the investigation.[328] The federal agencies were present and coordinating the investigation with Paul Weiss from the very beginning, and they remained involved throughout the years of internal investigation.[329] During this time, the government was "kept abreast of developments on a regular basis," and "gave considerable direction to the investigating Paul Weiss attorneys, both about what to do and how to do it."[330]

During the course of the investigation, and in addition to numerous document and interview requests, the CFTC "asked" Paul Weiss to identify and host additional in-person interviews with three Deutsche Bank employees, including Black, as well as anyone these three employees interacted with.[331] Paul Weiss interviewed Black again in 2011, 2012, and 2014.[332] At the fourth interview in 2014, Deutsche Bank went as far as "*ask[ing] the Government for 'permission' to interview its own employee*."[333] Over the years, Black could not refuse to talk to Deutsche Bank's investigative team

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[326] *Id.*

[327] The 2015 Paul Weiss "White Paper" summarizes, in broad terms, the extent of Deutsche Bank's cooperation.

> During the course of Deutsche Bank's nearly five-year internal investigation, Paul Weiss lawyers conducted nearly 200 interviews of more than fifty Bank employees-including, of course, of Black-and shared the results of these interviews with the Government. In addition to conducting interviews, Paul Weiss extracted and reviewed 158 million electronic documents, as well as listened to 850,00 audio files, or over hundreds of thousands of hours of audio tapes.

Id. at *7 (internal citations omitted).

[328] *Id.* at *12 ("In other words, Paul Weiss did everything that the Government could, should, and would have done had the Government been doing its own work. The fact that the record contains very little evidence about the Government's own independent investigative efforts during the first three years of Deutsche Bank's "voluntary" investigation renders that inference all the more compelling. . . .").

[329] *Id.* at *2.

[330] *Id.*

[331] *Id.* at *3.

[332] *Id.* at *4-6.

[333] *Id.* at *6.

if he wished to retain his job.[334] Because of this extensive cooperation between the government and Deutsche Bank's counsel, the court found that the government had outsourced its investigative powers, requiring the application of the *Garrity* standard to private conduct.[335]

Despite attributing the government's action to Paul Weiss's compelled interviews on behalf of Deutsche Bank, the district court held that the government's use of Black's compelled interview did not constitute a *Kastigar* violation.[336] The court added that even if there was a *Kastigar* violation, it was harmless error.[337] This is because it is an established principle that "'*Garrity* immunity automatically attache[s]' where an employer makes a sufficiently clear and direct threat that it will take an adverse employment action against a public employee."[338] In other words, even though the immunity attached to Black's compelled interviews with Paul Weiss, the court found that the Government's use of the compelled interviews did not violate Black's *Kastigar* rights.

By way of example, the court listed certain direct and indirect uses that are against *Kastigar*'s mandate, such as "obtaining [an] indictment based on tainted evidence,"[339] "preparing [the Government's case for trial,"[340] or "presenting tainted evidence to the

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[334] Deutsche Banks's employee policy provided that an "employee 'must fully cooperate with Compliance and other appropriate Deutsche Bank departments (e.g., legal, Group Audit, etc.) handling internal and external examinations, investigations and other reviews involving Deutsche Bank, its customers and other related company activities.'" *Id.* at *3 (internal citation omitted). The policy did not provide for express termination in the case of non-cooperation, but such a threat was within the contemplated sanctions. *Id.* ("Employees who violate Deutsche Bank's policies may be subject to disciplinary action up to and including termination of employment.").

[335] *Id.* at *10. The Garrity rule applies where "'there is a sufficiently close nexus between the state and the challenged action.'" *Id.* Judge McMahon found that the record established this nexus, because "Deutsche Bank's interviews of Gavin Black, or which he was compelled to sit under threat of termination, are fairly attributable to the Government." *Id.* at *14. *See also supra* Part III.B (regarding the mechanism of attributing private action to the government).

[336] *Id.* at *1.

[337] *Id.* at *22.

[338] *Id.* at *16 (quoting United States v. Palmquist, 712 F.3d 640, 646 (1st Cir. 2013)).

[339] *Id.* at *21 (quoting United States v. Hubbell, 530 U.S. 27, 45 (2000)).

[340] *Id.* (quoting United States v. Hubbell, 530 U.S. 27, 45 (2000)).

grand jury."[341] Yet, the court concluded that, despite government outsourcing, the defendants failed to lay a sufficiently "firm foundation" to support their theory of a *Kastigar* violation[342] and the Government successfully carried its burden to show that its evidence was derived from independent sources.[343]

Similar to the district court in *Allen*,[344] the court in *Connolly* relied on the Second Circuit's decisions in *Riveccio* and *Nanni* in determining that the degree of prohibited use of Black's testimony was "merely tangential"[345] and as such did not "influence[] the [G]overnment's decision to pursue its line of investigation."[346] This conclusion rested on the court's finding that: no direct evidence of Black's testimony was admitted as evidence in the trial, the government did not use Black's false exculpatory indirectly, and none of the 3,500 material witnesses the government called contained information that would suggest that the government discussed Black's testimony with them.[347] The court rejected Black's counsel's theory of taint that the government relied on Black's initial interview's with Deutsche Bank's counsel "to gain an understanding of the LIBOR process, identify evidence, and develop investigative leads" as non-evidentiary, and not protected under the Fifth Amendment.[348]

However, the court agreed that the inquiry under *Kastigar* immunity is not based on the categorical content of the testimony, but rather on "the ways in which they influenced the Government's case."[349] Listing the impermissible uses of immunized testimony, the court included an example of false denials that could be "'"used' against [defendants] in the sense that' such denials might 'provide[] the motivation for' cooperating witness to testify."[350] An additional impermissible use of an immunized testimony may be to "tip off a

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[341] *Id.* (quoting United States v. Poindexter, 951 F.2d 369, 377 (D.C. Cir. 1991)).
[342] *Id.* at *12. The court did not specify what would constitute a sufficient foundation that would entitle the defendant to a *Kastigar* hearing.
[343] *Id.* at *22-23.
[344] *See supra* note 225 and accompanying text.
[345] *Connolly*, 2019 WL 2120523, at *2.
[346] *Id.* at *21 (quoting United States v. Riveccio, 919 F.2d 812, 815 & n.3 (2d. Cir. 1990)).
[347] *Id*. (quoting United States v. Nanni, 59 F.3d 1432, 1432 (2d Cir. 1995)).
[348] *Id.* at *19.
[349] *Id.* at *18 (citing United States v. North, 910 F.2d 843, 861 (D.C. Cir. 1990)).
[350] *Id.* (quoting Uniting States v. Biaggi, 909 F.2d 662, 689 (2d Cir. 1990)).

grand jury that a defendant's testimony is not credible."[351] The court's examples show the thin line drawn between evidentiary and non-evidentiary uses. For example, the use of compelled testimony to motivate co-conspirators would be, at least in some circumstances, considered a non-evidentiary use.[352] This, in turn, has been rejected by many courts as prohibited use per se under *Kastigar*.[353]

The court's analysis of what constitutes impermissible use underscores an important point about the scope of the self-incrimination privilege as interpreted in the light of its historical importance recognized in *Garrity*, *Kastigar*, *Hubbell*, and *Allen*. The use of categorical nomenclature, such as evidentiary and non-evidentiary, restricts the breadth of the inquiry under the Fifth Amendment that is necessary to preserve its protections.

An inquiry under the Fifth Amendment consistent with the courts' expansive reading of it should turn on whether the evidence is "testimonial" in character[354] and whether the use of the immunity has "le[ft] the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity."[355] Preserving this inquiry is especially important as the breadth and the methods of government prosecutions evolve nationally and globally. Categorizing information based on evidentiary and non-evidentiary uses cannot capture the multitude of ways a government can be exposed to compelled evidence – whether it is from private firms or other governments – nor can it keep up with the rapid evolution of the investigative and enforcement methods.

The court's holding in *Connolly* also signaled an important change in ways how courts may view large corporate internal investigations conducted by a private counsel at the government's

[351] *Id.* (citing United States v. Cortese, 568 F. Supp. 119, 131-32 (M.D. Pa. 1983)).
[352] *See supra* note 193 and accompanying text.
[353] *See supra* Part II.D.
[354] United States v. Hubbell, 530 U.S. 27, 35 (2000).
[355] *Id.* at 40 (citing Kastigar v. United States, 406 U.S. 441, 458-59 (1972)).

behest.[356] The eagerness of the firms to cooperate with the government and furnish the most, and the best, information regarding potential wrongdoings was as much a survival strategy on the part of the banks which desired a favorable strategy as it was the Government's strategy to outsource large parts of complex investigations and gain vital information needed to increase the number of individual corporate convictions.[357] But the strategy seems to have led to plea deals with potentially guilty actors to secure convictions of the middle-rank employees,[358] and it also eroded the Fifth Amendment constitutional protections of those thrown in the crosshairs.

Yet, in the aftermath of *Allen* and *Black*, the government may have to be more cautious in the way it conducts its investigations. *Connolly* signals that the courts may begin to more closely scrutinize the government's communications and any cooperation with, or instanced outsourcing investigations to, private actors.[359] Because the outer bounds of what constitutes a prohibited use of compelled testimony under *Kastigar* are undefined by the courts, and many uses do not even squarely fit with the current framework operating within the evidentiary and non-evidentiary categories, courts could – and should – subject every use to an effect inquiry, asking to what extent did the use change the defendant's situation. The government and private counsels will therefore have to closely monitor the extent of their cooperation and implement new safeguards in interviews conducted at the government's request in order to ensure the preservation of employees' privilege against self-incrimination.

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[356] *See Connolly*, 2019 WL 2120523, at *1 (citing Abbe David Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 GEO. L.J. ANN. REV. CRIM. PROC. iii (2011)). Judge McMahon acknowledged that there are "profound implications if the Government . . . is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position vis-à-vis potential targets of criminal activity." *Id.*

[357] See *supra* Part III.A on the privatization of government investigations.

[358] *See supra* notes 153-54 and accompanying text.

[359] *See S.D.N.Y. Decision May Have Outsized Implications on DOJ's "Outsourcing" of Investigations*, QUINN EMANUEL URQUHART & SULLIVAN, LLP. (May 8, 2019), https://www.quinnemanuel.com/media/1419441/sdny-decision-may-have-outsized-implications-on-doj-s-outsourcing-of-investigations.pdf.

V. CONCLUSION

The global reach of international business facilitated the growth and impact of both international financial crime and international prosecutions.[360] Corporate eagerness to settle misconduct tightened cooperation between the government and corporate entities.[361] The government's need to identify individual culprits of large misconduct, and corporate eagerness to avoid ruinous consequences of a potential dragged-out trial, grew into a mode of cooperation where the government conditioned favorable settlements on corporate willingness to cooperate on government's terms. Globally, the government also began to rely on information supplied by foreign sovereigns to conduct its own investigations.[362] *Connolly* and *Allen* are examples of the prosecution trends in cases that become globalized, privatized, and more complex.

The globalization and privatization of the government's investigations endanger the protections granted by the Fifth Amendment in the United States. The government's actions become obscured by the complexity of the crime, numerosity of the actors cooperating with (or acting on behalf of) the government, and uncertainties about the scope of the self-incrimination privilege. Thus, the government can hide its conduct behind actions of a corporation or a sovereign. As a second line of defense, it can also, after receiving volumes of information from a different government or a corporation, argue that its use of a testimony was "non-evidentiary." Such prosecutions go against the historical importance of the Fifth Amendment as well as against precedent that placed great value on the Fifth Amendment's ability to protect individuals from overzealous government actions. Thus, the rights of an individual become weakened by getting caught in the midst of much larger, and better-informed, governments and multi-national corporations each pursuing its own goals.

The law should not get blind-sided by these developments, and adequate protections should be required from the government when it cooperates with foreign governments or outsources any of its investigative functions into private hands. At the same time, to counteract this change, the courts need to scrutinize this "brave new

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[360] *See supra* Part III.
[361] *See supra* Part IV.C.
[362] *See supra* Part IV.A.

world"[363] of prosecution with more flexible standards of review. *Kastigar* did not set the exact boundaries for what is an impermissible testimonial use. Rather, the standard is flexible, allowing for readjustment and re-alignment in the face of developing prosecution trends. Courts should therefore rid themselves of the imprecise and obscure terminology that connects constitutionality with evidentiary and non-evidentiary terminology; instead, they should use an open-ended inquiry that will allow for evaluating each use of a compelled testimony on a case-by-case basis.

[363] United States v. Allen, 864 F.3d 63, 90 (2d Cir. 2017).