12. FIFTH AMENDMENT AND INDIVIDUALS

As is well known, the Fifth Amendment to the U.S. Constitution protects one from being made to be a witness against oneself in a criminal case. One might say that there are two major strands of law (and fact pattern) that flow from this basic idea.

One is the area of police interaction with citizens in the interrogation process. Think *Miranda* and mainly street crime. (For the cynic, this is Fifth Amendment law for poor people who do not have lawyers, make bad decisions about talking to the police, and are often tricked or frightened into providing evidence against themselves.)

The other is the area of immunity grants and testimony before grand juries, at trial, and in other judicial and quasi-judicial contexts. It is the second strand of Fifth Amendment thinking that is most relevant to corporate crime and that this chapter will examine. (For the cynic, this is Fifth Amendment law for well-off people who have lawyers and negotiate with the government to get something in exchange for waiving their Fifth Amendment rights.)

Why does the Constitution contain this right? What value(s) might it be designed, or interpreted, to further?

A. Constitution, Statutes, and Procedural Options

The government can do what it is not allowed to do under the Constitution as long as it follows the rules set forth in immunity statutes. The idea is that the Fifth Amendment right has been "supplanted"—i.e., not taken away but replaced in full—by the grant of immunity.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 6002. Immunity generally

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. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

> (1) the testimony or other information from such individual may be necessary to the public interest; and
>
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. § 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

> (1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;
>
> (2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Punishment for contempt is a key part of the framework here, along with the perjury statutes which we have already examined. The idea is to empower the judicial process to acquire truthful testimony (information) by the combined effect of: (1) supplanting the Fifth Amendment right with immunity, (2) getting the witness to tell the truth by threatening perjury charges for false testimony, and (3) preventing the witness from simply refusing to testify. All three are necessary to make the investigative engine run.

18 U.S.C. § 401. Power of Court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 402. Contempt Constituting Crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

. . . in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Federal Rule of Criminal Procedure 42. Criminal Contempt

(a) DISPOSITION AFTER NOTICE. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) SUMMARY DISPOSITION. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

The following is an example of an immunity order issued by a United States District Court. Pay careful attention to its language.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUBERT ROTTEVEEL,

Defendant.

CASE NO. 2:11-CR-00447 WBS

ORDER PURSUANT TO 18 U.S.C. §§ 6002-6003 GRANTING IMMUNITY AND REQUIRING TESTIMONY

NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. § 6002 that Manuel Romero give testimony or provide other information which he refuses to give or to provide information with respect to the purchase of real property and loan applications and other documentation submitted on his behalf to lending institutions with respect to the charged fraud scheme in the above-referenced case, in this case on the basis of his privilege against self-incrimination as to all matters about which he may be asked to testify in this trial.

IT IS FURTHER ORDERED that no testimony or other information compelled under this order, or any information directly or indirectly derived from such testimony or other information, shall be used against Manuel Romero in any criminal case, except that Manuel Romero shall not be exempted by this order from prosecution for perjury, giving a false statement pursuant to this order, or otherwise failing to comply with this order, and that immunity granted herein is co-extensive with 18 U.S.C. § 6002.

IT IS SO ORDERED

HON. WILLIAM B. SCHUB, United States District Judge

The foregoing constitutional and statutory regime sets up the following sequence for the well-represented individual (let's call her Agnes) who may have criminal exposure in a corporate investigation. Much of this chapter explores in greater depth how the law sets up this sequence through the combined effects of (1) the Fifth Amendment, (2) the immunity statutes, (3) the perjury, obstruction, and false statements statutes, and (4) the contempt laws. A common sequence in a corporate investigation is as follows:

1. A request from government agents or prosecutors for a voluntary interview is conveyed to Agnes through her counsel. Agreeing to answer questions in response will effect a complete waiver of Agnes's Fifth Amendment privilege, with nothing guaranteed in return.

2. If Agnes refuses to be interviewed without protecting her rights, prosecutors may offer to interview Agnes under a "proffer" agreement, which will be discussed further in chapter 16 (because a proffer agreement is most commonly a prelude to a cooperation and plea agreement). This agreement would provide Agnes with immunity from direct use of her interview statements against her, but not immunity from her statements being used against her indirectly as leads to other evidence or to contradict or cross-examine Agnes at any later trial (referred to as derivative use). The proffer agreement also provides Agnes no protection against prosecution for any false statements she might make in the interview. If there is any chance that Agnes will be charged and want to contest the case at trial, an interview under such an agreement may make it impossible for her to testify effectively in her own defense.

3. If Agnes refuses to be interviewed under a proffer agreement, the prosecutors will have to decide whether to afford full immunity (use plus derivative use) to Agnes. This can be done by letter agreement (a contract signed by both parties) or by serving Agnes with a grand jury subpoena and then obtaining a court immunity order per the statutory procedure above. Agnes will prefer a court order if she fears prosecution in other jurisdictions because a letter agreement will bind only the prosecutor's office that signed it. Prosecutors will be very hesitant to immunize Agnes if it is early in their investigation and they are not yet sure about Agnes's level of criminal exposure. Taking testimony under derivative use immunity can make later prosecution of a witness very difficult or impossible, as we will see in this chapter.

4. If Agnes testifies or is interviewed under an immunity agreement or order, she can still be prosecuted for perjury, obstruction of justice, and false statements if she lies.

5. In a rare case (usually involving violent organized crime or intense political pressure), Agnes might refuse to testify even in the face of an immunity order. If she does so, she can be held in *civil* contempt by a judge and jailed until such time as she changes her mind and agrees to comply with the order to testify. Furthermore, Agnes can be prosecuted for *criminal* contempt and punished with prison time regardless of whether she relented during civil detention. Civil contempt is not considered punishment but rather a remedy to accomplish compliance with a court order. The act of contempt, however, is also considered a crime warranting punishment.

6. Alternatively, as will be explored in chapter 16, prosecutors with a strong case against Agnes may seek to persuade her to enter into a plea and cooperation agreement under which she would waive her Fifth Amendment privilege and agree to testify in exchange for a guarantee that she will not face any charges beyond limited ones set forth in the agreement.

B. Prosecutorial Conduct

With immunity, we again have an area of enormous prosecutorial power and freedom of decision making. Prosecutors have the ability to apply to the court for immunity, but the court has almost no discretion to deny an immunity application under the statutes, so power to grant immunity *de facto* rests with the prosecutor. Why is this power so significant?

The DOJ has provided additional guidelines for prosecutors seeking to exercise this power. Are there any factors that prosecutors should consider that are not included in the following guidelines?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL (Excerpts)

9-23.140. Authority to Initiate Immunity Requests

Assistant United States Attorneys, with the approval of the United States Attorney or, in his or her absence, a supervisory Assistant United States Attorney, and Department attorneys, with the approval of an appropriate Assistant Attorney General or Deputy Assistant Attorney General of DOJ, may initiate requests to compel testimony under the use immunity statute.

9-23.210. Decision to Request Immunity—The Public Interest

Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:

A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;

B. The value of the person's testimony or information to the investigation or prosecution;

C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;

E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;

F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.

9-23.212. Decision to Request Immunity—Conviction Prior to Compulsion

It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify. While this is not feasible in all cases, a successful prosecution of the witness, or obtaining a plea of guilty to at least some of the charges against the witness, will avoid or mitigate arguments of co-defendants made to the court or jury that the witness "cut a deal" with the government to avoid the witness's own conviction and punishment.

9-23.400. Authorization to Prosecute after Compulsion

After a person has testified or provided information pursuant to a compulsion order—except in the case of act-of-production immunity—an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General. Such requests for authorization should be sent to the Assistant Attorney General for the division that issued the letter of authority for requesting the original compulsion order.

The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar v. United States*, 406 U.S. 441 (1972).

C. Immunity and the Constitution

The following foundational case explains why the immunity statutes are consistent with the Fifth Amendment right and do not violate the Constitution. In the course of doing that, the case also makes clear what the effect of statutory immunity is. The key to all of this is to understand three terms: (1) transactional immunity, (2) use immunity, and (3) derivative use immunity. In addition, pay careful attention to the Court's discussion of its prior decision in *Murphy v. Waterfront Commission*.

KASTIGAR v. UNITED STATES, 406 U.S. 441 (1972)

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. §§ 6002, 6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony. The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions

or the term of the grand jury expired. The Court of Appeals for the Ninth Circuit affirmed. This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity).

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. . . . But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege.

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. . . . In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes. . . .

Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that '(n)o person . . . shall be compelled in any criminal case to be a witness against himself,' deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful basis for compelling incriminatory testimony. They ask us to reconsider and overrule *Brown v. Walker*, 161 U.S. 591 (1896), and *Ullmann v. United States*, decisions that uphold the constitutionality of immunity statutes.

We find no merit to this contention. . . .

Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U.S.C. § 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

> '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.

The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege. If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated.

Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use. They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a reenactment of the Immunity Act of 1868, provided that no 'evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . .'

Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court. On appeal, this Court construed the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute 'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him.' Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege, the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

> 'We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. (The immunity statute under consideration) does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.' 142 U.S., at 585–86, 12 S. Ct., at 206.

Sixteen days after the *Counselman* decision, a new immunity bill was introduced by Senator Cullom. . . . The bill, which became the Compulsory Testimony Act of 1893, . . . removed the privilege against self-

incrimination in hearings before the Interstate Commerce Commission and provided that:

> '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, documentary or otherwise . . .' Act of Feb. 11, 1893, 27 Stat. 444.

This transactional immunity statute became the basic form for the numerous federal immunity statutes until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration. The new statute, which does not 'afford (the) absolute immunity against future prosecution' referred to in *Counselman*, was drafted to meet what Congress judged to be the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.

The statute's explicit proscription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts. "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Our holding is consistent with the conceptual basis of *Counselman*. . . .

The basis of the Court's decision was recognized in *Ullmann v. United States*, 350 U.S. 422 (1956), in which the Court reiterated that the *Counselman* statute was insufficient:

> 'because 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.'

. . . In *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The *Murphy* petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity from prosecution under the laws of New Jersey and New York. They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did

not purport to extend. . . .

The issue before the Court in *Murphy* was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction. The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

> '(A) state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Governments must be prohibited from making any such use of compelled testimony and its fruits.'

. . . [B]oth the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. . . . As the *Murphy* Court noted, immunity from use and derivative use 'leaves 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. . . . This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom. . . .

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:

> 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection, commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources. . . .

We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. . . .

The "*Kastigar* burden"—what the government must prove to maintain a prosecution in the face of a motion to dismiss on the basis that the government has relied directly or indirectly on immunized testimony—is often described as "heavy." Indeed, the burden is so heavy that prosecutors are loath to take it on and often treat derivative use immunity as functionally equivalent to transactional immunity. The next case demonstrates how heavy that burden is, and how prosecutions across international boundaries can further complicate the problem. The nature of the facts and charges will be familiar from Chapter 3.

UNITED STATES v. ALLEN, 864 F.3d 63 (2d Cir. 2017)

JOSÉ A. CABRANES, Circuit Judge:

This case—the first criminal appeal related to the London Interbank Offered Rate ("LIBOR") to reach this (or any) Court of Appeals—presents the question, among others, whether testimony given by an individual involuntarily under the legal compulsion of a foreign power may be used against that individual in a criminal case in an American court. As employees in the London office of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank") in the 2000s, defendants-appellants Anthony Allen and Anthony Conti ("Defendants") played roles in that bank's LIBOR submission process during the now-well-documented heyday of the rate's manipulation. Allen and Conti were, for unrelated reasons, no longer employed at Rabobank by 2008 and 2009, respectively. By 2013, they were among the persons being investigated by enforcement agencies in the United Kingdom ("U.K.") and the United States for their roles in setting LIBOR.

The U.K. enforcement agency, the Financial Conduct Authority ("FCA"), interviewed Allen and Conti (each a U.K. citizen and resident) that year, along with several of their coworkers. At these interviews, Allen and Conti were compelled to testify and given "direct use"—but not "derivative use"—immunity. In accordance with U.K. law, refusal to testify could result in imprisonment. The FCA subsequently decided to initiate an enforcement action against one of Defendants' coworkers, Paul Robson, and, following its normal procedures, the FCA disclosed to Robson the relevant evidence against him, including the compelled testimony of Allen and Conti. Robson closely reviewed that testimony, annotating it and taking several pages of handwritten notes.

For reasons not apparent in the record, the FCA shortly thereafter dropped its case against Robson, and the Fraud Section of the United States Department of Justice (the "DOJ") promptly took it up. Robson soon pleaded guilty and became an important cooperator, substantially assisting the DOJ with developing its case. Ultimately, Robson was the sole source of certain material information supplied to the grand jury that indicted Allen and Conti and, after being called as a trial witness by the Government, Robson provided significant testimony to the petit jury that convicted Defendants.

In October 2014, a grand jury returned an indictment charging Defendants with one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349, as well as several counts of wire fraud, in violation 18 U.S.C. § 1343. Following a trial held in October 2015 in the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge), a jury convicted on all counts. The District Court sentenced Allen principally to two years' imprisonment and Conti to a year-and-a-day's imprisonment. Agreeing that Defendants had raised a "substantial issue" for appeal, the District Court granted bail pending appeal. . . .

As relevant here, Rabobank was a contributor panel bank for USD LIBOR and JPY LIBOR. Allen joined Rabobank in 1998 as a cash trader and was the bank's USD LIBOR submitter until 2005, when he became Rabobank's Global Head of Liquidity and Finance. In that new role, which he held until being laid off when Rabobank closed its London branch in late 2008, he was responsible for supervising other cash traders. One of those cash traders was Conti, who assumed primary responsibility for USD LIBOR submissions starting

in 2005 and continuing through 2009, when he quit shortly after his job was moved to Utrecht. Another cash trader, Paul Robson (whose testimony is central to the issue before us), was primarily responsible for Rabobank's JPY LIBOR submissions during the relevant time period. Others, including Allen himself, would sometimes submit USD LIBOR rates or JPY LIBOR rates when Conti or Robson were unavailable. According to the "Final Notice" issued to Rabobank by the FCA for its LIBOR-related misconduct, "Rabobank did not explicitly have a policy in place to address LIBOR submissions procedures until 30 March 2011, and certain LIBOR-related compliance risks were not addressed until August 2012."

In addition to LIBOR submitters, Rabobank also employed derivatives traders who would regularly enter into interest rate swap agreements. It was a routine practice of these derivatives traders to submit requests to Conti and Robson (or, at times, their stand-ins) for higher or lower LIBOR submissions. The Government's theory of the case was that these trader requests were dictated by the traders' (and thus Rabobank's) interest in having LIBOR be higher or lower on particular dates based on the transactions that the trader had entered or positions they held. Allen and Conti, the Government alleged, honored those requests in lieu of making good-faith estimates of Rabobank's projected borrowing rates.

One USD derivatives trader, Lee Stewart (nicknamed the "Ambassador"), sat in the same line of desks at Rabobank's London office as did Allen and the cash traders—including Conti, the principal USD LIBOR submitter. Stewart testified at trial that he offered LIBOR requests "out loud," "in front of everyone," and never used "code" or "tr[ied] to hide what [he] was talking about." Robson testified that every morning before 11 a.m., Conti led, and Allen participated in, a "gather[ing]" and "discuss[ion]" of the best way to influence LIBOR, prefaced by the shout, "right, LIBOR times[!]"

By contrast, those derivatives traders located in other offices, like USD derivatives trader Christian Schluep (located in New York) or JPY derivatives trader Takayuki Yagami (located in Tokyo), would more often submit their LIBOR requests in writing. Thus there are numerous arguably incriminating written exchanges between the latter traders and the LIBOR submitters. Schluep and Conti had several exchanges regarding the setting of USD LIBOR—for example:

> • On July 17, 2006, Schluep asked Conti, "IF ANY CHANCE, A HIGH 3MTH TODAY PL!" Conti replied, "[o]k matey ... high one today."
>
> • On October 31, 2006, Schluep sent Conti a message discussing market activity and then stated, "SMALL FAVOUR AS USUAL, LOW 2S HIGH 3S IF POSSIBLE MATEY," meaning he wanted a low two-month LIBOR and a high three-month LIBOR. Conti responded to the earlier parts of Schluep's message and added, "[w]ill do matey on the libors."
>
> • On August 13, 2007, Schluep sent a message to Conti, requesting "HIGH 3S AND 6S PLS TODAY MATE (ESP 6MNTHS!!) IF U WOULD BE SO KIND .. [sic] GOTTA MAKE MONEY SOMEHOW!" Conti responded simply, "cool," to which Schluep replied, "CHEERS TC.. [sic] EVERY LITTLE HELPS!"

Schluep also had exchanges with Allen—for example:

> • On October 6, 2006, Schluep sent a message to Allen stating, "HELLO SKIPPER, CAN U PUT 3S AT 37 FOR ME TOMORROW PLS... MANY THANKS." Allen replied, "NEVER IN DOUBT!"
>
> • On November 29, 2006, Schluep sent a message to Allen asking for a "LOW 1S HIGH 3S LIBOR PLS!!!" Allen replied "OK MATE, WILL DO MY BEST ... SPEAK LATER." Schluep later thanked Allen, because the submissions were "BANG ON THE MONEY!" Allen replied, "NO WORRIES" and joked that he "HAD TO WORK MY WAY OUT OF AN AMBASS HEADLOCK TO GET THOSE IN!"
>
> • On December 1, 2006, Schluep sent a message to Allen stating, "APPRECIATE 3S GO DOWN, BUT A HIGH 3S TODAY WOULD BE NICE." Allen responded, "I AM FAST TURNING INTO YOUR LIBOR BITCH!!!!" Schluep replied, "JUST FRIENDLY ENCOURAGEMENT THAT'S ALL, APPRECIATE THE HELP." Allen replied, "NO WORRIES MATE, GLAD TO HELP[.]"

There were similar, if perhaps more explicit and thus arguably more incriminating, exchanges between Yagami and Robson regarding the setting of JPY LIBOR—for example:

> • On September 21, 2007, Robson told Yagami that market information supported a submission of 0.85 for the one-month JPY LIBOR. Yagami asked for a higher rate, specifically 0.90. Robson agreed, even though he would "probably get a few phone calls," telling Yagami that there were "bigger crooks in the market than us guys!"
>
> • On March 19, 2008, Yagami told Robson "[w]e have loads of 6mth fixings today" and—conveying a request from another trader—asked Robson to submit 1.10 for the six-month yen LIBOR. Robson responded that market information supported a 1.03 submission for the six-month LIBOR but that he would submit 1.10 as asked, even though it would likely prompt "a phone call." Robson added that it "will be quite funny to see the reaction" to his submission at Yagami's requested rate.

Whether Allen and Conti did, in fact, accommodate trader requests by adjusting their LIBOR submissions was an issue that Defendants contested at trial. Although Allen and Conti claim they ignored the trader requests, the Government presented evidence at trial purporting to show that these trader requests were accommodated. For instance, on August 13, 2007, Schluep e-mailed Conti and said: GONNA NEED A FRICKIN HIGH 6 MTH FIX TOMORROW IF OK WITH U ... 5.42?" The next day, Schluep sent a reminder and Allen informed another trader that the six–month LIBOR submission would be 5.42 because "i think thats [sic] what [C]hristian [Schluep] needs." The Rabobank submission for six–month USD LIBOR that day was 5.42. . . .

Where Defendants and the Government parted ways on the facts was whether the traders' requests were honored. While Conti did not take the stand at trial, Allen testified that he never actually accommodated such requests. On direct examination by the Government, by contrast, Robson—Rabobank's JPY LIBOR

submitter—explained that LIBOR's lack of precision allowed him to accommodate trader requests without raising eyebrows. . . .

Moreover, Robson proffered to the Government that Conti likewise accommodated trading positions when making LIBOR submissions. And Robson was the sole source of trial and grand jury testimony that Allen specifically directed and instructed others in this scheme. . . .

The FCA's interviews were compulsory; they were conducted under a grant of direct (but not derivative) use immunity, and a witness's failure to testify under such terms could result in imprisonment. In order to avoid potential problems under *Kastigar*, the DOJ took care to conduct their interviews wholly independently of the FCA's interviews and their fruits. Specifically, the 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. In accordance with that protocol, the FCA interviewed Robson (on January 17, 2013), Conti (on January 25, 2013), and Allen (on June 20 and 21, 2013), among others. Robson, in his compelled testimony to the FCA, denied any improper conduct at Rabobank.

In November 2013, the FCA initiated an enforcement action against Robson and, following its normal procedure, disclosed to Robson the relevant evidence against him, including the compelled testimony of Allen and Conti. Robson's attorney instructed him to review the materials sent by the FCA in preparation for a meeting between Robson and his attorney. Robson "reviewed the materials over the course of two to three successive or nearly successive days sometime in or about November and/or December of 2013." During this review, Robson underlined, annotated, and circled certain passages of both Allen's and Conti's compelled testimony. Robson also took roughly five pages of handwritten notes. Before Robson had the chance to discuss this material with his attorney, however, the FCA stayed its regulatory proceeding in favor of a criminal prosecution of Robson by the DOJ. On instruction from his lawyer, Robson placed the FCA materials in a box, put them in his attic, and did not review them further. . . .

In mid-July 2014, the DOJ first interviewed Robson at a so-called proffer session. On August 5, 2014, Robson signed a cooperation agreement and shortly thereafter pleaded guilty. At Robson's plea hearing, the prosecutor informed the District Court that "there is . . . a chance that we would seek a superseding indictment in light of information that has come to light from our two cooperators" and that there was "a distinct possibility" the new indictment would "involve[ ] other individuals."

So it did. On October 16, 2014, the grand jury returned a superseding indictment charging two new individuals—Allen and Conti—with one count of conspiracy to commit wire fraud and bank fraud as well as several counts of wire fraud. It is not disputed that the Government's presentation of evidence to the grand jury that indicted Defendants relied on evidence that Robson had provided. While Robson did not himself testify, the new information he gave was relayed to the grand jury through FBI Special Agent Jeffrey Weeks, who did testify. And Weeks's testimony to the grand jury on certain matters derived exclusively from Robson. In particular, Robson was the only source for Weeks's testimony 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," and that

"Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions as appropriate reason or justification for setting the rates." . . .

At trial, the Government's case-in-chief consisted of documentary evidence (e.g., e-mails, "instant chats," and phone calls involving Allen, Conti, or their alleged co-conspirators) and testimony from eight witnesses, including three cooperators: Stewart, Yagami, and Robson. In addition to cross-examination of the Government's witnesses, Allen and Conti each offered an expert witness, and Allen testified in his own defense. On November 5, 2015, the jury returned a verdict of guilty on all counts (nineteen counts, in total, for Allen and nine for Conti). . . .

In arguing that Fifth Amendment protections apply in this case, Defendants rely on our cases pertaining to foreign and cross-border law enforcement, which have consistently held that "in order to be admitted in our courts, inculpatory statements obtained overseas by foreign officials must have been made voluntarily." In so holding, we joined our sister circuits that have considered the issue. Defendants contend that these cases are sufficient to resolve the present dispute regarding whether compulsion by a foreign power implicates the Fifth Amendment. We agree. . . .

The Supreme Court has taken care . . . to distinguish extraterritorial applications of the Fourth Amendment from those of the Self-Incrimination Clause of the Fifth Amendment. The Fourth Amendment "prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial," such that "a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." By contrast, in the case of the Fifth Amendment's Self-Incrimination Clause, "a constitutional violation occurs only at trial," even if "conduct by law enforcement officials prior to trial may ultimately impair that right." In light of that distinction, "it naturally follows that, regardless of the origin—i.e., domestic or foreign—of a statement, it cannot be admitted at trial in the United States if the statement was 'compelled.'"

Thus, the Self-Incrimination Clause's prohibition of the use of compelled testimony arises from the text of the Constitution itself, and directly addresses what happens in American courtrooms, in contrast to the exclusionary rules that are crafted as remedies to deter unconstitutional actions by officers in the field. Its protections therefore apply in American courtrooms even when the defendant's testimony was compelled by foreign officials.

Moreover, for much the same reasons, the Clause applies in American courtrooms even where, as here, the defendant's testimony was compelled by foreign officials lawfully—that is, pursuant to foreign legal process—in a manner that does not shock the conscience or violate fundamental fairness. The Clause flatly prohibits the use of compelled testimony and is not based on any matter of misconduct or illegality on the part of the agency applying the compulsion. . . .

The Government also asserts that a prohibition on its use in U.S. courts of testimony compelled by a foreign authority "could seriously hamper the prosecution of criminal conduct that crosses international borders." In particular, the Government submits:

> A foreign government could inadvertently scuttle prosecutions in the U.S. by compelling

> testimony and then making the testimony available to potential witnesses or the public. Worse yet, a hostile government bent on frustrating prosecution of a defendant would have to do no more than compel [that defendant] to testify and then publicize the substance of that testimony, unilaterally putting the United States to its heavy *Kastigar* burden.

The Government's first concern—that foreign powers could inadvertently or negligently obstruct federal prosecutions—fails to account for the fact that this risk already exists within our own constitutional structure. In our system—composed of "State and National Governments," with the latter government further divided into separate co-equal branches—the DOJ does not control the granting or handling of witness immunity by the States or by the U.S. Congress. Similarly, and "[f]or better or for worse, we live in a world of nation-states in which our Government must be able to 'function effectively in the company of sovereign nations.'"

We are confident the Government is able to do so. Indeed, in a March 2016 address that specifically discussed the immunity issue in this case, Leslie Caldwell, then-Assistant Attorney General for the Criminal Division, observed that

> as we and our [foreign] counterparts work together more frequently and better understand our respective systems, we are having . . . conversations [about double jeopardy and Fifth Amendment protections] earlier, so that individuals are much less likely to be caught in the middle of last minute turf battles over where and by whom a prosecution should be brought.

In the present case, the Government was plainly aware from the outset—well before the FCA transmitted the Defendants' compelled testimony to Robson—of the need for close coordination of its efforts with those of the U.K. authorities. The practical outcome of our holding today is that the risk of error in coordination falls on the U.S. Government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations.

As to the Government's concerns that a hostile foreign government might hypothetically endeavor to sabotage U.S. prosecutions by immunizing a suspect and publicizing his or her testimony—that, of course, is not this case. This case raises no questions regarding the legitimacy or regularity of the procedures employed by the U.K. government or the U.K. government's investigation more generally. We thus need only say here that should U.S. prosecutors or judges face the situation suggested by the Government, our holding today would not necessarily prevent prosecution in the United States. That is true not only if the U.S. prosecution navigated any resulting *Kastigar* issues by meeting its burden or by not using exposed witnesses. It is true for another reason as well. Specifically, should the circumstances in a particular case indicate that a foreign defendant had faced no real threat of sanctions by his foreign government for not testifying, then that defendant's testimony might well not be considered involuntary. In short, the situation hypothesized by the Government is not before us today, and our resolution of this case on the facts that are before us leaves open the issue of foreign efforts to sabotage a U.S. prosecution.

On the other hand, the Government nowhere responds to the troubling consequences of accepting its argument. As conceded at oral argument, the Government's rule would remove any bar to introducing compelled testimony directly in U.S. prosecutions similar to this one—as in, "Your honor, we offer

Government Exhibit 1, the defendant's compelled testimony." To be sure, the Government did not introduce Defendants' compelled testimony directly and appears to have generally sought in good faith to respect the principles underlying the Fifth Amendment. But it is well established that a defendant's "preservation of his rights" does not turn "upon the integrity and good faith of the prosecuting authorities." We cannot entertain a rule that discards the most basic Fifth Amendment right simply because prosecutors can be expected to respect its objectives generally.

The concerns that we express here are not idle. However unusual this particular prosecution may prove to be, so-called cross-border prosecutions have become more common.[112] Such prosecutions necessarily entail intimate coordination between the United States and foreign authorities. As then-Assistant Attorney General Caldwell put it in the address to which we referred earlier, "[c]ollaboration and coordination among multiple regulators in cross–border matters is the future of major white collar criminal enforcement." Perhaps the most striking development in cooperative conduct is the embedding of U.S. prosecutors in foreign law enforcement. According to Caldwell, the DOJ "recently placed Criminal Division prosecutors with Eurojust in The Hague and INTERPOL in France" and was "exploring the possibility of embedding prosecutors with other foreign law enforcement as well." In a more recent address, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden announced that DOJ will be detailing one of its anti-corruption prosecutors to work at the U.K. FCA—"the first time the Criminal Division . . . will detail a prosecutor to work in a foreign regulatory agency on white collar crime issues."

[112] The rise in non-prosecution agreements and deferred-prosecution agreements between the U.S. and foreign entities for misconduct occurring abroad attests to this new reality. In addition to LIBOR, there have recently been agreements arising out of investigations into the manipulation of certain foreign exchange rates, *see* DOJ, Press Release, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas; agreements arising out of investigations into U.S. tax evasion at Swiss banks, *see* DOJ, Swiss Bank Program, https://www.justice.gov/tax/swiss-bank-program (last visited July 18, 2017); and of course agreements arising out of FCPA enforcement, *see* DOJ, *FCPA-Related Enforcement Actions: 2017*, https://www.justice.gov/criminal–fraud/case/related–enforcement–actions/2017 (last visited July 18, 2017). While a rise in individual prosecutions of foreign defendants may not be as evident, the DOJ has expressed a clear preference that, as a matter of general prosecutorial policy, where there is a resolution with an institution, there should be a prosecution of a responsible individual (or individuals) as well. *See* Sally Quillian Yates, Memorandum, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), https://www.justice.gov/dag /individual-accountability.

One area in particular where intimate cooperation and coordination will be needed between U.S. prosecutors and foreign authorities (or, perhaps, between U.S. prosecutors and U.S. prosecutors on detail to foreign authorities) is the securing of witness testimony. As the Government explained in a letter to the District Court in this case, "large scale economic crime conspiracies that harm U.S. markets, such as LIBOR rigging and the manipulation of the foreign exchange spot, often occur, in large part, overseas and successful prosecutions of these matters frequently rely on evidence provided by witnesses who live in foreign countries." And as this case illustrates, foreign authorities may conduct compulsory witness interviews, including interviews of those

who end up being—or are already—the targets of U.S. prosecution.

We do not presume to know exactly what this brave new world of international criminal enforcement will entail. Yet we are certain that these developments abroad need not affect the fairness of our trials at home. If as a consequence of joint investigations with foreign nations we are to hale foreign men and women into the courts of the United States to fend for their liberty we should not do so while denying them the full protection of a "trial right" we regard as "fundamental" and "absolute."

Accordingly, we adhere to our precedent in assessing the voluntariness of inculpatory testimony compelled abroad by foreign governments. In the instant appeal, there is no question that the Defendants' testimony was compelled and, thus, involuntary. We therefore conclude in this case that the Fifth Amendment prohibited the Government from using Defendants' compelled testimony against them.

Kastigar . . . established a doctrine to enforce this protection. When a witness has been compelled to testify relating to matters for which he is later prosecuted, the government bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." This burden is "not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." . . .

With the foregoing principles in mind, we consider whether any evidence from Robson used in Defendants' prosecution was tainted. To be clear, there is no dispute that the Government "used" evidence from Robson: he was a key cooperator and a prominent trial witness. The less straightforward question is whether any evidence supplied by Robson (to the government, to the grand jury, or at trial) was tainted by his earlier review of the testimony of Defendants compelled in the United Kingdom under U.K. law.

Our Court apparently has never encountered the circumstance in which a government trial witness had, prior to testifying, reviewed a defendant's compelled testimony. The D.C. Circuit, however, has addressed the applicable legal standards in a pair of high-profile cases arising out of the Iran–Contra affair. In those cases, that Court held that "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes" an impermissible use of the defendants' compelled testimony. . . .

In apparent agreement with both parties on appeal, we conclude that the legal standards set forth by the D.C. Circuit . . . are helpful here. We need not, in this case, decide whether the Government is required to demonstrate that Robson's review of Defendants' compelled testimony did not in any manner subtly "refresh his memory, focus or organize his thoughts," or in some other traceless way influence his state of mind. At a minimum, however, we agree with the D.C. Circuit that the Government is required to prove that his exposure to the compelled testimony did not shape, alter, or affect the information that he provided and that the Government used.

The most effective way to demonstrate that a witness's testimony was untainted by exposure to a defendant's immunized testimony is by demonstrating that his or her testimony was unchanged from comparable

testimony given before the exposure. Thus, typically, the prosecution can meet its burden by memorializing (or "canning") the witness's testimony prior to his or her exposure.

In the present case, Robson did testify to the FCA regarding Rabobank's submission and alleged manipulation of LIBOR rates, as well as the roles of Allen and Conti, prior to Robson's exposure to Defendants' compelled testimony. But what Robson's "canned" testimony preserved is toxic to the Government's case; it omits or contradicts in material parts the testimony Robson later provided indirectly to the grand jury and directly to the petit jury. At the *Kastigar* hearing held by the District Court, Robson agreed that "the testimony that [he] gave to the [FCA] and the testimony that [he] gave before the jury in this trial were very different." For instance, Robson testified to the jury about an altercation between Stewart and Damon Robbins, an alternate submitter for USD LIBOR, on Rabobank's London desk. But Robson did not testify about this to the FCA, and the *Kastigar* hearing raised questions about whether he had even seen the incident at all or merely read about it in the compelled testimony. Far from rebutting the presumption that Robson's trial testimony was tainted, his pre-exposure testimony actually evidences such taint through its material differences with Robson's post-exposure trial testimony.

As Robson's FCA testimony hurts rather than helps its cause, the Government appears to contend on appeal that it satisfied its burden solely through Robson's "'persuasive[ ]'" testimony at the *Kastigar* hearing. We conclude, however, that Robson's testimony at the hearing falls far short of satisfying the demands of *Kastigar*. As explained below, the Government adduced, at bottom, nothing more than bare, self-serving denials from Robson to meet its heavy burden. We hold that such conclusory denials are insufficient as a matter of law to sustain the prosecution's burden of proof under *Kastigar* in the face of materially inconsistent pre-exposure testimony. . . .

Accordingly, we hold that a bare, generalized denial of taint from a witness who has materially altered his testimony after being substantially exposed to a defendant's compelled testimony is insufficient as a matter of law to sustain the prosecution's burden of proof under *Kastigar* that that witness's testimony was derived from a wholly independent source. . . .

In sum, the Government did not, and cannot, meet its burden under *Kastigar*. We therefore conclude that the Government's use of evidence provided by Robson violated the Defendants' Fifth Amendment rights. . . .

Upon review of the trial record, we have no trouble concluding that this error was not harmless beyond a reasonable doubt. While two other cooperating witnesses testified, Robson was the unique source of particularly significant and incriminating evidence. Robson was the only LIBOR submitter to testify on behalf of the government, and he testified—contrary to the Defendants' central argument for acquittal—that, pursuant to a scheme at Rabobank, he in fact took trading positions into account when making submissions. And Robson was also the only witness the Government ever interviewed who said that Allen "directed" Rabobank's submitters to account for trading positions when setting LIBOR. Indeed, absent Robson's testimony that Allen issued "instructions" to him, Allen likely would not have been charged, much less convicted, of the nine counts relating to specific JPY LIBOR submissions, because Allen never submitted LIBOR estimates for that currency. Well aware of the substantial litigation risk under *Kastigar* of using a

witness who not only had been exposed to Defendants' compelled testimony but who dramatically changed his own story after such exposure, the Government nevertheless chose to call Robson to the witness stand, underscoring the significance of his testimony to the Government's case. . . .

Accordingly, we conclude that the admission of Robson's trial testimony was not harmless. This error requires that Defendants' convictions be vacated and that they be awarded a new trial wherein any tainted statements are suppressed. Defendants also argue, however, that the use of Robson's tainted evidence, conveyed to the grand jury through Agent Weeks's testimony, requires dismissal of the indictment. We thus turn to that argument.

Our precedents establish that an indictment is subject to dismissal if it was procured on the basis of tainted evidence. . . .

Upon review of the evidence and testimony presented to the grand jury in this case, we cannot conclude beyond a reasonable doubt that the grand jury would have indicted Allen and Conti without the evidence supplied by Robson. As the District Court itself acknowledged, "material parts of [Agent Weeks's] grand jury testimony derived exclusively from Mr. Robson." Specifically, when Agent Weeks testified that Allen was the scheme's leader who had "instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR," his testimony derived exclusively from Robson's proffer. And when Agent Weeks testified that Mr. Conti "adjusted his U.S. dollar LIBOR rates . . . for his own benefit and the benefit of the other traders," he based his testimony exclusively upon Mr. Robson's proffer, telling the grand jury that "Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions as appropriate reason or justification for setting the rates." . . .

Neither did the District Court suggest that the evidence conveyed from Robson, through Agent Weeks, to the grand jury, was harmless; instead, the District Court concluded that the Government had met its burden to prove Robson's evidence was untainted. As explained above, that conclusion was in error. Because we cannot conclude that the *Kastigar* errors before the grand jury were harmless, the indictment must be dismissed.

D. Internal Investigations and State Action Doctrine

Is it a violation of someone's Fifth Amendment right for a corporation to threaten to fire her if she doesn't answer questions? The answer turns in large part on the issue of what constitutes state action in this context for the purpose of constitutional law generally.

A foundational Supreme Court case on employment and the Fifth Amendment, which is not on all fours with the corporate investigation scenario in the private sector, is *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the Court held that incriminating statements by police officers, extracted by state investigators under threat of termination from the officers' local police departments, and without any immunity protection, if they refused to answer were compelled in violation of the Fifth Amendment.

The next two cases are on this point, but they are district court opinions and arguably can be limited to their facts. What *should* be the rule about the constitutionality of the talk-or-be-fired scenario?

UNITED STATES v. STEIN, 435 F. Supp. 2d 330 (S.D.N.Y. 2006)

KAPLAN, District Judge:

Our forefathers adopted an adversary system of justice—one in which no person may be convicted of a crime unless the government sustains its burden of convincing a jury beyond a reasonable doubt of a defendant's guilt. Part and parcel of that system is the principle that no one may be compelled, in a criminal case, to be a witness against one's self.

KPMG, the accounting giant, and many of its personnel found themselves under criminal investigation for their role in allegedly abusive tax shelters. An indictment, regardless of whether KPMG was guilty of anything, almost certainly would have meant the demise of the firm—the fate met by its competitor, Arthur Andersen & Co., when it was indicted in the Enron scandal.

Although KPMG long had paid legal fees for any of its employees who were sued or charged with crimes as a result of doing their jobs, the government threatened to consider such payments as a factor weighing in favor of indicting the firm. It threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment. So KPMG changed its practice regarding legal fees. It informed employees that it would pay fees, up to $400,000, but only on the condition that they cooperate with the prosecutors. In other words, KPMG told its personnel that it would cut off payment of legal expenses of any employee who refused to talk to the government or who invoked the Fifth Amendment. And it made crystal clear that it would cut off any payments of legal fees to anyone who was indicted.

The government took full advantage. It sought interviews with many KPMG employees and encouraged KPMG to press the employees to cooperate. Indeed, it urged KPMG to tell employees to disclose any personal criminal wrongdoing. When individuals balked, the prosecutors told KPMG. In each case, KPMG reiterated its threat to cut off payment of legal fees unless the government were satisfied with the individual's cooperation. In some cases, it told the employees to cooperate with prosecutors or be fired.

The government obtained statements, commonly known as proffers, from nine KPMG employees who now are defendants here (the "Moving Defendants"). The Moving Defendants contend that their statements were coerced in violation of their Fifth Amendment privilege against self-incrimination. They move to preclude the government from using the statements or any evidence derived therefrom.

Having considered the evidence, the Court is persuaded that the government is responsible for the pressure that KPMG put on its employees. It threatened KPMG with the corporate equivalent of capital punishment. KPMG took the only course open to it. In the words of its chief legal officer, KPMG did everything it could "to be able to say at the right time and with the right audience, we're in full compliance with the Thompson Memorandum." It exerted substantial pressure on its employees to waive their constitutional rights.

In this case, not all of the statements made by the Moving Defendants to the government were coerced. Those

that were, however, must be suppressed. . . .

One of the guiding principles set forth in the [DOJ] Thompson Memorandum is that "[i]n gauging the extent of the corporation's cooperation [for purposes of determining whether it should be indicted], the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, *to make witnesses available,* to disclose the complete results of its internal investigation, and to waive attorney-client and work-product privileges." The commentary goes on to elaborate on the meaning of cooperation in relevant part by stating: "One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the *completeness of its disclosure* including, if necessary, a waiver of the attorney-client and work product protections . . ." Thus, the Thompson Memorandum makes clear that the failure of a business organization facing possible indictment to induce its personnel to submit to interviews by the government and to disclose whatever they know may be a factor weighing in favor of indictment of the entity. . . .

The KPMG lawyers made clear to prosecutors that KPMG believed that an indictment would be fatal to the organization. They said that KPMG intended to cooperate in order to save the firm and that it would not protect individual employees. Later in the meeting, Robert Bennett and Kenneth Bialkin of Skadden, Arps, Slate, Meagher & Flom, the senior lawyers representing KPMG, told the USAO that KPMG's "common practice" had been to pay legal fees for employees in connection with legal matters arising out of their doing their jobs. Although KPMG still was checking on its legal obligations, they said, it would not pay legal fees for employees who declined to cooperate with the government, or who took the Fifth Amendment, as long as it had discretion to take that position. Mr. Bennett made clear also that KPMG would recommend to individual employees "lawyers who understand cooperation is the best way to go in this type of case." He expressed also the view that "it [wa]s in the best interests of KPMG for its people to get attorneys that will cooperate with" the government. . . .

As noted, each of the Moving Defendants received the form letter that stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual "cooperate with the government and . . . be prompt, complete, and truthful." Each subsequently made proffers to the government pursuant to the USAO's standard proffer agreement after receiving the letter or, in one case, after having been told its substance but before receiving it. Six of the nine left KPMG before they made their statements and do not claim that they made their statements under a threat of loss of their employment. There is no evidence that Mr. Gremminger, one of the three who made a proffer while still employed by KPMG, ever was threatened with firing if he did not make a statement. The situations of the other two, Mr. Smith and Ms. Warley, were different.

Mr. Smith initially refused to make a proffer. Ms. Warley, on the other hand, made a proffer on April 21, 2004. This led to a dispute between her Texas counsel and the USAO in which the attorney demanded agreement by the government with a number of conditions as a prerequisite to a further session.

On May 18, 2004, AUSA Weddle informed Skadden that (1) Mr. Smith had refused to meet with the government and (2) although Ms. Warley had met with prosecutors once, she had refused to meet again except

on conditions unacceptable to the USAO. Within days, Eugene O'Kelly, then chairman of KPMG, told Mr. Smith that he understood that "there were concerns about whether [Mr. Smith] was cooperating with the investigation" and told Mr. Smith that "he did not want [him] to put [Mr. O'Kelly] in a position where he was forced to take action against" him. Mr. Smith quite reasonably interpreted this comment as meaning that KPMG would fire him if he did not proffer to the government.

On May 28, 2004, promptly after the O'Kelly–Smith conversation, Skadden forwarded copies of Mr. Weddle's letter to counsel for Smith and Warley. The cover letters stated in relevant part:

> "Absent an indication within the next ten business days from the government that your client no longer refuses to meet with the government pursuant to its standard proffer agreement, KPMG will cease payment of [the client's legal] fees.
>
> "Finally, please note that KPMG will view continued non-cooperation as a basis for disciplinary action, including expulsion from the Firm."

Shortly after this threat, Mr. Smith—acting against the advice of his attorney and in order to keep his job—changed his position. He entered into the USAO's standard proffer agreement on June 16, 2004 and met with prosecutors on that date, June 17, and November 23, 2004.

The record does not fully disclose what transpired next between Ms. Warley and the USAO. In any event, she returned for a second proffer session on October 19, 2004 that lasted less than twenty minutes. Ms. Warley's counsel advised the government that Ms. Warley believed that certain Texas statutes precluded her from voluntarily revealing client information without the clients' permission and asked for a grand jury subpoena, compliance with which would be mandatory. The government obliged, but the USAO then terminated the proffer session despite Ms. Warley's request to continue. A few days later, Ms. Warley appeared before the grand jury but invoked the Fifth Amendment.

On November 10, 2004, Mr. Weddle again wrote to Skadden, informing it that "notwithstanding [Ms. Warley's] counsel's representations that she would cooperate with the investigation, [she] continues to refuse to cooperate." On November 15, 2004, Skadden forwarded the government's letter to Ms. Warley's counsel and advised him that KPMG had ceased payment of her legal fees, effective November 10, 2004. It added:

> "In addition, absent an indication from the government within the next ten business days that your client no longer refuses to cooperate with the investigation, KPMG will consider additional actions, including Ms. Warley's separation from the Firm."

In the end, Ms. Warley's counsel disputed the claim that she had not cooperated, but she nevertheless was terminated by KPMG. Subsequent negotiations between Ms. Warley's counsel and the government concerning a further proffer were not successful.

In sum, then, all of the proffers followed KPMG's conditioning of the payment of attorneys' fees on employees' cooperation with the government. In addition, Mr. Smith's proffer and that of Ms. Warley on October 19, 2004 both followed explicit threats of employment termination.

KPMG repeatedly claimed that there was a direct causal connection between its actions and the proffers by some of its employees.

In a November 2, 2004 letter to the USAO, which obviously was intended to demonstrate that KPMG should not be indicted because, among other things, it had cooperated with the government, Skadden wrote:

> "KPMG has repeatedly directed all current and former personnel to cooperate with the investigation and has conditioned payment of attorney's fees upon prompt, complete, and truthful cooperation with the government's inquiry. Whenever your Office has notified us that individuals have not rendered prompt, complete, and truthful cooperation, KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and (if applicable) to take personnel action, including termination. *In certain instances, KPMG's action has led previously non-cooperating individuals to meet with your Office.* In other instances, KPMG has ceased payment of fees and expenses."

At later meetings, and in a so-called "White Paper" that argued against indictment of the firm, Mr. Bennett "noted that KPMG had 'hinged attorneys fees on whether people would talk to [the government]' " and "that KPMG had cut off fees for several individuals for non-cooperation and had terminated two partners for non-cooperation," including for *"asserting . . . [the] 5th Amendment right not to testify."* A memorandum of a June 13, 2005 meeting with the DOJ discloses that Mr. Bennett argued that "We [KPMG] said we'd pressure—although we didn't use that word—our employees to cooperate" and when employees did not cooperate, "Justin [AUSA Weddle] or Stan [AUSA Okula] would tell us," and the firm then cut off fee payments and/or fired the individual. Indeed, KPMG's final submission to the DOJ argued that it had fully cooperated by, among other things, "pressuring current and former personnel to cooperate fully with the investigation." . . .

The Fifth Amendment provides in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself." An individual claiming a violation of the privilege against self-incrimination must prove that the statement sought to be suppressed was a product of compulsion by or attributable to the government. . . .

It no longer may be doubted that economic coercion to secure a waiver of the privilege against self-incrimination, where it is attributable to the government, violates the Fifth Amendment if the pressure is sufficient to "deprive[ ] [the accused] of his 'free choice to admit, to deny, or to refuse to answer.'" The point is well illustrated by *Garrity v. New Jersey,* where the Supreme Court held that statements obtained from police officers in circumstances in which a state statute would have required the termination of their employment had they declined to answer were involuntary and therefore inadmissible against them in a criminal trial. So one may not exclude the possibility that KPMG's conditioning of the payment of legal fees upon cooperating with the prosecutors, assuming it was attributable to the government, left these defendants with no choice but to talk. Yet that is only the beginning of the discussion. . . .

Prospective criminal defendants often make so-called queen for a day proffers to prosecutors, and they do so for several reasons. As the Moving Defendants concede, some do so in the hope of obtaining a cooperation

agreement. Some do so in efforts to negotiate pleas. And some do so in the hope of persuading the government not to indict at all. Thus, the fact that most of these defendants made proffers after KPMG conditioned the continued payment of their legal fees on their cooperating with the government in and of itself sheds little light on whether their statements were coerced. In other words, the fact that these defendants proffered *after* KPMG conditioned payment of their legal fees on cooperation does not mean that they proffered, even in part, *because* KPMG so conditioned payment. To illustrate the point, Mr. Watson acknowledges that he proffered on the first of several occasions voluntarily because he hoped to persuade the USAO that he should not have been prosecuted.

In consequence, *Garrity* does not require the result the Moving Defendants advocate. While it stands for the proposition that the coerced nature of a statement sometimes may be apparent on undisputed facts, it does not support the Moving Defendants' argument that the existence of an objectively coercive influence alone is sufficient to warrant suppression, even where other evidence or common sense suggests that the statement at issue in fact was voluntary. . . .

The situations of Mr. Smith and, with respect to all but the first of their proffers, Mr. Watson and Ms. Warley are quite different. Mr. Watson submitted a declaration asserting that he decided to proffer on the second and third occasions only because of the pressure placed upon him by KPMG. Although Mr. Smith and Ms. Warley did not submit affidavits addressing the issue of voluntariness, there was more than sufficient evidence to raise an issue of fact on that point. In consequence, the Court held an evidentiary hearing on the issue of coercion of these statements.

The evidence that Mr. Smith's proffers all were coerced is compelling. After he received the March 11, 2004 letter, the government requested that he proffer. Despite KPMG's insistence on cooperation and its having conditioned the payment of legal fees upon compliance with that request, he refused. In May, however, the government reported his refusal to KPMG. Mr. O'Kelly implicitly but unmistakably threatened to fire him if he did not fall into line. The threat was made explicit by Skadden on May 28, 2004. Mr. Smith, whose family was entirely dependent upon him for support, rejected his attorney's advice and agreed to proffer in order to save his job.

The government argues that Mr. Smith's decision was not a product of the government's pressure on KPMG, arguing that he previously had made statements to government bodies or otherwise represented the firm vis-a-vis government agencies and concerned clients because he, as a very senior company official, and KPMG had a "unity of interest." But this contention is not persuasive.

To be sure, Mr. Smith, as vice chair of the firm, took a prominent position in attempting to deal with a host of matters related to the tax shelters at issue in this case. He was involved, to varying degrees, with the IRS promoter audit, the SEC independence investigation, the DOJ summons enforcement proceeding, and other matters and testified before the Senate. The government may well be correct that his position would have been in jeopardy if he had refused to engage in these activities. But that does not get the government where it wants to go.

To begin with, the question here is whether the statements Mr. Smith made to the USAO after KPMG conditioned payment of his legal fees on his cooperation and explicitly threatened to fire him if he did not waive his constitutional rights and proffer were coerced. That other statements also might have been coerced by fear of loss of his job is beside the point.

Second, there is a world of difference between the prior statements and activities and those in question here. The former occurred in circumstances in which only KPMG's interests were immediately at stake, not Mr. Smith's personal liberty. Once the criminal referral was made and the USAO sent Mr. Smith a subject letter, the personal stakes for him changed dramatically. In consequence, even assuming *arguendo* that Mr. Smith voluntarily took some risks for the firm before he became the subject of a criminal investigation, the suggestion that he voluntarily ran the risk to his own freedom that was entailed in submitting to questions from prosecutors would lack force.

Finally, the question ultimately is one of credibility. The Court credits Mr. Smith's testimony and finds that he made the statements at the proffer sessions because KPMG threatened to fire him and cut off payment of his legal fees if he did not. The statements were coerced.

Mr. Watson is a young man who joined KPMG in 1992 as a staff accountant, became a non-equity partner in 1997, an equity partner in October 2001, and left the firm in July 2002. He subsequently pursued two business ventures that failed and has been unemployed for nearly a year.

In the spring of 2004, his net worth was about $320,000, of which about a third was the equity in his personal residence. He received a subject letter from the USAO shortly after March 15, 2004 followed quickly by the KPMG form letter that said it would pay his legal expenses in connection with the investigation, up to $400,000, provided he cooperated with the government.

Mr. Watson had been a witness before the Senate subcommittee in November 2003. He understood that the Senate staff viewed him as a whistleblower and that he had nothing to fear. He soon learned, however, that the USAO viewed him differently. Nevertheless, after receiving the subject letter, he asked his attorneys to reach out to the government and to offer to speak to them, which he did for the first time on April 1, 2004. He did so voluntarily because he "felt that the government misunderstood [his] involvement . . . and that if [he] went in, [he] could clear up that misunderstanding and convince them not to indict [him]."

Mr. Watson was greatly disappointed by his reception at the USAO. He left the meeting thinking that it had gone "very poorly" and "felt sick about it." After consulting with counsel, he concluded that he "did not want to return for . . . further proffer sessions." Nevertheless, he returned for two subsequent proffer sessions. He testified that he did so because he could not afford to pay for what he regarded as an adequate defense and felt compelled to return in order to avoid KPMG cutting off payment of his legal fees.

The government has sought to suggest that Mr. Watson returned for the second and third proffer sessions in order to explore the possibility of a cooperation agreement or some other negotiated arrangement that would limit his criminal exposure. But the argument ultimately is not persuasive on the critical point in issue, which is whether he returned voluntarily.

Having considered the evidence and observed Mr. Watson on the stand, the Court credits his testimony that he returned for the second and third proffer sessions only because he felt compelled to do so by KPMG's having conditioned payment of his legal fees on his cooperating with the prosecutors. Once he returned for those sessions, he no doubt sought to achieve the best possible outcome. But that does not undercut the conclusion that KPMG coerced his appearance by conditioning payment of his legal fees on his appearance and cooperation. Moreover, given Mr. Watson's financial situation, the Court finds that KPMG's condition left him with no practical choice but to cooperate.

The Court recognizes that the criminal process often requires defendants and prospective defendants to make hard choices among unpalatable alternatives and that there often is nothing wrong with this. What distinguishes this case is that the government here coerced KPMG to apply pressure to Mr. Watson and other individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain. That goes beyond the bounds of appropriate government action. . . .

This is not the end of the analysis. The Fifth Amendment "restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government." Accordingly, defendants Smith and Watson are entitled to suppression only if the actions of KPMG in coercing the statements in question are fairly attributable to the government.

As the Supreme Court has explained, action by a private entity is "fairly attributable" to the government where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Such a nexus exists either "(1) where the state 'has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice [by the private actor] must in law be deemed to be that of the State;' or (2) where 'the private entity has exercised powers that are traditionally the exclusive prerogative of the State.'" In other words, state action will be found where the government commands or significantly encourages a private entity to take the specific action alleged to violate the Fifth Amendment, as well as where the government is "entwined" in the management or control of specific conduct at issue. . . .

Here, the government quite deliberately precipitated KPMG's use of economic threats to coerce the proffer statements in question. "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO." The Thompson Memorandum, moreover, made it clear that a company's failure to ensure that its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor of indicting the company. The USAO knew that KPMG would apply additional pressure, beyond the threatened cut-off of legal fees, to "uncooperative" employees. Indeed, it reported them to KPMG in circumstances in which there was no conceivable reason for doing so except to facilitate the firing threats that ensued. . . .

The ultimate question here is whether "the state 'has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed

to be that of the State.'" This Court finds that the government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government "and the *specific* conduct of which" the Moving Defendants complain. KPMG's actions in this regard are "fairly attributable" to the United States.

Many companies faced with allegations of wrongdoing are under intense pressure to avoid indictment, as an indictment—especially of a financial services firm—threatens to destroy the business regardless of whether the firm ultimately is convicted or acquitted. That is precisely what happened to Arthur Andersen & Co., one of the world's largest accounting firms, which collapsed almost immediately after it was indicted—and the Supreme Court's eventual reversal of its conviction did not undo the damage. So any entity facing such catastrophic consequences must do whatever it can to avoid indictment.

The DOJ and other federal agencies have capitalized on this, in part by altering the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished. The Thompson Memorandum is a part of this change. In cases involving vulnerable companies, the pressure exerted by it and by the prosecutors who apply it inevitably sets in motion precisely what occurred here—the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.

In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick—it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made. In seven, the evidence does not warrant that conclusion. The coerced statements and their fruits must be suppressed.

UNITED STATES v. CONNOLLY, 2019 WL 2120523 (S.D.N.Y. May 2, 2019)

COLLEEN McMAHON, Chief Judge

[Gavin] Black moves for relief under *United States v. Kastigar*, 406 U.S. 441 (1972), on the basis that statements obtained by his employer, Deutsche Bank AG ("Deutsche Bank"), in the course of what purported to be an internal investigation into the possible manipulation of the London Inter-Bank Offered Rate ("LIBOR"), are fairly attributable to the Government within the meaning of *Garrity v. New Jersey*, 385 U.S. 493 (1967). . . .

Black has made a rather convincing showing that Deutsche Bank and its outside counsel, Paul Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), were *de facto* the Government for *Garrity* purposes; more important, the Government has made an utterly unpersuasive case in rebuttal. There remain holes in the record, however, and a full-bore *Garrity* hearing would be a fascinating exercise—especially because there are profound implications if the Government, as has been suggested elsewhere, 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. The Court is deeply troubled by this issue.

But the Court is not eager to put the parties through a purely academic exercise. And in this case, holding a *Garrity* hearing would be a purely academic exercise because, even if Deutsche bank and Paul Weiss were agents of the Government, Black's *Kastigar* rights were not violated. The motion is, therefore, denied. . . .

In or about October 2008, the United States Commodity Futures Trading Commission ("CFTC") opened an investigation into LIBOR manipulation by two financial services firms—Barclays PLC ("Barclays") and UBS Group AG ("UBS")—both of which were LIBOR panel submitting banks.

In 2010, the Government started looking at another LIBOR panel member, Deutsche Bank. The United States Securities and Exchange Commission ("SEC") was the first federal agency to open an investigation into Deutsche Bank's role in LIBOR manipulation. The Bank retained Paul Weiss sometime in "early 2010" to respond to the SEC's inquiry.

On April 19, 2010, the CFTC sent a letter to Deutsche Bank's General Counsel for the Americas, Joseph Polizzotto, stating that it, too, intended to look into whether Deutsche Bank had submitted false or misleading LIBOR reports. The CFTC advised Deutsche Bank that it "expect[ed]" the Bank to "cooperate fully" with its investigation. It then went on to explain exactly what cooperation would look like:

> Accordingly, the Division requests that Deutsche Bank Securities Inc. (and its parent, subsidiaries, affiliates and divisions, collectively referred to as "Deutsche Bank") voluntarily conduct by external counsel a fall review of Deutsche Bank's U.S. Dollar LIBOR reporting for the relevant time period, and report on an on-going basis the results of that review to the Division, with the review to be completed by no later than September 1, 2010. Further, the Division requests that Deutsche Bank certify that it was in compliance with the Act and Regulations with respect to its reporting of LIBOR and related trading.

Appended to the CFTC's letter was a CFTC Enforcement Advisory Memorandum titled "Cooperation Factors in Enforcement Division Sanction Recommendations." This memorandum stated that a corporate cooperator might receive cooperation credit if, among other things, it "utilize[s] all available means to [ ] make employee testimony or other relevant corporate documents available in a timely manner." It also noted that the quality of a corporation's cooperation might depend upon whether the company "avoid[ed] entering into joint defense agreements with counsel for employees[.]"

Deutsche Bank expanded Paul Weiss's representation to include conducting the so-called "voluntary" investigation that was demanded (not requested) by the CFTC. According to Walter Ricciardi, the Paul Weiss partner who headed the Bank's internal investigation into LIBOR from its inception until January 2013, there was nothing "voluntary" about the investigation that followed the CFTC letter; given the draconian consequences that would likely ensue if it did not accept the agency's invitation, Deutsche Bank's only choice was about its "level of cooperation" with the Government, not about whether to cooperate. Accordingly, Deutsche Bank immediately decided that it would go all-in with cooperation.

On the record presently before the Court, it is clear enough that, for five years, Deutsche Bank and its outside counsel coordinated extensively with the three Government agencies—the SEC, the CFTC, and eventually the United States Department of Justice ("DOJ")—that were looking into possible LIBOR manipulation. Indeed, it is apparent that the Government was kept abreast of developments on a regular basis, and that the federal agencies gave considerable direction to the investigating Paul Weiss attorneys, both about what to do and about how to do it. The issue raised by Black's motion is just exactly how much the investigation conducted by Paul Weiss was a substitute for investigative efforts by Government attorneys.

In the early days of the CFTC's investigation, counsel for Deutsche Bank and the CFTC held a series of telephone meetings during which they laid out the framework for the Bank's initial investigatory steps. The CFTC proposed, and Deutsche Bank expressly agreed, to take certain immediate actions, including specifically, "Interview[ing] [ ] all relevant Bank staff, including those who had knowledge/approval/over sight of, input on or discussions regarding the setting and submission of the Bank's LIBOR[.]"

In a letter "set[ting] forth" the actions Deutsche Bank had "agreed" to undertake, the CFTC also conveyed the Government's expectation that counsel would regularly provide updates on its internal investigation:

> [A]s we discussed, the CFTC and the SEC further envision regular updates, initially occurring weekly, from Counsel concerning the status and progress of the internal investigation, These updates will include simultaneous productions of responsive documents and information uncovered in the internal investigation.

The Court will assume that the CFTC and SEC received the weekly reports demanded in the July 14, 2010 letter, especially since Ricciardi testified that, while he did not recall the CFTC's specific request for ongoing updates, he "probably didn't pay much attention to it because that's just the standard way it's always done."

At the same time that the CFTC opened its investigation, the DOT submitted an "Access Request Letter" to the CFTC, asking it to provide DOJ with all documents it obtained as part of its investigation into LIBOR manipulation generally. As a result of this access request letter, DOJ ultimately "received [from CFTC] hundreds of thousands of documents throughout the course of its investigation of Deutsche Bank[.]"

On November 4, 2010, Paul Weiss lawyers and representatives of Deutsche Bank's legal department met in person with CFTC representatives in order to provide a summary of the Bank's investigation to date. Prior to that meeting, Paul Weiss lawyers had conducted telephone interviews with several people at Deutsche Bank who ended up being part of this case, including James King and Michael Curtler (both of whom eventually testified at Black's trial). They had also interviewed David Nicholls, an individual who oversaw Deutsche Bank's global finance and currency forward-trading desks horn London.

At the November 4 meeting, the CFTC "asked" (*i.e.*, instructed) Paul Weiss to "interview King, Curtler, and Nicholls again, this time in person, before Thanksgiving, *and that at the same time, to the extent* [*Paul Weiss*] *learn*[*s*] *that King or Curtler regularly interact with or obtain information from others, on the same desk or other desks*, [*Paul Weiss*] *interview those individuals as well*[.]") Deutsche Bank identified Gavin Black as

an individual who fell within the parameters of the Government's interview request. The Government concedes "for the purposes of this motion" that the "certain employees" it expected Paul Weiss to interview included Gavin Black.

Paul Weiss lawyers, acting on behalf of Deutsche Bank, interviewed Black on November 22, 2010. Black did not have discretion to refuse to talk to the investigative team. Deutsche Bank's employee policy, titled "Global Compliance Core Principles," provides 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." Although the policy did not explicitly provide for termination if employees did not comply—it only states, "Employees who violate Deutsche Bank's policies *may* be subject to disciplinary action up to and including termination of employment[ ]"—Ricciardi testified, credibly, that any employee who did not cooperate with the investigation would have lost his job. Moreover, Black himself has submitted a declaration in which he avers that "[he] did not believe that [he] had any choice but to agree to meet with Paul Weiss lawyers and answer their questions [,]" and that, "had [he] refused to do so, it would have resulted in [his] termination from Deutsche Bank." In light of Ricciardi's testimony, Black's subjective understanding is what any reasonable employee of Deutsche Bank would have understood.

As the Paul Weiss investigation continued, Deutsche Bank representatives and counsel continued to update the Government about their findings and coordinate next steps, as to Black and others. The Government gave Deutsche Bank/Paul Weiss marching orders during these meetings. For example, on December 4, 2014, a Government official directed Roberto Finzi, a Paul Weiss partner, to "approach [an employee] interview as if he were a prosecutor"—a request with which Finzi complied by giving his "word." It is not clear whether the Government followed a similar protocol with respect to some or all of Paul Weiss's earlier interviews of Deutsche Bank employees. Other evidence indicates that the UK FCA—which was conducting a LIBOR investigation of its own—required Paul Weiss to provide it with an "interview plan and a list of documents" before it was permitted to interview another Deutsche Bank employee.

Nonetheless, the Court has only a limited picture of Black's interactions with Paul Weiss and Deutsche Bank. It knows even less about the Government's role in those interactions.

Paul Weiss lawyers interviewed Black a second time on August 25, 2011 and a third time on June 19, 2012. Black was not represented by counsel at either of these interviews—just as he had not been represented at the November 22, 2010 interview. Nor does it appear that he was provided with any advance information about what to prepare (or be prepared for) at these interviews. He was given standard *Upjohn* warnings at all interviews.[1]

[1] An "*Upjohn* warning" is the notice an attorney (in-house or outside counsel) provides a company employee to inform her that the attorney represents only the company and not the employee individually. An attorney cautions a company employee with an *Upjohn* warning when the company is involved in litigation or conducting an internal investigation. Providing an employee with an *Upjohn* warning should

make it clear that:

> • The attorney-client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company.
>
> • The company may choose to waive the privilege and disclose what the employee tells the attorney to a government agency or any other third party.

The term originated with *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that the attorney-client privilege is preserved between the company and its attorney when its attorney communicates with the company's employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege.

. . . After the Bank interviewed Black for the third time in 2012, its lawyers met with the Government in person to provide a "download," meaning an exhaustive summary, of Black's statements to Paul Weiss attorneys. Government notes from the "download" meeting corroborate the version of events that Ricciardi subsequently provided to the Government, *viz*, that Black's interviews with Paul Weiss largely consisted of his denying any wrongdoing. They also reflect some willingness by Paul Weiss to help the Government investigate Black, should it ever come to that point:

> Gavin, if you choose to interview him, may recall only one or two e-mails presented before him; beyond that he does not recall any email exchanges. He will be exceptionally clear and straightforward with his answers. That said, he does not recall communication entirely. At best 3-4 occasions, which the emails may cover, are recalled. [O]ne communication where a setter asks: "Any Requests" Black would not interpret this to be soliciting a LIBOR request at that time, nor would he see anything wrong with that statement today. There is no nefarious meaning behind it, he would say.

According to Black's counsel, the Government ultimately used the information it learned from this "download" meeting to question Black during his proffer session, which took place in London on October 1, 2013—long after Deutsche Bank, through Paul Weiss, had interviewed Black and then relayed his statements to the Government.

On September 9, 2014, as the Bank's internal investigation was drawing to a close, Deutsche Bank's counsel sought the Government's "permission" to interview Gavin Black, who still worked at the Bank, for a fourth time—which is to say, Deutsche Bank *asked the Government for "permission" to interview its own employee.* The Government asserts in its brief that Paul Weiss interviewed Gavin Black on December 4, 2014, at which interview Black was represented by counsel. While the Government does not provide a citation to the record to support this assertion, and the Court has not located other evidence to corroborate this assertion, it will accept the Government's representation.

On January 21, 2015, Paul Weiss submitted a report, known colloquially as the Paul Weiss "White Paper," summarizing the findings of its LIBOR investigation and laying out a roadmap of the case against Deutsche

Bank and various individuals who worked for the Bank.

Among other things, the White Paper provides an exhaustive overview of the Bank's substantial cooperation with the Government during its LIBOR investigation. 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 850,000 audio files, or over hundreds of thousands of hours of audio tapes. . . .

When all was said and done, the LIBOR investigation was the largest and most expensive internal investigation in the respective histories of both Deutsche Bank and Paul Weiss.

But the investigation was a conspicuous success for Deutsche Bank. On April 23, 2015, Deutsche Bank entered into a deferred prosecution agreement ("DPA") with DOJ, under which Deutsche Bank agreed to (*i*) pay $ 775 million in criminal penalties; (*ii*) continue cooperating with the Government in its ongoing investigation; and (*iii*) retain a corporate monitor for the three-year term of the agreement. In addition, one of Deutsche Bank's subsidiaries, Deutsche Bank Group Services (UK) Limited, agreed to plead guilty to one count of wire fraud and pay its own fine. (*Id.*) . . .

One critically important issue is just what the Government was doing during the five years between the sending of the CFTC's April 2010 letter and Deutsche Bank's eventual entry into a DPA with DOJ on April 23, 2015. Did the Government conduct a substantive parallel investigation to the "internal" investigation at Deutsche Bank, or did it simply give direction to Deutsche Bank/Paul Weiss, take the results of their labor (which appears to have been fully disclosed to Government lawyers), and save itself the trouble of doing its own work?

On the record presently before it, the Court would have to conclude the latter. The Government—which has never treated this matter with the seriousness it deserves—did not provide the Court with much information about any independent investigative activities it may have undertaken during those years. Indeed, it has declared that it has no need to do so.

The Government—first the SEC on April 4, 2010, then the DOJ on June 27, 2011—subpoenaed Deutsche Bank for documents. However, the Government does not appear to have interviewed any witnesses from Deutsche Bank—at least, not until after Paul Weiss interviewed those witnesses and passed information gleaned from those interviews on to the Government—or taken any investigative depositions, or reviewed anything that had not first passed through the maw of Paul Weiss's five-year, $10 million investigative machine and been fully digested for the Government by the target of the investigation. . . . It is hard not to conclude that the Government did not conduct a single interview of its own without first using a road map that Paul Weiss provided—illuminating just how the Government should "investigate" the case against certain Deutsche Bank employees, including Black. . . .

The Fifth Amendment provides in relevant part, "No person . . . shall be compelled in any criminal case to be

a witness against himself." U.S. Const. amend. V. An individual claiming a violation of the privilege against self-incrimination must prove that the statements at issue were both the product of coercion and attributable to the government.

In *Garrity*, the Supreme Court held that the statements obtained from police officers under threat of termination of employment were involuntary and therefore inadmissible against them in a criminal trial. Justice William O. Douglas, writing for the majority, reasoned that the "fear of being discharged under [New Jersey's public employment forfeiture statute] for refusal to answer on the one hand and the fear of self-incrimination on the other hand was 'a choice between the rock and the whirlpool,'" *id.* at 496 (quoting *Stevens v. Marks*, 383 U.S. 234, 243 (1966)). Subjecting employees to that Hobson's choice violates the Constitution.

While *Garrity* involved the conduct of a government employer, the *Garrity* rule applies with equal vigor to private conduct where the actions of a private employer in obtaining statements are "fairly attributable to the government." *United States v. Stein*, 541 F.3d 130, 152 n.11 (2d Cir. 2008) ("*Stein II*"). Private conduct is attributed to the government when "there is a sufficiently close nexus between the state and the challenged action." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (internal quotation marks and citation omitted); *Stein II*, 541 F.3d at 146–47.

As the Second Circuit explained in *Stein II*, a close nexus of state action exists between a private entity and the state when a governmental actor (*i*) exercises coercive power; (*ii*) is entwined in the management or control of the private actor; (*iii*) provides the private action with significant encouragement, either over or covert; (*iv*) engages in a joint activity in which the private actor is a willful participant; (*v*) delegates a public function to the private actor; or (*vi*) entwines the private actor in governmental policies.

It is not enough, however, that there be a close nexus between the state and the actions undertaken by a private entity; the Government must influence the specific conduct of which the party complains. The "controlling factor" is not whether the state directed the constitutionally prohibited conduct, but whether the state "involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement." *United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 415 (2d Cir. 1974), *cert. denied*, 419 U.S. 1027 (1974). The defendant bears the initial burden of showing that his interview statements are subject to *Garrity* protection.

There is no question in the Court's mind that Black was compelled, upon pain of losing his job, to sit for at least three, probably four, interviews with Paul Weiss. Ricciardi testified that the "choice" facing an employee asked to sit for an interview "is to cooperate or find new employment, basically[.]" Black has stated that "[he] did not believe that [he] had any choice but to agree to meet with Paul Weiss lawyers and answer their questions[,]" and that, "had [he] refused to do so, it would have resulted in [his] termination from Deutsche Bank." . . . As a result, the only real issue for the Court to consider under *Garrity* is whether Deutsche Bank's internal investigation—and, specifically, the investigatory steps it took with respect to Gavin Black—can be attributed to the Government. . . .

The record, which is limited (the responsibility for which falls squarely on the Government), contains compelling evidence that Deutsche Bank's investigation is fairly attributable to the Government. Among other things, it suggests that the Government directed Deutsche Bank to investigate Gavin Black on its behalf. The Bank's first interview of Black was conducted at the behest of the Government. Although there is no evidence either way about whether the fruits of that interview were shared with the Government agencies investigating Deutsche Bank, it is plausible—if not likely—that they did, since the record reflects that Paul Weiss was eager to share information about Black's subsequent two interviews. Record evidence also establishes that, as Deutsche Bank's investigation progressed, the Government continued to discuss Black by name in meetings with Bank investigators. All of this occurred well before any representative of the Government made any effort to speak with Black; that did not occur until the fall of 2013, three and a half years after Deutsche Bank's "internal" investigation began.

Of course, it is not enough under *Garrity* that Deutsche Bank's investigation was *generally* fairly attributable to the Government. The Bank's interviews of Black must have been Government-engineered interviews. The evidence certainly points in that direction. There is no evidence suggesting that Black's interviews were conducted on some different footing than were the interviews of other Deutsche Bank employees. During the period when Paul Weiss conducted the first three (of four) interviews of Black, the Government told Deutsche Bank whom to interview and when. It told Deutsche Bank to interview Gavin Black. Moreover, even as late as 2014—when the investigation was in its fourth year—the Government was still directing Paul Weiss's activities. When Paul Weiss wanted to interview Gavin Black on September 9, 2014, it sought the Government's permission to do so. And the Government did not simply give permission; it directed an experienced Paul Weiss partner and former Assistant U.S. Attorney for the Southern District of New York on the precise manner in which he should ask his questions. For its part, rather than simply producing documents and providing interview summaries, Paul Weiss, in full (and understandable) aid of its client's (*i.e.*, Deutsche Bank's) interests, digested the vast information it collected, highlighted the most important nuggets, and shared a blueprint for what prosecutors should expect should they finally interview Black on their own. Not surprisingly, when it came time to resolve its case against Deutsche Bank, the Government credited Paul Weiss for its extensive support of its own investigative efforts.

The only conclusion one can draw from this evidence is that, rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation—and then built its own "investigation" into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the Bank and its lawyers. This was no ordinary "outside" investigation. Deutsche Bank did not respond to the Government's subpoenas by turning over documents without comment, and its employees were not subjected to government or regulatory depositions on notice, at which they were defended by company counsel. Indeed, Deutsche Bank did the opposite—it effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies. . . .

Having declined to offer much by way of evidence, the Government falls back on strained legal and policy arguments that are not just unconvincing, but unworthy.

The Government (repeatedly) argues, for example, that Deutsche Bank could not have shared a close enough nexus with the Government, because its fiduciary duty diverged from the Government's, in that Deutsche Bank—as a public company—owed its duty to shareholders, and Paul Weiss—as counsel to Deutsche Bank—owed a duty of loyalty to its client. It is hard to take this argument seriously.

The Second Circuit noted in *Stein II* that, "The threat of [ruinous indictment] brings significant pressure to bear on corporations, and that threat 'provides a sufficient nexus' between a private entity's employment decision at the government's behest and the government itself." *See Stein II*, 541 F.3d at 151 (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 367 (2007)). According to Ricciardi, Deutsche Bank was facing the threat of ruin, such that the only "choice" facing Deutsche Bank when it received the CFTC's letter was the "level of cooperation" it would provide to the Government—because not cooperating was not an option. Viewed in that light, the CFTC's request that Deutsche Bank conduct a "voluntary" investigation was a classic "Godfather offer"—one that could not be refused. And Deutsche Bank's interest in cooperating was perfectly aligned with the Government's interest in outsourcing its investigative functions (if that is indeed what occurred in this case). This massive amount of pressure is highly relevant to any assessment of the sufficiency of the nexus between the Government and Deutsche Bank's "internal" investigation. . . .

Finally, the Government urges that the Court must not conclude that there was a sufficiently close nexus between it and Deutsche Bank, because doing so will hamper law enforcement by curtailing the Government's ability to encourage cooperation, which will prove a bad idea as a matter of policy.

The Court does not doubt that it saves the Government considerable time and precious resources to permit counsel for the target of an investigation to do the heavy lifting of ferreting out the truth—especially in a case like this one, which is so large, technical, and complicated. But this is a court of law, not a court of policy. The Court is not concerned with whether the outsourcing of investigations to private parties makes life easier for the Government or for the taxpayers; it is concerned with the protection of the defendant's constitutional right against self-incrimination, and so with the constitutional implications, if any, of such outsourcing. That concern trumps the Government's interest in convenience.

In conclusion, given the Government's deliberate choice not to create a record that would allow for a contrary finding, the record presently before the Court establishes that the Government violated *Garrity*, because Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the Government. . . .

As stated earlier, the Fifth Amendment prevents the Government from making any use, direct or indirect, of a defendant's compelled statements. The Government must affirmatively prove by a preponderance of the evidence that the evidence it "used" was derived from a source that was "wholly independent" of Black's compelled testimony. Prohibited "uses" of compelled testimony include "obtaining [an] indictment" based on tainted evidence, *Hubbell*, 530 U.S. at 45; "preparing [the Government's case for trial," *id.*; and presenting tainted evidence to the grand jury. *Poindexter*, 951 F.2d at 377. *Kastigar* does not, however, encompass "merely tangential" non-evidentiary uses of compelled testimony, *Rivieccio*, 919 F.2d at 815 & n.3, such as

evidence that does not "influence[ ] the [G]overnment's decision to pursue its line of investigation." *Nanni*, 59 F.3d at 1432.

None of Black's interview statements was introduced into evidence at his trial. In fact, the Government, in view of the looming *Garrity/Kastigar* issue, declined to call Ricciardi as a prosecution witness at the last possible moment—which it initially planned to do for the sole and exclusive purpose of getting Black's false denials before the jury, so the Government could argue that they were completely at odds with the literal text of his emails and chats.

Nor did the Government make indirect use Black's false exculpatory statements at trial. There is not a single item of trial evidence that would not have come in but for Black's interview statements to Paul Weiss. Black does not identify, and the Court cannot find, a single question that was asked that otherwise would not have been asked. . . .

The Government thus did not violate *Kastigar* at Black's trial.

The Government also did not make direct or indirect use of any of Black's interview statements before the grand jury. As found in the Court's Order Denying the Pretrial Motion of Defendant Gavin Black to Dismiss the Indictment for Alleged Violations of *Kastigar*, dated May 29, 2018, the Government identifies an independent source other than Black's interviews (whether with the UK FCA or with Paul Weiss) for everything that FBI Special Agent Jeffrey Weeks (the only grand jury witness) presented to the grand jury—either in the form of documents, cooperators, or information received from Deutsche Bank. Indeed, in connection with the Court's prior *Kastigar* opinion, the Court reviewed the Government's alternative source material for *every line* of grand jury testimony; all were accounted for, and none derived, directly or indirectly, from Black. . . .

Even assuming that the Government violated *Kastigar*, any such *Kastigar* violation would constitute harmless error. . . .

The Government has persuaded the Court that any improper use of Black's compelled statements was harmless. As should be readily clear to the parties by now, the Court having sat through a lengthy trial and reviewed the evidence on numerous occasions—does not doubt that Black would have been indicted and convicted even if Paul Weiss lawyers had never spoken to him. The evidence that the Government obtained against Black from its many independent sources was overwhelming.

Problem 12-1

Both *Stein* and *Connolly* found state action, but the cases ultimately had very different outcomes. What are the key factual differences that resulted in the coerced statements in *Stein* being granted use immunity (perhaps even derivative use immunity), yet the statements in *Connolly* were still admissible?

Here is a civil lawsuit in which fired employees tried to get mileage out of the same reasoning pursued in the above district court opinions. The Second Circuit opinion here suggests that the *Stein* and *Connolly* reasoning might be limited to certain kinds of facts.

GILMAN v. MARSH & McLENNAN COS., INC., 826 F.3d 69 (2d Cir. 2016)

DENNIS JACOBS, Circuit Judge:

Faced with the prospect of criminal indictment premised on the actions of two employees, a company demanded that those employees explain themselves under the threat of termination. They refused, were fired, and in this suit seek to recover employment benefits they lost by termination. . . .

In April 2004, the New York Attorney General (the "AG") began investigating "contingent commission" arrangements by which insurance brokers were thought to be steering clients to particular insurance carriers. Marsh, as one of the brokers under investigation, retained outside counsel, Davis Polk & Wardwell LLP, to conduct an internal investigation of the AG's allegations. The internal investigation included interviews with Gilman and McNenney in the spring and summer of 2004.

The focus of the AG investigation shifted, in September 2004, to an alleged bid-rigging scheme involving Marsh and several insurance carriers. On October 13, 2004, two individuals at American International Group, Inc. ("AIG") pleaded guilty to felony complaints charging them with participation in a bid-rigging scheme with Marsh. In the allocution of one of the AIG employees, Gilman and McNenney were identified as co-conspirators. The next day, the AG filed a civil complaint against Marsh for alleged fraudulent business practices and antitrust violations.

The fallout from the civil complaint was swift and severe. Marsh's stock price plunged, a raft of private civil suits were filed, and Marsh's directors, clients, and shareholders demanded answers to the bid-rigging allegations. Marsh responded by expanding the ongoing internal investigation; on October 19, 2004, Marsh suspended Gilman and McNenney (with pay). More or less at the same time, Marsh's counsel asked Gilman and McNenney to sit for interviews and warned that failure to comply would result in termination. Gilman was asked to interview with a lawyer from Davis Polk as soon as possible. McNenney alleges that he was asked to submit to an interview with a lawyer from the AG and that he was told to do so without presence of counsel. (Marsh vigorously denies that McNenney was asked to interview with the AG, let alone to do so without counsel.)

On October 25, 2004, the CEO of Marsh's parent company resigned and was replaced by Michael Cherkasky. The same day, Cherkasky met with Eliot Spitzer, then-Attorney General of New York, to discuss the investigation. Gilman and McNenney contend that the upshot of the meeting was that the AG would forgo criminal prosecution of Marsh itself in exchange for its cooperation with the AG's investigation, including waivers of attorney-client privilege and work-product immunity for information developed in the (expanding) internal investigation. That day, an AG press release announced that a civil proceeding would suffice to punish and reform Marsh, and that criminal prosecutions arising out of the alleged bid-rigging scheme would be limited to individuals. This press release was widely understood to mean the AG would indict Gilman and

McNenney—as it eventually did.

By the time of the October 25 meeting and agreement between Cherkasky and Spitzer, neither Gilman nor McNenney had complied with Marsh's counsel's requests that they sit for interviews. On October 27, 2004, McNenney's attorney conveyed McNenney's refusal to Davis Polk; Marsh fired him the next day. On October 28, 2004, Gilman's attorney scheduled an interview for his client on November 2. But on November 1, 2004, Gilman submitted paperwork purporting to effectuate an early retirement; later that day, his attorney conveyed Gilman's refusal to be interviewed. Marsh fired Gilman the next day, and did not accept Gilman's purported retirement.

As Marsh employees, Gilman and McNenney were eligible for some valuable employment benefits. Under Marsh's Stock Award Plans, they received grants of stock options, stock bonus units, and/or deferred stock units, some of which they could have been entitled to upon termination if (for example) they had retired or were fired without cause. If, however, they were terminated "for cause," any unvested stock benefits were forfeited. Under Marsh's ERISA-governed Severance Pay Plan, Gilman and McNenney were entitled to severance if, inter alia, they remained in good standing with Marsh on their last day of work and if their employment terminated (i) because they lacked job skills, or (ii) in connection with a restructuring, or (iii) because Marsh had eliminated their position. An otherwise-eligible employee whose employment was terminated "for cause" was not entitled to severance. Marsh took the position that it fired Gilman and McNenney "for cause," and denied them unvested, deferred compensation as well as severance.

As relevant here, Gilman and McNenney sued Marsh to obtain the lost employment benefits, alleging violations of ERISA, breach of contract, and breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Marsh, concluding that the interview requests were reasonable, that Gilman's and McNenney's refusal to sit for interviews gave Marsh cause for termination, that Marsh did in fact fire them for cause (and did not breach the implied covenant), and that Gilman's purported retirement was ineffective. Gilman and McNenney appeal. . . .

The first question is whether the demand that Gilman and McNenney submit to interviews was reasonable as a matter of law. If so, Marsh had cause to fire them and deny them employment benefits. If not, Gilman's and McNenney's claims against Marsh for benefits should have withstood summary judgment. We conclude that the interview demands were reasonable as a matter of law because at the time they were made, Gilman and McNenney were Marsh employees who had been implicated in an alleged criminal conspiracy for acts that were within the scope of employment and that imperiled the company. The second question is whether there is a triable issue of fact as to whether Marsh fired them for cause. We conclude that there is not and reject the argument that Gilman and McNenny were let go routinely as part of a reduction in force and the argument that Gilman could not be fired because he had preemptively resigned. Finally, we reject Gilman's and McNenney's contention that, in light of Marsh's cooperation with the AG, Marsh's requirement that they answer potentially incriminating questions amounted to state action, and was thus unreasonable. Accordingly, Marsh had cause to fire them, as it did, and Gilman and McNenney are entitled to none of the employment benefits they seek.

Under Delaware law, which governs Marsh's employment contracts with Gilman and McNenney, "cause" for termination includes the refusal to "obey a direct, unequivocal, reasonable order of the employer." *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1268 (Del. 1981). Gilman and McNenney do not dispute that Marsh's orders that they sit for interviews were direct and unequivocal. So the decisive issue is whether the orders were reasonable.

When Gilman and McNenney were named as co-conspirators in a criminal bid-rigging scheme for their conduct *as Marsh employees*, it was obvious (as Gilman and McNenney themselves affirmatively argue) that the AG intended to prosecute them criminally. At that time, Marsh had sufficient basis to act on the allegations, made under oath in open court, and would have had cause to terminate Gilman and McNenney, regardless of the ultimate resolution of the allegations. . . . If Marsh had indeed fired them then, it would have been for cause, and Gilman and McNenney would for that reason have been ineligible for the employment benefits they currently seek. It is difficult to see how their claims for benefits improved because Marsh instead gave them the chance to explain themselves, and they refused to comply.

Marsh was presumptively entitled to seek information from its own employees about suspicions of on-the-job criminal conduct. Marsh could take measures to protect its standing with investors, clients, employees, and regulators. Marsh also had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company. And as corporate officers, Gilman and McNenney had a duty to Marsh to disclose information they had about the AG's allegations.

Marsh's demands placed Gilman and McNenney in the tough position of choosing between employment and incrimination (assuming of course the truth of the allegations). But though Gilman and McNenney "may have possessed the personal rights to [not sit for interviews], that does not immunize [them] from all collateral consequences that come from [those] act[s]," including leaving Marsh "with no practical option other than to remove [them]." *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1077 (Del. Ch. 2004). "[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end." *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975). Marsh had to use the "sanction of discharge for refusal to answer," id., because in the absence of an exculpatory explanation, Marsh needed to assume the worst: that the bid-rigging allegations were true and that Marsh was vicariously liable for their criminal conduct. . . .

Given the circumstances, Marsh's demand that Gilman and McNenney explain themselves in an interview under the penalty of termination was unassailable, even routine. It did what any other company would do, and (arguably) what any company should do. Marsh's interview demands were reasonable and it had cause to fire Gilman and McNenney for refusing to comply. . . .

Gilman and McNenney argue that Marsh's interview demands constitute state action that infringed their right against self-incrimination. This is "the legal equivalent of the 'Hail Mary pass' in football." *In re Lionel Corp.*, 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting). They advance the following argument: if Marsh's request that Gilman and McNenney sit for interviews under the penalty of termination is deemed

state action (because of Marsh's cooperation with the AG), and if that demand and threat violated their Fifth Amendment right, then Marsh's request was unreasonable as a matter of law, and their refusal to comply with the interview demands cannot support their loss of benefits.

The claim that Marsh was a state actor leans heavily on *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008); but *Stein* cannot support that weight. . . . The government's influence in *Stein* was "overwhelming" in several respects: KPMG's "survival depended on its role in a joint project with the government to advance government prosecutions," *id.* at 147; "the government forced KPMG to adopt its constricted Fees Policy," *id.* at 148; the government "intervened in KPMG's decisionmaking," *id.*; the prosecutors "steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases," *id.*; and "absent the prosecutors' involvement . . . KPMG would not have changed its longstanding fee advancement policy," *id.* at 150. Since the government steered KPMG to adopt a policy it otherwise would not have adopted, and then supervised KPMG's implementation of that policy, KPMG's conduct was found to constitute state action.

. . . Marsh had good institutional reasons for requiring Gilman and McNenney to sit for interviews or else lose their jobs: the company's stock price was sinking and its clients, directors, investors, and regulators were demanding answers about the allegations. There is no evidence that the AG "forced" Marsh to demand interviews, "intervened" in Marsh's decisionmaking, "steered" Marsh to request interviews, or "supervised" the interview requests. Nor is there evidence that the nature and scope of the pending interviews were framed by the government, or changed after Cherkasky's October 25 meeting with Spitzer. The expansion of Marsh's internal investigation was precipitated by allegations advanced by the government, but it is not a measure it would have forgone "but for" the AG's influence.

Even if, as McNenney contends, Davis Polk sought to interview him without counsel and with the AG present, that request occurred well before October 25, and McNenney adduced no evidence that Marsh's request for an interview arose out of pressure or coercion from the AG. And Marsh, which already had cause to fire McNenney, could presumably put additional conditions on its interview request anyway, as it still gave McNenney fundamentally the same choice to explain himself or be fired.

Gilman and McNenney invite us to consider that the occasion for the corporate investigation was a criminal initiative by government, and that a likely use of the internal investigation was that Marsh would offer up its findings (together with the employees' testimony) in the nature of a sacrifice to an angry prosecutor. No doubt, Marsh was compelled by circumstances to conduct an investigation (with expectation that any privileges attached to it would be waived) and that one mighty circumstance was a possible prosecution of the firm. But in the ordinary course, allegations of serious wrongdoing would provoke such an investigation, whether or not the allegations were made by prosecutors and whether or not the company itself was at risk of prosecution. The interests of prudent directors alone would justify or compel such a measure. *Stein* is properly distinguished because (among other things) KPMG had no institutional interest in stripping its employees of their chosen defense counsel and KPMG was forced to abandon a longstanding policy that it had decided to continue; it was therefore found that government compulsion was the "but for" reason for the new Fees Policy. . . .

Gilman and McNenney urge that we adopt, in effect, this categorical rule: acts that are taken by a private company in response to government action, and that have as one goal obtaining better treatment from the government, amount to state action. But a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned. A rule that deems all such companies to be government actors would be incompatible with corporate governance and modern regulation.

Problem 12-2

Recall Shirley, the hedge fund trader from the problems in Chapter 11, who walked into your office with the grand jury subpoena. Return to that initial office meeting with her again. Provide the (much more robust) advice and explanation to Shirley that you would now give at that first meeting in light of what you have learned from the materials in this chapter.

Problem 12-3

You represent a corporation under investigation for securities fraud. In an effort to obtain a non-prosecution agreement, you advise the corporation to cooperate with the DOJ and conduct a thorough internal investigation. Some of the corporation's employees may be individually implicated in the fraud and are hesitant to speak with investigators. How would you advise the corporation to proceed with its investigation, balancing your obligation to your client (the corporation) and the Fifth Amendment rights of the employees?