COMMENT

A NEW HURDLE TO INTERNATIONAL COOPERATION IN CRIMINAL INVESTIGATIONS: WHETHER FOREIGN GOVERNMENT–COMPELLED TESTIMONY IMPLICATES THE PRIVILEGE AGAINST SELF-INCRIMINATION

JENNIFER REICH†

† Alumni Editor, *University of Pennsylvania Law Review*, Volume 166. Carey J.D./M.B.A. Program, 2019, University of Pennsylvania Law School and The Wharton School of Business; B.A., 2013, Barrett Honors College at Arizona State University. Thank you to Professor Linda Hoffa, Alyssa Lattner, Paul Stephan, and the editors of the *University of Pennsylvania Law Review*, for their invaluable edits, comments, and insights. Thank you also to my parents, Daniel Reich and Magda Lopez, my brother Max, and Emeritus Professor Jack Crittenden for fostering my interests and intellectual growth, and without whose support I would not be here. All mistakes herein are mine.

INTRODUCTION

As globalization has fostered increasing cross-border crime, so too has it triggered increasing international law enforcement cooperation. Government leaders like former FBI Director James Comey,[1] former SEC Chair Mary Jo White,[2] former Attorney General Loretta Lynch,[3] and Republican Senator Orrin Hatch[4] have all emphasized the urgency of such expansion in numerous

1 *See, e.g.*, James B. Comey, Director, FBI, Confronting the Cyber Threat (Nov. 18, 2015), https://www.fbi.gov/news/speeches/confronting-the-cyber-threat [http://perma.cc/X59Y-4UPU] ("[W]e're going to deploy more of our people around the world. We're going to push our analysts, and our cyber agents, our experts, to more and more places around the world—because even though this is an infrastructure-, a fiber-optic-based threat, those physical relationships, especially with our foreign partners where the keyboards may sit in their jurisdictions, matter tremendously."); James B. Comey, Director, FBI, The FBI's Approach to the Cyber Threat (Aug. 30, 2016), https://www.fbi.gov/news/speeches/the-fbis-approach-to-the-cyber-threat [https://perma.cc/294C-NQK2] ("[W]e're trying to forward deploy far more cyber agents and cyber analysts and have them sit with our foreign partners."); James B. Comey, Director, FBI, Fighting Terrorism in the Digital Age (Nov. 3, 2014), https://www.fbi.gov/news/speeches/fighting-terrorism-in-the-digital-age [http://perma.cc/U9B4-6FPU] ("[W]e have to work together with our federal, state, local, and international partners to identify and stop those who are coming after us.").

2 *See, e.g.*, Mary Jo White, Chair, SEC, Securities Regulation in the Interconnected, Global Marketplace (Sept. 21, 2016), https://www.sec.gov/news/speech/securities-regulation-in-the-interconnected-global-marketplace.html [http://perma.cc/G6JZ-RD2F] ("While international cooperation and coordination have increased significantly in recent years, we still face significant challenges from laws and practices that can impede strong regulation, supervision, and enforcement. And it is incumbent upon the SEC and our international counterparts to work through these issues in a way that provides maximum cooperation and coordination and avoids regulatory arbitrage.").

3 *See, e.g.*, Loretta Lynch, U.S. Att'y Gen., Attorney General Loretta E. Lynch Addresses the 20th Annual International Association of Prosecutors Conference (Sept. 14, 2015), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-addresses-20th-annual-international-association [http://perma.cc/K6GW-LFHS] ("As we have seen time and again that collaboration is crucial, and it's why we have worked hard to strengthen the bonds we share with our partners, and to enhance cooperation in all law enforcement matters—from corruption to white collar crime and money laundering; from terrorism to cyberattacks. To achieve this end, it is essential that we have strong mechanisms for providing mutual legal assistance to each other . . . .").

4 Press Release, Senator Orrin Hatch, Release: Lynch Agrees to Work with Hatch on Republican High-Tech Task Force Priorities (Jan. 28, 2015), https://www.hatch.senate.gov/public/index.cfm/releases?ID=71B6D550-494A-4127-84E4-BB251339FB04 [http://perma.cc/4FKN-HZ5M] (highlighting the importance of the LEADS Act, sponsored by the Senator, which seeks to "promote international comity and law enforcement cooperation").

speeches and in their allocation of resources. Cases of terrorism, cybercrime, financial fraud, and corruption are forcing the U.S. government to rely increasingly on foreign partners for extraditions, evidence gathering for use at U.S. trials, parallel investigations, and informal investigative support. However, U.S. jurisprudence has not kept pace with these developments. An emerging struggle for U.S. prosecutors comes when our laws, and in particular our Constitution, clash with those of a partner country. This Comment will outline one such predicament found in *United States v. Allen*: whether the Fifth Amendment bars the admission of testimony compelled by a foreign sovereign.[5] Because there are no other cases that have addressed this specific issue,[6] this Comment will analogize to related Supreme Court precedent and other situations to theorize how other courts will and should treat foreign government–compelled testimony. Part I of this Comment will first analyze the full *Allen* hypothetical and the Second Circuit's ruling. Part II of the Comment will consider the Department of Justice's analogizing of the *Allen* situation to the Supreme Court's decision in *United States v. Balsys*[7] regarding the applicability of the Fifth Amendment in a U.S. deposition where the defendant fears criminal prosecution by a foreign government. It will address three arguments raised by the *Balsys* Court in arriving at its decision, namely 1) the textual context of the Self-Incrimination Clause, 2) the Same-Sovereign Rule, and 3) relevant policy considerations, and apply them to the *Allen* situation. Part II will then apply the *Balsys* Court's suggestion of a standard based on "cooperative internationalism," or closeness of law

5 Note that Judge Jed Rakoff of the District Court intentionally sidestepped the self-incrimination issue in the initial opinion on this case, though the Second Circuit overturned him on that basis and denied the government's request for a rehearing en banc. 160 F. Supp. 3d 684, 690 n.8 (S.D.N.Y. 2016), *rev'd*, 864 F.3d 63 (2d Cir. 2017) (acknowledging and then declining to address the issue, deciding the case on alternate grounds); reh'g en banc denied No. 16-898 (2d Cir. Nov. 9, 2017).

6 The Second Circuit cited to numerous ostensibly parallel cases in footnotes 67 and 68 of its decision as "sufficient to resolve the present dispute regarding whether compulsion by a foreign power implicates the Fifth Amendment" in favor of full Fifth Amendment protections. United States v. Allen, 864 F.3d 63, 80 nn.67–68 (2d Cir. 2017). However, those cases are all quite factually distinct from the *Allen* situation, as they focus on coercive acts by foreign governments, rather than those that might simply be considered compelled. For a full discussion on this distinction see *infra* subsection III.B.2.

Ironically, some of the same cases cited by the Second Circuit are also cited in a 2016 Congressional Research Service (CRS) report as evidence of the opposite proposition that "the Fifth Amendment self-incrimination clause and its attendant *Miranda* warning requirements do not apply to statements made abroad to foreign officials." CHARLES DOYLE, CONG. RESEARCH SERV., RL94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 28 (2016). The CRS report goes on to discuss voluntariness as a general prerequisite for admissibility, but cites to only domestic cases and those where voluntariness is in question due to torture or other acts that "shock the conscience," a materially different issue and one that does not address the involuntariness/compulsion distinction previously mentioned. *Id.* at 28-29.

7 524 U.S. 666 (1998).

enforcement cooperation, to trigger Fifth Amendment applicability. Part III of the Comment will assess 1) courts' occasional practice of assuming applicability without any discussion, 2) parallels to the case law on *Miranda* warnings and broader due process arguments, and 3) testimony compelled by Congress. Part IV will analyze the spectrum of potential standards courts could apply to the admissibility of foreign government–compelled testimony. In addition to considering six different options, from barring any self-incriminatory compelled testimony to allowing all of it, the Comment will recommend a middle path forward based on differing levels of cooperation and good faith efforts by prosecutors. Although foreign-compelled testimony enters complex legal territory, it should be allowed into evidence where the U.S. government is not acting entirely in concert with foreign officials and where U.S. officials have taken reasonable steps to avoid Fifth Amendment concerns.

I. THE PROBLEM POSED BY *UNITED STATES V. ALLEN*

In *United States v. Allen,* the Southern District of New York and the Second Circuit diverged on a highly salient issue of first impression. Anthony Allen and Anthony Conti, among others, were charged in federal court with wire fraud after they were suspected of manipulating U.S. dollar and Japanese Yen London Interbank Offered Rates[8] (LIBOR).[9] As part of an independent United Kingdom investigation into the same conduct, Allen and Conti were compelled to testify by the U.K.'s Financial Conduct Authority (FCA),[10] potentially under penalty of imprisonment.[11] U.K. regulators granted the men direct use immunity, but not derivative use immunity, a distinction disallowed under U.S. law.[12] Paul Robson, who ultimately became an

8 LIBOR is a metric to gauge interest rates for bank borrowing across different currencies and can be described as "one of the best known and most important interest rates in the world . . . . [due to] its widespread use as a benchmark for many other interest rates at which business is actually carried out." John Kiff, *What is LIBOR?*, INT'L MONETARY FUND: FIN. & DEV., Dec. 2012, at 32, 32, http://www.imf.org/external/pubs/ft/fandd/2012/12/pdf/basics.pdf [https://perma.cc/BSG5-3NY8].

9 Superseding Indictment at 33-34, *Allen*, 160 F. Supp. 3d 684 (No. 1:14-cr-00272-JSR).

10 The U.K. Financial Conduct Authority has criminal, civil, and regulatory enforcement powers. *See Enforcement*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/enforcement [http://perma.cc/H87V-HF8V]. The entity is essentially a counterpart to the U.S. Securities and Exchange Commission, but with enforcement powers that include imprisonment. *See, e.g.*, Financial Services and Markets Act 2000, ch. 8, §§ 397(1), (8)(b), http://www.legislation.gov.uk/ukpga/2000/8/pdfs/ukpga_20000008_en.pdf [http://perma.cc/GPA8-EX57] (ascribing a sentence of up to seven years imprisonment for the provision of a false or misleading statement on investments under certain circumstances, enforced by the Financial Conduct Authority).

11 *Allen*, 160 F. Supp. 3d at 688.

12 *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL § 718 (1997), https://www.justice.gov/usam/criminal-resource-manual-718-derivative-use-immunity [https://perma.cc/L58P-EV22] (discussing the Supreme Court's upholding of the federal immunity statute mandating both direct and derivative use immunity). For the purposes of this Comment, the

immunized witness in the United States, was interviewed by the FCA and, pursuant to U.K. law, provided with transcripts from Allen's and Conti's compelled interviews.[13] In response, attorneys for Allen and Conti both submitted motions asking the U.S. court to compel immunity for their clients, but they were rejected.[14] After Robson's testimony in the U.S. contributed to a successful conviction of Allen and Conti, their lawyers submitted a motion for a post-trial *Kastigar* hearing.[15] They argued that, because Robson's review of their FCA transcripts violated their Fifth Amendment rights and therefore tainted Robson's testimony in the U.S. proceedings, the charges against Allen and Conti should be dismissed.[16]

Cognizant of the potential problem, the U.S. Department of Justice (DOJ) had made clear to Robson before he testified in U.S. court that he was not to share any of the information he gleaned from Allen's and Conti's transcripts with U.S. prosecutors, and the DOJ held extensive meetings with the FCA about the need to establish a wall between the two agencies to prevent any taint of the DOJ's case.[17] In fact, the DOJ went as far as to use a separate filter team of attorneys from a different section of the Department to address issues related to the FCA depositions.[18] Of note, the potential U.S. constitutional concerns of compelled testimony had apparently been raised by defense counsel to U.K. authorities during a U.K. hearing.[19]

---

distinction between direct use and derivative use immunity presents a wrinkle in analyzing the appropriateness of using compelled testimony in U.S. courts, and highlights the reality that U.S. and foreign protections against self-incrimination do not perfectly overlap. But, this is not a primary concern of this Comment. For a fuller treatment of this issue, see generally Neal Modi, Note, *Toward an International Right Against Self-Incrimination: Expanding the Fifth Amendment's "Compelled" to Foreign Compulsion*, 103 VA. L. REV. 961 (2017).

13 *Allen*, 160 F. Supp. 3d at 689.

14 *See* Memorandum of Law in Support of Defendants' Motion to Compel the Government to Immunize Submitter-R1 and for a Rule 15 Deposition of Submitter-R1, or, in the Alternative, to Exclude Testimony from Government Witnesses at 18-19, *Allen*, 160 F. Supp. 3d 684 (No. 1:14-cr-00272-JSR); *see also* Memorandum of Law in Support of Defendants' Motion to Compel the Government to Immunize Submitter-R3, or, in the Alternative, for a Jury Instruction Regarding Submitter-R3's Testimony at 1, 13, *Allen*, 160 F. Supp. 3d 684 (No. 1:14-cr-00272-JSR).

15 "When a witness/defendant establishes [that the government used or intends to use immunized testimony to indict him or prove his guilt], a proceeding known as a *Kastigar* hearing is used to determine if the government improperly used his immunized testimony . . . . The timing of the hearing varies; many courts hold it before trial, but others defer it until during or after trial." 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 12.15 (2d ed. 2006).

16 *Allen*, 160 F. Supp. 3d at 690.

17 *Id.* at 694-95.

18 Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 2 n.1, *Allen*, 160 F. Supp. 3d 684 (No. 1:14-cr-00272-JSR).

19 Oral Argument at 31:20-32:30, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898-cr), http://www.ca2.uscourts.gov/oral_arguments.html (click on "2017" and scroll to Jan. 26, 2017 arguments) [https://perma.cc/QQ6A-KQYH].

Intentionally avoiding the question of the Fifth Amendment's applicability,[20] Judge Rakoff of the Southern District of New York settled the hearing on a separate issue. Judge Rakoff held that the DOJ established a "strict and effective wall of separation"[21] that insulated the government's case from any potentially tainted evidence and met whatever *Kastigar* burden might exist on the facts presented. But on appeal, the Second Circuit disagreed, finding a blanket ban "on the use of compelled testimony in American criminal proceedings . . . even when a foreign sovereign has compelled the testimony."[22] Moreover, the Second Circuit found that the witnesses were substantially exposed to compelled testimony, reversing the convictions and dismissing the indictment.[23]

The Second Circuit's ruling raises two issues: 1) whether resource-intensive, complex, and potentially risky machinations by the DOJ should be necessary, and 2) in the face of such strict judicial scrutiny, whether close international law enforcement cooperation is advisable under the Second Circuit's new precedent. Fundamentally, the question that needs to be answered is this: In a case where otherwise inadmissible evidence from a foreign government's legal proceedings leaks into a U.S. prosecution through no direct action by U.S. authorities, can that evidence taint the entire case, requiring dismissal? As *Allen* demonstrates, this question is no longer a mere hypothetical.[24]

II. ANALYZING THE *BALSYS* SUPREME COURT PRECEDENT

The closest analogous Supreme Court precedent to the *Allen* situation, and the primary precedent cited in the Government's brief opposing the

20 *See Allen*, 160 F. Supp 3d at 690 n.8 (ruling that there was no need to determine if *Kastigar* applied, because even if it did apply to foreign government–compelled testimony, the government had already met its *Kastigar* burden).

21 *Id.* at 695.

22 *Allen*, 864 F.3d at 68.

23 *Id.* at 69.

24 Indeed, at a 2016 conference sponsored by the American Society of International Law and attended by the author, a panel discussion between Judge Jed Rakoff and Carol Sipperly (an *Allen* prosecuting attorney) highlighted the issue of foreign-compelled testimony as one likely to arise with increasing frequency in federal court. In a recent article for *Law360*, David Rundle of the law firm WilmerHale raised a similar sentiment. *See* David Rundle, *Testing the 5th: Compelled Testimony From Foreign Gov'ts*, LAW360 (Apr. 11, 2016, 10:36 AM), http://www.law360.com/articles/782250/testing-the-5th-compelled-testimony-from-foreign-gov-ts [https://perma.cc/4NKC-5XJN] (noting the combination of international investigations into financial institutions and the wide jurisdictional reach of federal courts is likely to lead to further cases like *Allen*). The issue has been raised hypothetically at least as far back as 2014. *See* John Vukelj & Megan K. Vesely, *How the SEC May Receive Testimony Compelled in U.K., Canada*, N.Y. L.J. (Apr. 7, 2014), http://www.newyorklawjournal.com/id=1202649563089/How-the-SEC-May-Receive-Testimony-Compelled-in-UK-Canada?slreturn=20170817223350 [http://perma.cc/44ER-3NNF] ("[T]he exchange of [foreign government–compelled] testimony raises concerns about how the privilege against self-incrimination operates in cross-border investigations.").

Kastigar motion to dismiss in *Allen*, is *United States v. Balsys*.[25] There, Justice Souter's 7–2 majority opinion limited Fifth Amendment protections for individuals facing foreign prosecution.[26] The *Balsys* plaintiff was a suspected Nazi war criminal subpoenaed by the Department of Justice's Office of Special Investigations (OSI), an office formed specifically to denaturalize and deport Nazis.[27] He invoked the Fifth Amendment at a DOJ deposition, claiming that his responses to OSI's questions "could subject him to criminal prosecution by Lithuania, Israel, and Germany."[28] The Supreme Court rejected the plaintiff's refusal to testify, basing its opinion on the textual context of the Fifth Amendment in the Constitution, the same-sovereign rule originally gleaned from *United States v. Murdock*,[29] and policy considerations that weighed heavily towards executive branch deference.[30] Ultimately, the *Balsys* Court found that sufficiently close cooperation between U.S. prosecutors and their foreign counterparts could be grounds for exclusion, but that the facts at issue in *Balsys* did not merit such a finding.[31]

These elements offer unique insight into the problem of foreign-compelled testimony, because *Balsys* is *Allen*'s mirror image. In *Balsys*, U.S. prosecutors compelled statements that could be used in possible overseas prosecutions, while in *Allen* overseas prosecutors compelled statements that were used in a U.S. prosecution. *Balsys* also introduces the salient concept of a threshold point for "cooperative internationalism," or a point at which U.S. and foreign prosecutors collaborate so closely that they should be considered the same for Fifth Amendment purposes.[32] As such, although key distinctions exist between the two cases, the *Balsys* decision provides a foundation for analyzing an *Allen*-type situation.

A. *Applying Three Core* Balsys *Arguments*

Though *Balsys* is not binding precedent, three of the core arguments made by the Supreme Court in that case are instructive here: the linguistic context of the Self-Incrimination Clause, the same-sovereign rule, and the several policy considerations raised. Interestingly, however, the Second Circuit panel in *Allen*, both in the opinion and during oral arguments, refrained from serious analysis of *Balsys* outside of rejecting the relevancy of the same-sovereign

25 524 U.S. 666 (1998).

26 *Id.* at 698.

27 *Id.* at 670.

28 *Id.*

29 290 U.S. 389, 396 (1933) ("[O]ne under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law.").

30 *Balsys*, 524 U.S. at 691-698.

31 *Id.* at 693-96 (identifying the concept of cooperative internationalism and rejecting it as a sufficient issue in the case).

32 *Id.* at 698-699.

rule.[33] The Department of Justice devoted some analysis to *Balsys* in its original district court brief,[34] but the Government's arguments on appeal focused on a wider interpretation of the Fifth Amendment that drew parallels between the positioning of a private enterprise and foreign government.[35] This strategy was handily rejected by the Second Circuit.[36] Ultimately, then, the three core *Balsys* arguments are most instructive as an analytical framework largely neglected at the Second Circuit.

1. Linguistic Context of the Self-Incrimination Clause[37]

The Fifth Amendment's meaning is comparatively less clear in the *Allen* context than the Court purports it to be in *Balsys*. The *Balsys* Court applies the *noscitur a sociis*[38] canon of interpretation to assert that the Self-Incrimination Clause should be read in the context of the other clauses of the Fifth Amendment, rather than as drawing a contrast to the further-removed Sixth Amendment, which clearly only applies in a domestic context.[39] Specifically, the Court asserts that the Self-Incrimination Clause's reference to "any criminal case" was meant to distinguish the Clause from an earlier portion of the Amendment referencing "capital, or otherwise infamous crime[s]" rather than to broaden the Clause to cover international jurisdictions.[40] No historical records or legislative history from the enactment of the Constitution speak to

33 *See* Oral Argument at 1:18:30-1:25:15, United States v. Allen, 864 F.3d 63 (2d Cir. 2017) (No. 16-898-cr), http://www.ca2.uscourts.gov/oral_arguments.html (click on "2017" and scroll to Jan. 26, 2017 arguments) [https://perma.cc/QQ6A-KQYH] (discussing the compelled testimony issue with no references to the "same-sovereign" issue or to *Balsys*); *see also Allen*, 864 F.3d at 85-86 (refuting the Government's "same-sovereign" argument by distinguishing the Fifth Amendment as a personal trial right without engaging any of the substantive arguments in *Balsys*).

34 Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 7-11, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR) (arguing that following *Balsys*, the Self-Incrimination Clause is not implicated when a foreign sovereign compels testimony under the same-sovereign rule).

35 *Allen*, 864 F.3d at 84.

36 *See id.* at 84-85 (rejecting the Government's private employer argument).

37 The full text of the Fifth Amendment is as follows: "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." U.S. CONST. amend. V (emphasis added).

38 "It is known from its associates."

39 United States v. Balsys, 524 U.S. 666, 672-73 (1998).

40 *Id.*

the linguistic issue.[41] Such a finding raises the question as to which aspects of "any criminal case" are limited to domestic applicability.

In an *Allen*-type situation, the issue is whether a "criminal case" as defined under the Fifth Amendment includes an intentional investigative portion by another foreign body. As highlighted by the Second Circuit, the prosecution is undoubtedly domestic,[42] but the gathering of evidence in preparation for that prosecution occurs internationally, informed at least somewhat by independent foreign government actors who are not obligated to comply with the Fifth Amendment. The Court held in *Kastigar v. United States* that the Fifth Amendment privilege "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 . . . ."[43] As with the Fifth Amendment text, the *Kastigar* Court did not distinguish whether "any disclosures" referred only to disclosures to domestic authorities and in domestic proceedings or to international ones as well, but the *Balsys* Court's domestic-only interpretation could arguably suggest the former.[44] Where foreign governments do the compelling, it is unclear whether that foreign government investigation is intended to be treated as part of "any criminal case" under the Fifth Amendment when the resulting evidence enters a U.S. trial.

Per Supreme Court precedent in *Chavez v. Martinez*, a violation of the Self-Incrimination Clause occurs when such evidence is used at trial, not during the act of coercive questioning.[45] In *Chavez*, the Court distinguished between claims under the Fifth and Fourteenth Amendments, stating,

---

41 *Id.* at 673 n.5 (citing to sources asserting the Self-Incrimination Clause has almost no legislative grounding and that the "any criminal case" language was added for purposes irrelevant here). The dissent concedes the lack of history undergirding the Self-Incrimination Clause and its extraterritorial applicability. *Id.* at 711-12 (citing the analysis of *United States v. Gecas*, 120 F.3d 1419, 1435 (11th Cir. 1997) among other sources, to establish an absence of legislative history on Fifth Amendment privilege).

42 *See* United States v. Allen, 864 F.3d 63, 81 (2d Cir. 2017) ("Whatever may occur prior to trial, the right not to testify against oneself *at trial* is 'absolute.'" (emphasis in original) (quoting Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013))).

43 406 U.S. 441, 444-45 (1972) (emphasis added) (footnote omitted).

44 *Supra* note 41. However, note that the Second Circuit in *Allen* interpreted this same issue differently. *See Allen*, 864 F.3d at 86 n.99 (citing to Justice Harlan's concurrence in *Murphy v. Waterfront Comm'n of N.Y. Harbor* that the use of compelled testimony at trial is part of the courts' "'supervisory power' over the administration of justice in federal courts," and characterizing it as consistent with *Balsys* (quoting 378 U.S. 52, 81 (1964)) (Harlan, J., concurring)).

45 538 U.S. 760, 767 (2003) ("[I]t is not until [an unconstitutionally compelled statement's] use in a criminal case that a violation of the Self-Incrimination Clause occurs."). Note that this precedent is relied on by the *Allen* defendant. *See* Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Superseding Indictment on *Kastigar* Grounds at 3, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR) (citing to *Chavez* in its

> Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.[46]

Coercive questions then can violate different rights at different times—Fourteenth Amendment due process rights at the time of questioning and the Fifth Amendment right against self-incrimination upon their admission at trial.[47] Still, although self-incrimination may occur when the evidence is used at trial, it must be unconstitutional under the Fifth Amendment in the first place to constitute a violation.[48] At issue, then, is whether foreign government–compelled testimony should be carved out as "extra-Constitutional" testimony in a U.S. trial, which *Chavez* does not address.

2. Limitations Imposed by the Same-Sovereign Rule

As argued by the Department of Justice, the same-sovereign rule originally espoused in *United States v. Murdock*[49] points in the direction of limiting the applicability of the Self-Incrimination Clause in such cases.[50] The *Balsys* Court explains the same-sovereign rule as "limiting [the Self-Incrimination Clause's] principle to concern with prosecution by a sovereign that is itself bound by the

---

argument that "a violation of the Fifth Amendment occurs not when the involuntary statements are elicited, but when they are *used in a U.S. prosecution*" (emphasis in original)).

46 *Chavez*, 538 U.S. at 773.

47 Note that this issue was raised at oral arguments, in briefs, and in the final opinion. *See, e.g.*, Oral Argument at 1:18:30-1:25:15, *Allen*, 864 F.3d 63 (No. 16-898-cr), http://www.ca2.uscourts.gov/oral_arguments.html (click on "2017" and scroll to Jan. 26, 2017 arguments) [https://perma.cc/QQ6A-KQYH]. (raising the idea that constitutional concerns outside of the Fifth Amendment could arise from foreign government–compelled testimony); *see also Allen*, 864 F.3d at 83 (rejecting the Government's citation to *Colorado v. Connelly*, 479 U.S. 157 (1986), on the basis that it was a Fourteenth Amendment case). This question raises two subsidiary issues: 1) whether testimony collected abroad, that would arguably violate a defendant's Fourteenth Amendment due process rights if collected in the United States, is in fact a violation of the Fourteenth Amendment, and if so 2) whether a violation of the Fourteenth Amendment related to self-incrimination necessarily implicates the Fifth Amendment and would lead to tainted evidence at trial. Perhaps a defense attorney could argue to exclude evidence at trial on Fourteenth Amendment grounds, or on Fifth Amendment grounds based on the Fourteenth Amendment due process violation, but such arguments are beyond the scope of this Comment.

48 *See, e.g.*, Gardner v. Broderick, 392 U.S. 273, 276 (1968) (asserting that individuals can waive constitutional concerns about privilege in appropriate circumstances).

49 290 U.S. 389, 391 (1933), *overruled in part by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

50 *See* Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 7-11, *Allen*, 160 F. Supp. 3d 684 (No. 1:14-cr-00272-JSR) (explaining that the Self-Incrimination Clause should not apply to all cases of this type).

Clause."[51] Parallel to *Balsys*, *Murdock* involved a federal defendant hesitant to testify for fear of self-incrimination in state court, a concern about which the Court was unmoved.[52] *Murphy v. Waterfront Commission of New York Harbor* overturned *Murdock*,[53] a move the *Balsys* majority explained was necessary after *Malloy v. Hogan*[54] "applied the doctrine of Fourteenth Amendment due process incorporation to the Self-Incrimination Clause, so as to bind the States as well as the National Government to recognize the privilege."[55] Interestingly, *Murphy* dealt with a situation parallel to *Allen* rather than *Murdock* or *Balsys*, as the concern in *Murphy* was that compelled state testimony might be admitted into evidence at a federal trial.[56] The *Murphy* Court resolved this incongruence by saying that since the privilege was fully applicable to both sovereigns, the question was the same.[57] This meant that post-*Malloy*, the federal and state governments were seen as the same-sovereign, maintaining *Murdock*'s logic but undercutting its presumption that state and federal governments represented fundamentally different sovereigns.[58]

If read broadly, *Balsys* suggests that the primary concern of the case law is matching the source of compulsion and the source of prosecution, rather than simply determining whether there was unconstitutional compulsion to elicit evidence which was then used in a U.S. trial. In reconciling *Murdock* with *Murphy*, the Court emphasized that "the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt."[59] Where foreign governments are concerned, U.S. prosecutors generally have no hand in compelling testimony. Justice Breyer's dissent decried the underlying proposition here that "prosecution by a different sovereign seems not quite as unfair as prosecution by the same-sovereign,"[60] but the Court's majority accepted this reasoning because of the marked differences between

---

51 United States v. Balsys, 524 U.S. 666, 689 (1998).

52 *Murdock*, 290 U.S. at 391, 397 (affirming the lower court's conviction of the defendant for refusing to give testimony).

53 378 U.S. 52, 73 (1964), *abrogated by Balsys*, 524 U.S. 666.

54 378 U.S. 1, 3 (1964) (holding that "the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination").

55 *Balsys*, 524 U.S. at 680-81.

56 *Murphy*, 378 U.S. at 53-54.

57 *Id.* at 53 n.1.

58 Using this logic, the *Balsys* Court rejected the *Murphy* Court's claim to overturn *Murdock*. *See Balsys*, 524 U.S. at 689. The *Balsys* majority explicitly rejected the *Murphy* majority's policy arguments as well as its historical arguments unrelated to *Malloy* and the Fourteenth Amendment for overturning *Murdock*. *Id.* at 686-91.

59 *Id.* at 683. Note that, in *Allen*, the government advanced the same argument using this quote. Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 9, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR).

60 *Balsys*, 524 U.S. at 717-18.

the federal–state and U.S.–foreign power relationships.[61] The majority saw the fairness issue as helping a defendant avoid being "'whipsawed' into incriminating himself under both state and federal law, even though the privilege [against self-incrimination] was applicable to each,"[62] and avoiding historical practices of an overreaching government coercing confessions.[63] But, these are not of grave concern where the compelling and prosecuting authorities diverge in their legal obligations.[64] In the *Balsys* and *Allen* contexts, deterrence only extends so far as U.S. authorities can persuade their foreign counterparts to follow U.S. law to which they are not subject, unlike the States which are directly subject to the Fifth Amendment under Fourteenth Amendment incorporation.[65] Without such a connection, the rationale of the Self-Incrimination Clause is not met and the *Murphy* arguments for applicability are undermined.

Herein potentially lies a divergence between an *Allen* analysis and a *Balsys* analysis. *Allen* presents a scenario where U.S. authorities have significantly more control over the resulting prosecution than in *Balsys*, where foreign governments can use the defendant's American-compelled testimony as they wish. U.S. prosecutors could share evidence with foreign counterparts only when they are convinced it will not be used in contravention of the Eighth Amendment or move for judges to seal proceedings where evidence exposing defendants to self-incrimination in a foreign jurisdiction could come into play, but such actions are within the discretion of prosecutors and are not required,[66] and judges are particularly hesitant to infringe on the executive branch's authority to conduct foreign affairs.[67]

In line with the Second Circuit's general reasoning, the increased American control over fairness of prosecution in *Allen*-type scenarios places a heavier burden on U.S. prosecutors to ensure that fairness is achieved because courts would be addressing the conduct of U.S. prosecutors without the *Balsys*-type direct implications for American foreign policy. Prosecutor

---

61 In fact, the *Balsys* majority acknowledged that "[p]rior to *Murphy*, such 'whipsawing' efforts had been permissible, but arguably less outrageous since, as the opinion notes, 'either the "compelling" government or the "using" government [was] a State, and, until today, the States were not deemed fully bound by the privilege against self-incrimination.'" *Id.* at 681-82 n.7 (quoting *Murphy*, 378 U.S. at 57 n.6).

62 *Id.* at 667.

63 *Id.* at 693 (noting that preventing government overreach "lies at the core of the [Self-Incrimination] Clause's purposes").

64 *See supra* notes 52, 57–58.

65 Malloy v. Hogan, 378 U.S. 1, 6 (1964).

66 Note that judges could take similar actions unilaterally as well.

67 Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2011) ("Historically, most scholars have accepted with little question the notion that the Court will defer to executive views in core matters of foreign relations.").

misconduct with regard to compelled testimony can be deterred in *Allen* in a way not possible in foreign prosecutions, strengthening the Court's overall Fifth Amendment goal to deter the abuse of compelled testimony.[68] However, prosecutors still lack significant control in cases where U.S. authorities are not gathering the evidence for U.S. prosecutions. As will be discussed in the next subsection, there are also policy reasons why the receptivity of other governments to U.S. standards should not dictate the ability of U.S. law enforcement to prosecute a domestic case.

3. Balancing Policy Considerations

The balance of policy considerations espoused by the *Balsys* secondary majority[69] similarly weighs in favor of curtailing the applicability of the Fifth Amendment in the *Allen* context. The Court criticizes *Murphy* as offering a Panglossian declaration of the policies underpinning the privilege against self-incrimination, rather than any sort of serious analysis. To the *Murphy* Court, the Self-Incrimination Clause

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life,"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[70]

For its part, the *Balsys* Court argues that in this statement the *Murphy* Court "does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope."[71] The same passage

---

68 *See Fifth Amendment:* Michigan v. Tucker, 65 J. CRIM. L. & CRIMINOLOGY 466, 472-73 (1974) (discussing the deterrence of law enforcement misconduct as part of the Supreme Court's reasoning on Fifth Amendment protections).

69 Note that Justices Thomas and Scalia declined to join Parts IV and V of the opinion, leaving those parts at 5–4 decisions rather than 7–2. United States v. Balsys, 524 U.S. 666, 668 (1998).

70 Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (citations omitted).

71 *Balsys*, 524 U.S. at 691.

dismisses many of the aforementioned policies as either domestically focused or historically unsupported, more rhetorical flourish than serious policy.[72]

One policy argument taken up by the *Balsys* Court's critique and relevant to the *Allen* context is its framing of testimonial privilege more as an immunity transaction than as an inviolable right.[73] Because courts do not have the authority to enforce immunity abroad, and given that the *Kastigar* decision requires that immunity be coextensive with Fifth Amendment protections,[74] it follows that if immunity were to apply to foreign prosecutions, the government could never offer immunity deals to defendants implicated in international crimes.[75] In the *Allen* context, the implications of this conception deviate slightly based on the timeline, but the crux of the argument is the same—U.S. authorities do not have the authority to offer immunity in a deal made by investigators outside of U.S. control. In fact, foreign authorities can act outside Fifth Amendment privileges during the investigative phase without any intervention by U.S. prosecutors, and if they choose to publicize their findings in a way that taints a U.S. investigation with compelled testimony (say, by publishing or sending tainted information to U.S. prosecutors or key witnesses without identifying it as such), either the entire U.S. investigation must end or the defendant's immunity privilege must be withdrawn. These concerns were raised in the Department of Justice's district court brief, which called attention to the specter of "a hostile government bent on frustrating prosecution of a defendant in the United States . . . compel[ling] the witness to testify and publiciz[ing] the substance of his testimony . . . . unilaterally put[ting] the United States to the heavy *Kastigar* burden."[76] The Second Circuit responded that because the *Allen* case did not itself raise such concerns, the issue need not be decided.[77] However, the Second Circuit's dismissal of this issue belies the urgency of this flaw in its reasoning—the concerns of a hostile foreign power manipulating our justice system are not idle. Former Vice President Joseph Biden and former Deputy Assistant Secretary of Defense Michael Carpenter recently published in *Foreign Affairs* an article highlighting how the

72 *Id.* at 690-91.

73 *Id.* at 692-93 (finding that, in practice, "there is a conditional protection of testimonial privacy subject to basic limits").

74 Kastigar v. United States, 406 U.S. 441, 453 (1972) ("[I]mmunity from use and derivative use is coextensive with the scope of privilege . . . .").

75 *See Balsys*, 524 U.S. at 693 ("[T]he Judiciary could not recognize fear of foreign prosecution and at the same time preserve the Government's existing rights to seek testimony in exchange for immunity . . . .").

76 Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 11, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR).

77 *See* United States v. Allen, 864 F.3d 63, 88 (2d Cir. 2017) ("As to the Government's concerns that a hostile foreign government might hypothetically endeavor to sabotage U.S. prosecutions by immunizing a suspect and publishing his or her testimony—that, of course, is not this case.").

Kremlin weaponizes cross-border corruption and financial crime to undermine Western democracies.[78] By dismissing this significant issue, the Second Circuit overlooked a flaw in its attempt to establish a new blanket precedent. The same lack of control experienced by U.S. prosecutors in an *Allen* hypothetical parallels their lack of control over foreign use of American-compelled testimony as seen in *Balsys*, an important policy consideration highlighted by the Supreme Court.[79]

A related policy argument also rejected in *Balsys* is that the U.S. government's interest in rule of law is adequately served when defendants are convicted abroad for their crimes, creating the same incentive for overreach that the Fifth Amendment is meant to guard against. The *Balsys* Court framed the issue as using its discretion to expand the coverage of the Fifth Amendment, premised on the idea that it will induce our government to adopt international agreements to protect defendants from this overreach.[80] The Court nevertheless considered the potential benefits of such policies to be uncertain, as foreign courts that do not recognize any privilege against self-incrimination would still compel testimony from U.S. defendants.[81] Because a loss of testimony in U.S. trials would likely result, and the countervailing benefit of protecting defendants in foreign prosecutions is not guaranteed, the Court found that international jurisdiction for the Self-Incrimination Clause would not effectively address any outstanding incentives for overreach.[82] The Second Circuit in *Allen* suggests, in response, that the risk of defendant testimony being invalidated by foreign compulsion should fall "on the U.S. Government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations."[83] Although this may be the policy judgment of the Second Circuit, it does not comport with the *Balsys* Court's logic in an analogous situation that a remote threat of overreach is outweighed by competing concerns.

---

78 *See generally* Joseph R. Biden Jr. & Michael Carpenter, *How to Stand Up to the Kremlin: Defending Democracy Against Its Enemies*, 97 FOREIGN AFFAIRS, Jan.–Feb. 2018, at 44 (discussing extensive money laundering and other cross-border criminal violations used to promote Russian influence abroad). It is no small leap to imagine that, in shielding such activities from U.S. prosecutorial scrutiny, the Russian government might launch its own sham corruption investigations that would "compel" testimony and thwart U.S. efforts at justice. In such a case, the sham-nature of the investigation might not be clear and the foreign relations implications of U.S. courts decrying the Russian investigations might even be too steep to merit continued American pursuit of the cases regardless of a judicial exception, subtly undermining our own rule of law.

79 *Balsys*, 524 U.S. at 693, 697-98 (recognizing that U.S. courts cannot enforce immunity abroad and that forcing U.S. courts to consider potential foreign immunity issues would unacceptably inhibit U.S. prosecutors' abilities to offer immunity deals).

80 *Id.* at 696-97.

81 *Id.* at 697.

82 *Id.* at 697-98.

83 United States v. Allen, 864 F.3d 63, 88 (2d Cir. 2017).

In fact, in an *Allen*-type scenario, the potential U.S. government incentive for overreach is significantly less, given that foreign authorities would be those actually compelling the testimony, leaving U.S. law enforcement a further step removed from the compulsion, unlike in *Balsys*, where U.S. authorities were themselves doing the compelling. Unless foreign authorities act specifically under orders from U.S. authorities or otherwise engage as U.S. agents, there would be an insufficient connection to U.S. overreach.[84] Here then, the *Balsys* Court's argument favors inapplicability of the Self-Incrimination Clause to foreign testimony. Where two governments are not working perfectly in concert, concerns such as these inevitably arise.

B. *Cooperative Internationalism as a Threshold*

The *Balsys* secondary majority[85] alternatively offers a scenario where the same-sovereign rule could apply, postulating that foreign and U.S. authorities might work closely enough to shift the balance of policy considerations, and render the Self-Incrimination Clause to encompass foreign prosecutions. The Court defines such a threshold as "cooperative internationalism."[86] The Court recognizes that cooperative internationalism may raise concerns "[b]ecause the Government now has a significant interest in seeing individuals convicted abroad for their crimes, [creating] the same incentive to overreach that has required application of the privilege in the domestic context."[87] The *Balsys* Court does not explicitly instruct on when cooperative internationalism would be considered fully realized, but suggests that if

> the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign."[88]

---

84 *See Balsys*, 524 U.S. at 694-95 (rejecting the defendant's reasoning that foreign prosecutions engendered "the same incentive to overreach that has required application of the privilege [against self-incrimination] in the domestic context").

85 In *Balsys*, Justices Scalia and Thomas joined five other justices for three parts of the 7–2 majority opinion. However, they declined to join the parts relevant here, leaving the Court with only a 5–4 majority.

86 *Balsys*, 524 U.S. at 693.

87 *Id.* at 693-94.

88 *Id.* at 698.

Although this high level of coordination was not found in *Balsys*, the case was decided in 1999. During the intervening decades, international law enforcement cooperation has exploded, complete with Organisation for Economic Cooperation and Development (OECD) bodies dedicated to coordinating domestic laws on international crimes, such as foreign corruption and money laundering, treaties easing evidence sharing and extraditions, and more.[89] Modern international law enforcement cooperation might cause the same court that scoffed at cross-jurisdictional coordination at the time of *Balsys* to unequivocally support the assertion of full Fifth Amendment protections beyond U.S. borders today. Notably, cooperation between the United States' Securities and Exchange Commission, the United Kingdom's Financial Conduct Authority, and Canada's Ontario Securities Commission has been significant over the last few years. According to recent reports,

> [s]uch collaboration includes sharing information, including confidential and compelled testimony. The SEC has entered into Memoranda of Understanding (MOUs) with the FCA and the OSC that provide for the exchange of information and cooperation in overseeing corporations, and their directors and officers, that conduct business in the respective jurisdictions. Further, all three regulators are members of the International Organization of Securities Commissions (IOSCO), which also provides for mutual sharing of information . . . . The United States has also signaled its intention to prosecute securities violations that occur extraterritorially. Section 929P of the Dodd–Frank Wall Street Reform and Consumer Protection Act affirms the SEC's ability to bring an enforcement action against foreign individuals for foreign conduct that has some impact on the U.S. markets or investors.[90]

In this new world of formalized international cooperation and synchronized action, courts may need to address what counts as "cooperative internationalism," and whether or not it carries all of the same consequences as the Fourteenth Amendment and the same-sovereign rule when governing immunity between state and federal prosecutions.

---

89 For example, the OECD maintains international standards on anti-corruption and anti-bribery work, complete with interjurisdictional peer reviews and multilateral surveillance to ensure accountability. *See What We Do and How*, ORG. FOR ECON. COOPERATION & DEV., http://www.oecd.org/about/whatwedoandhow/ [https://perma.cc/Y5XH-LAXH] (listing numerous OECD activities of cross-border scope). The U.S. Treasury Department also participates with a number of international terrorist financing and financial crime cooperative initiatives. *See Terrorism and Financial Intelligence*, U.S. DEP'T. OF TREASURY, https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Terrorism-and-Financial-Intelligence.aspx [https://perma.cc/M2UA-9ZYJ] (explaining the role of the office of Terrorism and Financial Intelligence in combatting terrorist financing internationally).

90 *See* Vukelj & Vesely, *supra* note 24.

Here, the *Balsys* and *Allen* analyses could theoretically diverge, as there are differences in assessing the degree of cooperation among international law enforcement bodies that could be relevant to each context. The differences, like who physically conducts the interrogations, could necessitate different standards to establish international cooperation as a factor in determining the admissibility of foreign government–compelled testimony in U.S. courts. As a practical matter, it is also significantly harder to ensure that meticulous U.S. standards on information-sharing are met than it is to require U.S. prosecutors to negotiate immunity in conjunction with their foreign counterparts.[91] A full embrace of high standards for a *Balsys*-type scenario could thus have catastrophic policy implications when applied in an *Allen*-type scenario. Most countries, including those currently engaged in international criminal cooperation, may not be sufficiently equipped or coordinated with the U.S. to handle complex firewall schemes even like the one between the U.S. and the U.K. judged insufficient in *Allen*. As illustrated in *Allen*, many countries protect a right against self-incrimination, but that right can protect different behaviors and privileges than it would in the United States.[92] Mistakes happen, and prosecutors unfamiliar with the U.S. legal system but who want to cooperate with U.S. law enforcement can reasonably be expected to err with respect to sharing compelled testimony they gather legally under their own laws.[93] In some cases, foreign law enforcement will ignore U.S. concerns altogether in favor of complying solely with their own laws. There is no deterrence rationale for U.S. prosecutors in such a situation, except to discourage complicated cooperation with foreign counterparts. In the same

---

91 *See* Sean Hecker & Karolos Seeger, *The Use of Foreign Compelled Testimony in Cross-Border Investigations—The Impact of the Second Circuit's* Allen *Decision*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: BUSINESS CRIME 2018 9, 13 (Global Legal Group ed., 8th ed. Sept. 2017), https://www.debevoise.com/insights/publications/2017/09/the-use-of-foreign-compelled-testimony ("Given the potential pitfalls [of coordinating international law enforcement cooperation], if the DOJ is not able to take the lead on these cases from the beginning, it may opt not to pursue them at all."); Quinn Emanuel Urquhart Sullivan, LLP, *October 2017: Second Circuit Immunity Decision Upends Cross-Border Criminal Investigations*, JD SUPRA (Nov. 2, 2017), https://advance.lexis.com/document?crid=9296f878-b71c-4c48-b045-0573972bfb32&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A5PW0-YWN1-JCMN-Y3VK-00000-00&pdcontentcomponentid=299488&pdalertresultid=73269418o&pdalertprofileid=213f1a06-a317-407f-9899-fc09463b0151&pdmfid=1000516&pdisurlapi=true [https://perma.cc/NZL2-LBPT] (highlighting that the *Allen* decision could place a significantly heavier burden on U.S. prosecutors in every investigation where other law enforcement authorities have the legal right to compel testimony).

92 *See generally* G. Arthur Martin et al., *The Privilege Against Self-Incrimination Under Foreign Law*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 161 (1960) (discussing the nuances of the privilege against self-incrimination as it exists in the legal systems of multiple countries).

93 *See, e.g.*, United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974) (finding admissible statements gathered by a Peruvian law enforcement officer, trained in the United States and aware of U.S. law, who chose only to follow Peruvian law and ignore American *Miranda* warnings and right to counsel after an arrest).

spirit as the warnings of the *Balsys* Court, this position unduly burdens law enforcement trying to prosecute internationally mobile criminals and hurts executive branch foreign relations efforts, cutting off potentially fruitful cooperation where U.S. prosecutors fear accidental taint by their foreign counterparts. For foreign countries, because there is no analog to the Fourteenth Amendment in *Malloy* directly linking a foreign government's legal obligations to the U.S. government's, this easily becomes an issue of sovereignty.

Overall, it is worth noting that the *Balsys* decision has been panned in academic circles as misreading *Murphy* and other precedential cases,[94] and as flouting international norms and law.[95] The case, which comes in a line of precedent that has seesawed between *Murdock*'s narrowness and *Murphy*'s blanket coverage, is not the last word on self-incrimination. However, the case does provide relevant guidance when considering the U.S. trial admissibility of foreign government–compelled testimony.

III. OTHER RELEVANT COMPARISONS

Because of the dearth of case law on this issue, it is useful to draw lessons through comparison. Three components of current law are especially salient to the *Allen* context: 1) the implied applicability of *Bram v. United States*[96] and that dicta's acceptance by future Courts, 2) case law surrounding the admissibility of *Miranda* warnings, and 3) an analogous body like Congress compelling testimony as seen in *United States v. North*.[97] While there is no clear path to determine the international reach of the Fifth Amendment, weighing these considerations can guide a new framework for determining the admissibility of foreign government–compelled testimony.

A. *Assuming Applicability of the Fifth Amendment to Foreign Testimony*

Dicta from *Bram*, and, building from it, *United States v. Orlandez-Gamboa*[98] and *Brulay v. United States*[99], suggest that the Fifth Amendment is applicable to foreign government–compelled testimony. In *Bram*, Canadian authorities

94 *See, e.g.*, Steven J. Winger, Note, *Denying Fifth Amendment Protections to Witnesses Facing Foreign Prosecutions: Self-Incrimination Discrimination?*, 89 J. CRIM. L. & CRIMINOLOGY 1095, 1129-37 (1999) (analyzing the failure of *Balsys* to adhere to controlling precedents and to give sufficient emphasis to essential policies advanced by the Self-Incrimination Clause).

95 Dianne Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT'L. & COMP. L. 555, 562-63 (2000) (implying that *Balsys* reflects the absence of international norms considered in U.S. constitutional interpretation).

96 168 U.S. 532 (1897).

97 910 F.2d 843 (D.C. Cir. 1990), *withdrawn & superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990).

98 320 F.3d 328 (2d Cir. 2003).

99 383 F.2d 345 (9th Cir. 1967).

coerced a confession in Canada from a suspected murderer before handing him over to U.S. prosecutors.[100] The Court held that the confession was inadmissible because it was compelled, taking for granted that Fifth Amendment protections would apply to such evidence though obtained independently by foreign authorities.[101] *Bram* is the closest Supreme Court case to parallel the situation in *Allen*, but dicta from 1897 cannot definitively address the issue of foreign government–compelled testimony, particularly as *Balsys* might point in the opposite direction.

Drawing on *Bram*, the Second Circuit *Orlandez-Gamboa* case involved a Colombian drug cartel leader voluntarily admitting guilt and giving details about his dealings to Colombian prosecutors as part of a Colombian reduced-sentencing scheme.[102] After meetings with the defendant, Colombian prosecutors amended the charges to make him eligible for extradition to the United States and for prosecution by U.S. authorities for those crimes.[103] After extensive discussion, the U.S. court found Federal Rule of Evidence 410(4) inapplicable overseas and then conducted a voluntariness analysis under the Fifth Amendment, citing *Bram* as precedent but without any discussion on the applicability of the Fifth Amendment overseas.[104] The juxtaposition of extensive international analysis on Rule 410(4) without any on the Fifth Amendment suggests either that the court in *Orlandez-Gamboa* similarly ignored the extraterritorial issue, or, more likely, implicitly accepted *Bram*'s dicta. Interestingly, *Orlandez-Gamboa* was decided by Judge Guido Calabresi, the same judge who wrote the overturned opinion from *Balsys* five years earlier.[105] Courts' previous silence adds little to the argument, a point tacitly made in the government's reply brief which neglected any mention of *Orlandez-Gamboa*.[106]

The Ninth Circuit in *Brulay v. United States* took a slightly different tactic in its analysis of *Bram*'s dicta. In *Brulay*, Mexican officials detained a defendant, seized his amphetamine pills, questioned him, and ultimately extracted incriminating statements and evidence from him without the use of any

100 *Bram*, 168 U.S. at 537.

101 *Id.* at 541, 565 (concluding that "an influence was exerted" and "error was committed by the trial court in admitting the confession under the circumstances disclosed by the record").

102 *Orlandez-Gamboa*, 320 F.3d at 329.

103 *Id.*

104 *Id.* at 332 (holding that Gamboa's admissions, though potentially inadmissible as evidence under Rule 410(4) because they were made during negotiations concerning his sentence, were admissible because the rule had no extraterritorial applicability).

105 United States v. Balsys, 119 F.3d 122, 124 (2d Cir. 1997), *rev'd* 524 U.S. 666 (1998). Calabresi argued in *Balsys* that there was no "significant difference in the harm to governmental interests from granting the privilege to those who fear foreign prosecutions, and to those who fear domestic prosecution, because the reasons for allowing the privilege are similar in both situations, and because the language of the amendment does not distinguish between the two . . . ." *Id.* at 140.

106 Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at iv, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR).

coercion.[107] The court's analysis distinguishes between the Fourth Amendment, whose protections do not apply to actions by foreign officials, and the Fifth Amendment, whose protections do apply per *Bram*.[108] The Court briefly cites to the same timing rationale of *Chavez*,[109] which is of limited utility without further probing as discussed in subsection II.A.1 of this Comment. In these cases and in others like them, the *Bram* silence is instructive but, particularly without any deeper analysis of the issue, not controlling.

B. *Admissibility of Foreign Testimony Without* Miranda *Warnings*

One scenario where courts have extensively discussed the admissibility of foreign-compelled testimony is in the case law surrounding police interrogations and their attendant *Miranda* warnings. Many cases address situations where U.S. authorities interrogate suspects abroad, foreign authorities interrogate suspects abroad using torture or coercion, or foreign authorities do not give suspects *Miranda* warnings but proceed to extract information from suspects voluntarily. Each iteration presents a different constitutionality analysis, but all trace back to standards focused on 1) voluntariness and, more broadly, 2) due process.

1. Analyzing a Voluntariness Standard

Where U.S. authorities are heavily involved, constitutional protections attach. As such, interrogations conducted abroad by U.S. officials trigger Fifth Amendment *Miranda* protections to the extent practicable.[110] Where foreign authorities conduct the interrogation, *voluntary* non-Mirandized testimony under the Fifth Amendment can still be admissible where it is 1) not the product of a joint venture between U.S. and foreign authorities, and 2) not a product of tactics that "shock the judicial conscience."[111]

---

107 Brulay v. United States, 383 F.2d 345, 349 (9th Cir. 1967).

108 *Id.* at 348-49 n.5 (discussing the inapplicability of Fourth Amendment protections due to a lack of deterrent effect on U.S. law enforcement and the applicability of Fifth Amendment protections because they are triggered by the entrance of evidence into trial).

109 *Id.*

110 *See, e.g.*, United States v. Bin Laden, 132 F. Supp. 2d 168, 181, 188 (S.D.N.Y. 2001) (finding that a bombing suspect questioned abroad by foreign and then U.S. authorities was entitled to be Mirandized prior to the interrogation by U.S. authorities).

111 *See* United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003) (noting that "statements obtained under circumstances that 'shock the judicial conscience' will be suppressed"); *see also* Fred Medick, *Exporting* Miranda*: Protecting the Right Against Self-Incrimination when U.S. Officers Perform Custodial Interrogations Abroad*, 44 HARV. C.R.–C.L. L. REV. 173, 185-86 (2009) (describing the two major exceptions to the rule that Fifth Amendment protections against self-incrimination do not protect suspects questioned by foreign agents abroad); *cf.* United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976) (remarking that appellate courts may exercise their discretionary powers to exclude evidence obtained through extreme foreign searches and seizures).

The joint venture and "shocks the conscience" exceptions are not of particular relevance in an *Allen*-type context. The joint venture doctrine has been articulated by a number of Circuit Courts,[112] though no test for what constitutes a "joint venture" has been universally adopted.[113] It seems to underpin the *Balsys* call for a standard of "cooperative internationalism" discussed in Section II.B of this Comment. The joint venture doctrine is informative in cases with close international cooperation but is not dispositive as to the admissibility of foreign-compelled testimony writ large. The "shocks the conscience" doctrine also does not apply in an *Allen*-type context. Many of these cases directly address coerced confessions through alleged torture.[114] By contrast, in *Allen*, U.K. authorities did nothing to "shock the conscience" of a U.S. court or otherwise coerce defendants.[115] Moreover, it seems an odd contradiction that only voluntary statements taken in such a way as to shock judicial conscience are excluded from evidence, because arguably any such statement should be prima facie *in*voluntary under the applicable definitions of voluntary discussed below.[116] In an *Allen*-type case then, the key parallel to the *Miranda* cases centers on only the voluntariness question.

Read aggressively, the voluntariness standard could constitutionally invalidate all foreign government–compelled testimony.[117] The first order question, then, is whether a voluntariness standard applies at all. Although it has been commonly assumed that it does,[118] that has not previously been

112 *See* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1225 (9th Cir. 1988), *rev'd* 494 U.S. 259 (1990) (identifying cases in the Second, Fifth, Seventh, Ninth, and Eleventh Circuits that all engage joint venture doctrine). Although these are Fourth Amendment cases, the joint venture doctrine analysis is the same under both Amendments. *See e.g.*, *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 177, 203 (2d Cir. 2008) (discussing the joint venture doctrine in the context of Fifth Amendment claims).

113 *Verdugo-Urquidez*, 856 F.2d at 1225. ("The few courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied—though they have as a statistical matter been virtually unanimous in rejecting claims of undue participation." (quoting United States v. Morrow, 537 F.2d 120, 140 (5th Cir.1976) (internal quotation marks omitted)).

114 *See, e.g.*, United States v. Abu Ali, 528 F.3d 210, 227-28, 232-33 (4th Cir. 2008) (affirming the district court's finding that defendant's statements were voluntary because he was not subject to torture, and finding no credible evidence that there was "improper collaboration" between Saudi and U.S. officials in defendant's detention); *Yousef*, 327 F.3d at 144 (holding that defendant waived his argument—that his post-arrest statements were coerced as a result of torture—when he failed to raise the argument in a pre-trial suppression motion).

115 United States v. Allen, 864 F.3d 63, 82 (2d Cir. 2017) ("[T]he 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.").

116 The Second Circuit acknowledged this "far-fetched" scenario and backpedaled from its "shocks the conscience" exception in the *Allen* decision. *Allen*, 864 F.3d at 84 n.90.

117 Indeed, this is the intended outcome of the Second Circuit's *Allen* decision. *See id.* at 82.

118 *See, e.g.*, *Abu Ali*, 528 F.3d at 227-28 ("[V]oluntary statements obtained from a defendant by foreign law enforcement officers, even without *Miranda* warnings, generally are admissible."); Kilday

explicitly held, as the D.C. Circuit pointed out in *United States v. Straker*.[119] Assuming it does, courts need to address the definition of *in*voluntariness and whether it encapsulates legal foreign compulsion (as in *Allen*) in addition to coercion. If involuntariness includes both, courts need to decide whether to carve out an exception to admit such involuntary statements compelled in accordance with foreign law without coercion. The current voluntariness standard is a reflection of the ambiguous evolution of Fifth Amendment due process jurisprudence,[120] so arguments about its applicability are not clear cut.

The emphasis on voluntariness by courts does not necessarily imply that *in*voluntary statements legally compelled by foreign officials are never admissible. *United States v. Yousef*[121], an oft-cited case in the foreign interrogation space, evidences the contradictions that can arise from this disconnect. *Yousef* was a Second Circuit terrorism case related to the 1993 World Trade Center bombings, where questioning occurred on foreign soil, first by local authorities and then by U.S. officials.[122] The court found *Miranda* warnings irrelevant to the admissibility of evidence from foreign police interrogations where the defendant's statements were voluntary.[123] However, *Yousef* and similar cases (including all nine cited by the Second Circuit as evidence that this question is already settled[124]) never addressed the core issue of an arguably *in*voluntary

v. United States, 481 F.2d 655, 656 (5th Cir. 1973) ("[T]he statements were not coerced . . . . The evidence was therefore admissible.").

119 United States v. Straker, 800 F.3d 570, 614 n.16 (D.C. Cir. 2015) ("We have never decided what standard determines the admissibility of statements obtained abroad by foreign police officers, though it has been suggested that the ordinary voluntariness standard governs.").

120 *See* GOV'T PUBL'G OFFICE, FIFTH AMENDMENT: RIGHTS OF PERSONS 1536-38 (2014) https://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-10-6.pdf [https://perma.cc/BNG3-FRGM] [hereinafter FIFTH AMENDMENT: RIGHTS OF PERSONS] (documenting the evolution of the voluntariness standard and due process under the Self-Incrimination Clause).

121 327 F.3d 56 (2d Cir. 2003).

122 *Id.* at 78-83.

123 *Id.* at 145. Note that the government's *Allen* brief also raises the idea that *Yousef* was based on questionable case law. Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 21, 21 n.9, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR).

124 *See* United States v. Allen, 864 F.3d 63, 80 nn.67-68 (2d Cir. 2017). The citations from the Second Circuit opinion are *Bram v. United States*, 168 U.S. 532 (1897); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 200 (2d Cir. 2008); *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008); *United States v. Yousef*, 327 F.3d 56, 124, 145 (2d Cir. 2003); *United States v. Wolf*, 813 F.2d 970, 972 n.3 (9th Cir. 1987); *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974); *Kilday v. United States*, 481 F.2d 655, 656 (5th Cir. 1973); *United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972); and *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967). *Bram* and *Brulay* are both discussed in Section III.A of this Comment as implying Fifth Amendment applicability without any analysis on the issue. *Abu Ali*, *In re Terrorist Bombings*, *Yousef*, and *Kilday* all address the coercion issue with regards to *Miranda* warnings and are cited in subsection III.B.1. *Welch*, *Wolf*, and *Mundt* deal with similar coercion questions from *Miranda* warnings case law, and are far from dispositive here. *Welch* relies explicitly on the *Bram* dicta as a basis for excluding involuntary statements, but finds that a lack of *Miranda* warnings was not sufficient grounds for exclusion. 455 F.2d at 213. *Mundt* analyzes statements for involuntariness on the basis of whether they involved "threats or coercion . . . deprivation of food,

statement taken by foreign officials without coercion, ignoring a potential distinction between coerced and compelled statements.[125]

As alluded to in the government brief in *Allen*,[126] the Supreme Court in *Colorado v. Connelly* recognizes the importance of "coercive activity of the State" as the catalyst for a finding of involuntariness.[127] In domestic case law, coercion can be as simple as threatening to fire an employee.[128] When referencing involuntariness in the foreign interrogation context, the example cases cited in *Yousef* refer to circumstances that involve extreme physical harm.[129] Courts in other foreign interrogation cases have envisioned involuntariness as physical or psychological coercion, meaning beatings less than torture, extended detentions, keeping defendants ignorant of their rights, and otherwise wearing down their physical and mental wellbeing.[130] Interestingly, most of the examples involve recently apprehended individuals detained and questioned alone. All of this is a far cry from white collar formal judicial proceedings, where the compelled individuals have lawyers, like in *Allen*.[131] Without a full interrogation of involuntariness, this foreign

sleep or toilet facilities." 508 F.2d at 906. *Wolf* involves allegations of coercion by a threat of "physical violence." 813 F.2d at 972. Of note, *Yousef* and *In re Terrorist Bombings* are both decisions by Judge Cabranes, who wrote the final Second Circuit *Allen* opinion.

125 This issue was originally raised in the DOJ's *Allen* brief. See Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 21, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR) ("[The relevant cases don't] address[] the admissibility of potentially involuntary statements taken by foreign officials."). However, the Second Circuit rejected the argument. *Allen*, 864 F.3d at 82 ("[W]e have often referred to the Fifth Amendment's prohibition against illicit use as encompassing 'involuntary,' rather than 'compelled,' statements. But this semantic distinction does not bear significant, much less dispositive, weight.").

126 Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 21 n.9, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR) ("[T]he introduction of evidence into a judicial proceeding does not by itself satisfy the 'state action' requirement for triggering the constitutional protection against involuntary confessions.").

127 479 U.S. 157, 165 (1986).

128 *See* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 868, 868 n.29 (1995) (summarizing case law finding termination of government employment to be unconstitutional compulsion).

129 United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003) (identifying the rubbing of pepper in the eyes as conduct that "shocks the judicial conscience," warranting suppression (citing United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970))).

130 *See e.g.*, United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008) (analyzing the defendant's voluntariness in the context of his subjection to physical or psychological coercion, highlighting that he was not blindfolded, shackled, or denied basic necessities during his interrogation); *In re* Terrorist Bombings of U.S. Embassies in East Africa v. Odeh, 552 F.3d 177, 214 (2d Cir. 2008) (citing to the intellectual capabilities and lack of threats or promises to the defendant as evidence his statements were voluntary); United States v. Bin Laden, 132 F. Supp. 2d 168, 193 (S.D.N.Y. 2001) (finding an absence of coercion where the defendant faced interrogation sessions of reasonable duration, was not handcuffed, was confident and well-educated, and received breaks for basic needs).

131 The distinction is made explicit in *Abu Ali*, where the court rejected the defendant's constitutional claim for suppression of statements he made in Saudi custody. Although the defendant was not provided legal protections like prompt presentment and *Miranda* warnings in

compulsion/coercion distinction is ignored. An *Allen*-type situation, where that distinction could decide the case, highlights the importance of thoroughly considering the admissibility of foreign, legally compelled statements.

The four primary concerns with a voluntariness standard generally suggest that *Allen*-type foreign-compelled testimony should be admissible, either as voluntary testimony or as an exception to the voluntariness standard, but there is significant room for disagreement. The concerns are 1) upholding the moral rationales for the Fifth Amendment, 2) respecting foreign sovereignty, 3) recognizing the limited deterrence impacts, and 4) determining the reliability of evidence gathered through self-incrimination. The moral justifications for the Fifth Amendment are robust but not particularly well-defined.[132] They include protecting individuals from the "cruel trilemma" of self-accusing, perjury, or contempt; safeguarding the mental privacy of the accused; and respecting the integrity of the individual by not turning him into an "instrument" to be used against himself; among others.[133] Although the Supreme Court in *Balsys* rejected similar notions as Pollyannaish,[134] the moral concerns are real where foreign governments compel testimony. Fifth Amendment protection itself is not absolute, as individuals can trade immunity for testimony, but immunity eliminates the moral quandary of the trilemma. Where foreign governments do not offer such relief, there may be serious moral questions about whether their compelled testimony, even in accordance with their justice system, should be admitted.

The issue of respecting foreign sovereignty weighs towards admitting foreign-compelled statements. Foreign affairs is traditionally left by courts to the executive branch,[135] and imposing strict admissibility standards on foreign-compelled testimony would hinder U.S. international law enforcement cooperation and U.S. relations where foreign and U.S. authorities were independently pursuing related crimes. The costs would come as they did in *Allen*, with the U.S. government forced to expend significant financial and diplomatic capital training foreign partners in how to assist U.S. officials in their constitutional compliance.[136] The struggle comes where foreign legal systems allow for procedures that, to American eyes, look patently unjust. In those cases, respecting foreign sovereignty in American courts is a more complex question, but one that arguably remains

accordance with the U.S. Constitution, the court saw "the absence of these protections as [merely] one factor in the totality of circumstances in evaluating whether Abu Ali made his statements voluntarily," in deference to Saudi Arabian sovereignty. 528 F.3d at 233.

132 *See* Amar & Lettow, *supra* note 128, at 889-90 ("None of the rationales typically given for the Self-Incrimination Clause can satisfactorily explain the current scope of the privilege and its relation to the rest of our legal and moral system.").

133 *Id.* at 889-92 (discussing various rationales for the Fifth Amendment).

134 *See supra* subsection II.A.3.

135 *See supra* note 67.

136 *See supra* note 18 and accompanying text.

in the realm of foreign affairs and the executive branch.[137] Out of respect for the judicial systems of other countries, or at least those with similar legal systems, there is an argument that testimony following their judicial procedures should be admitted.

The deterrence rationale, which doesn't seem to apply here, is often cited in the *Miranda* cases for admitting voluntary, non-Mirandized statements. Because the United States cannot compel a foreign sovereign to follow U.S. constitutional requirements in their investigations, enforcing the requirement would have no deterrent effect on law enforcement overreach.[138] In cases like *Allen*, the same rationale applies because foreign governments cannot generally be expected to forego privileges under their own laws out of deference to U.S. law enforcement investigations. Under certain circumstances, U.S. prosecutors may persuade friendly foreign authorities to follow protocols designed to preserve Fifth Amendment protections, but this is an unrealistic expectation where U.S. prosecutors do not have complete control over governmental actions related to the U.S. prosecutors' evidence and witnesses.[139] As has consistently been held with *Miranda* warnings, a foreign law enforcement body, which is not bound by the Fifth Amendment or any other U.S. constitutional provisions, simply will not be deterred by U.S. standards on voluntariness, and neither will U.S. authorities be deterred from unconstitutional conduct by imposing this burden on an independent party.

At the same time, the voluntariness issue in *Allen* is distinct from *Miranda* warnings because it speaks directly to the reliability of the evidence in question.[140] Where robust immunity, like that available under the U.S. Constitution, is not granted to the accused, they remain highly incentivized to perjure themselves. Although an *Allen* situation does not threaten the type of coerced false confessions that originated self-incrimination protections,[141] it

137 The U.S. legal system encourages weighing the credibility of testimony at trial, but the potential for prejudice such evidence represents could outweigh any value it provided at trial.

138 *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."). *See, e.g.*, Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973) (noting that the U.S. Constitution cannot compel foreign sovereigns to take specific actions); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972) (acknowledging that *Miranda* requirements have almost no deterrent effect on foreign police officers); United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971) ("[T]he exclusionary rule has little or no effect upon the conduct of foreign police.").

139 *Cf. supra* note 91 and accompanying text.

140 *See* Memorandum in Opposition to Defendants' Motion to Dismiss Based on *Kastigar* at 21 n.9, United States v. Allen, 160 F. Supp. 3d 684 (S.D.N.Y. 2016) (No. 1:14-cr-00272-JSR) ("[A] court 'must exclude' an involuntary statement 'because of its inherent unreliability.'" (quoting United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972))).

141 *See* Amar & Lettow, *supra* note 128, at 923 (highlighting the high probability of unreliable confessions in 1789). *See generally* FIFTH AMENDMENT: RIGHTS OF PERSONS, *supra* note 120

still distorts incentives to honesty that our justice system generally promotes.[142] As previously mentioned, countries with seemingly unjust legal practices could also taint the reliability of evidence even where collected in accordance with their own due process procedures. The right answers are far from clear, as is the weight this voluntariness distinction should be granted when evaluating the admissibility of foreign government–compelled testimony. However, current case law leaves open the possibility of a legal distinction between compelled and coerced testimony, and there are policy reasons relevant to voluntariness that weigh toward making such a distinction.

2. Due Process Under the Self-Incrimination Clause

Within a voluntary analysis and without, the core constitutional issue is whether defendants receive due process. The Self-Incrimination Clause reads that no accused person "shall be compelled in any criminal case to be a witness against himself . . . without due process of law."[143] A plain text reading of the Clause suggests that once a person has received due process, she can be forced to testify against herself. From a purely textualist perspective then, *Allen*-type situations hinge on whether another country's administration of its own formal due process, which doesn't perfectly map onto American due process jurisprudence, creates the type of involuntariness that would render such testimony inadmissible. The Supreme Court has held that due process guarantees

> not particular forms of procedures, but the very substance of individual rights to life, liberty, and property . . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law . . . . In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. What is unfair in one situation may be fair in another. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is

(discussing the history of the self-incrimination privilege and referencing that six states after the American Revolution included protections against self-incrimination in their constitutions).

142 For example, through laws against perjury and oaths to tell the truth taken by witnesses.

143 U.S. CONST. amend. V.

> challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[144]

Foreign legal systems, like the UK government and the authority it grants the FCA, arguably meet this broad definition of due process when they compel self-incrimination. To be sure, not all foreign governments will, and for both political and practical reasons it is hard to draw a line between those governments that evince due process and those that don't. Managing such inconsistencies is difficult, but it is an important consideration for a voluntariness standard and for the ultimate question of constitutionality of foreign government procedures.

C. *Congressionally Compelled Testimony*

A final, potentially fruitful comparison comes from *United States v. North*,[145] which analyzes protections against self-incrimination in the context of compelled testimony during a congressional investigation.[146] *North* offers one example of constitutional protections constraining a non-traditional law enforcement actor outside of the executive branch, potentially useful when situating foreign authorities on the broad spectrum of standards of conduct constitutionally prescribed to different entities.[147] For example, while investigations by public employers also invoke Fifth Amendment protections,[148] courts have rejected any privilege in the context of private employers or other private parties.[149] As attempted by the Second Circuit in

144 FIFTH AMENDMENT: RIGHTS OF PERSONS, *supra* note 120, at 1546 (internal quotation marks omitted) (citing to multiple accepted Supreme Court precedents regarding the definition of due process).

145 910 F.2d 843 (D.C. Cir. 1990), *withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990).

146 While the *North* cases are discussed in relation to *Allen*, none of the *Allen* case materials considered the constitutional parallels between foreign governments and Congress in depth, instead focusing on *North*'s implications for the taint wall in this case. *See* United States v. Allen, 864 F.3d 63, 93 (2d Cir. 2017) (analyzing the Government's ability to meet its *Kastigar* burden based on the *North* standard). In *North*, the standard put forward was a "total prohibition" on prosecutorial exposure to immunized testimony, including the most tenuous witness exposure. United States v. North, 920 F.2d 940, 941-42 (D.C. Cir. 1990).

147 Other courts criticize the strictness with which the D.C. Circuit in *North* applied standards for judging taint, potentially limiting the universality of this analysis. *See* Amar & Lettow, *supra* note 128, at 879-80.

148 *See* J. Michael McGuinness, *Fifth Amendment Protection for Public Employees:* Garrity *and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations*, 24 TOURO L. REV. 697, 705-09 (2008) (describing Fifth Amendment protections for public sector workers established by the Supreme Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967)).

149 *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

Allen, foreign officials must now be situated within this spectrum,[150] and *North* provides a useful analogy.[151]

In *North*, congressional testimony compelled through a grant of immunity under 18 U.S.C. § 6002 was given during a recess of grand jury proceedings.[152] Pertinent to the highly publicized Iran–Contra scandal,[153] the immunized testimony was widely broadcast by media outlets and deemed sufficient to taint the grand jurors and witnesses.[154] Prior to *North*, the Supreme Court had made clear that Fifth Amendment protections apply to testimony before legislative committees.[155] Under § 6002, Congress can unilaterally grant criminal immunity for statements made in its committee hearings to compel self-incriminating testimony.[156] Although § 6002 is a statutory protection, the protection is coextensive with constitutional Fifth Amendment protections.[157]

North highlights the uncertain status of a foreign government, as opposed to a domestic government entity, compelling testimony that might impact U.S. trials. Based on *North*'s espoused values of resisting tyranny and avoiding the cruel expediency of forcing a confession,[158] foreign officials should be covered by Fifth Amendment protections. Congress and foreign authorities are similar in that both are government entities with sovereign powers that can induce the

150 *Allen*, 864 F.3d at 84-85.

151 This Comment intentionally ignores the Department of Justice's analogy of a foreign government to the private sector because it was well developed in the record and the Second Circuit compellingly distinguishes sovereign power from the power of a private entity. The Second Circuit stated:

> Only sovereign power exposes "those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." Only the U.K. *government* could have immunized Defendants (neither of whom were employed by Rabobank at the time), compelling them to testify or go to jail. To the extent there may be an "official/private action spectrum," when foreign authorities compel testimony they are acting in the quintessence of their sovereign authority, not in their capacity as a mere employer, and thus their compulsion is cognizable by the Fifth Amendment (when testimony so compelled is used in a U.S. trial).

Id. at 85 (emphasis in original) (quoting Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964); and then quoting Geoffrey S. Corn & Kevin Cieply, *The Admissibility of Confessions Compelled by Foreign Coercion: A Compelling Question of Values in an Era of Increasing International Criminal Cooperation*, 42 PEPP. L. REV. 467, 476 (2015)).

152 United States v. North, 910 F.2d, 843, 851, 857 (D.C. Cir. 1990).

153 *See id.* at 851 (detailing the establishment of congressional investigations following public revelations of U.S. arms sales to Iran to fund guerrilla fighters in Nicaragua).

154 *See id.* at 863-65, 871-73 (remanding the case and requiring the prosecution to affirmatively prove that the DOJ's investigation was not tainted by witness, prosecutor, and grand juror exposure to publicly broadcast testimony). The decision was upheld by *United States v. North*, 910 F.2d 940 (D.C. Cir. 1990).

155 *Watkins v. United States*, 354 U.S. 178, 195-96 (1957) (recognizing the privilege against self-incrimination before a legislative committee).

156 18 U.S.C. § 6002 (1994).

157 *North*, 910 F.2d at 853-54 (citing Kastigar v. United States, 406 U.S. 441, 453 (1972)).

158 *Id.*

imprisonment of individuals.[159] Both are similarly situated vis-à-vis U.S. law enforcement authorities in that neither holds formal law enforcement powers in the U.S. justice system but both can coordinate formally with U.S. federal law enforcement. Finally, both presumably share the previously decried incentive towards tyranny and overreach of authority stemming from their efforts to govern, maintain their political legitimacy, and bring criminals to justice.

At the same time, there are significant differences between Congress and foreign authorities relevant to an *Allen*-type analysis. The level of internal control or coordination present within the U.S. government is (hopefully) stronger than external coordination, where it is relatively uncommon to consider foreign law enforcement as engaged in a "joint venture" with U.S. authorities.[160] Here, Congress was able to pass § 6002 specifically immunizing testimony it receives, binding and directing U.S. law enforcement action in a way that foreign partners can't and shouldn't. In addition, contempt of Congress charges allow Congress to use U.S. law to imprison or otherwise pressure individuals into compliance with congressional subpoenas through judicial and executive branch cooperation, suggesting a significant level of coordination not available to foreign law enforcement.[161]

The disconnect here highlights a key distinction between U.S. and international entities and their prerogatives. Like U.S. law enforcement authorities, Congress serves American interests. Foreign authorities do not. Diverging goals can mean different targets for prosecution and different perspectives on the legality or culpability of actions, even where our countries' policy incentives are somewhat aligned.[162] The factual setup of *North* presents an illustrative hypothetical.[163] If the Nicaraguan National Assembly had broadcast the incriminating statements relevant in *North* instead of the U.S. Congress, U.S. prosecutors could similarly find their prosecutorial efforts scuttled, but this time in the interests of another country,

159 *See, e.g.*, TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 11 (2017), https://fas.org/sgp/crs/misc/RL34097.pdf [https://perma.cc/4ND5-2WZT] (discussing penalties, including imprisonment, for convictions of contempt of Congress as initiated by congressional investigators).

160 Joint ventures under Fourth Amendment jurisprudence trigger enhanced constitutional protections for defendants. *See* Amy E. Pope, *Lawlessness Breeds Lawlessness: A Case for Applying the Fourth Amendment to Extraterritorial Searches*, 65 FLA. L. REV. 1917, 1926-29 (2013).

161 *See supra* note 91 (discussing the practical difficulties of convincing non-U.S. entities to voluntarily adhere to robust U.S. legal standards); note 149 (addressing a parallel context in which Congress was able to use its statutorily granted authority, which would be enforced by the U.S. executive and judicial branches of government, to compel testimony).

162 Clearly the concerns are even greater when dealing with a hostile nation. *See supra* notes 77–79 and accompanying text.

163 Interestingly, this is the type of concerning hypothetical the Second Circuit declined to analyze in *United States v. Allen*. 864 F.3d 63, 86 (2d Cir. 2017).

rather than for an American conception of justice. Under this analogy, the extension of Fifth Amendment protections would hinge on our trust in the good faith of foreign partners and the consideration they will show to American interests in justice. As such, the answers congressional compulsion provides on the ultimate *Allen* constitutionality issue are limited.

North highlights the gray area between government and third-party compulsion into which foreign governments seem to fall, recalling from *Balsys* the idea of a threshold measure for finding cooperative internationalism.[164] Although analogous cases are useful, there are no perfect comparisons to guide an analysis of the admissibility of foreign government–compelled testimony in U.S. trials outside of the Second Circuit's *Allen* decision.

IV. EXAMINING SOLUTIONS

In light of the underdeveloped doctrine surrounding foreign government–compelled testimony and its admissibility in U.S. prosecutions, courts will soon need to articulate clearer legal standards to handle this issue. I assess six possible solutions along an approximate spectrum of the least to the most aggressive enforcement of the self-incrimination privilege: A) interpreting to its extreme the DOJ's *Allen* position that the privilege against self-incrimination should not apply abroad; B) allowing for testimony gathered in accordance with local laws; C) allowing for testimony where U.S. prosecutors made reasonable efforts to avoid taint under U.S. constitutional standards; D) creating a "cooperative internationalism" standard; E) establishing a hybrid option from these paths that I recommend to best balance constitutional concerns; and F) maintaining the Second Circuit's outright prohibition on testimony that does not meet U.S. constitutional standards. Some of these standards offer more practicable, fair outcomes than others, and some offer positive elements that I attempt to incorporate into the broader hybrid option. Above all, the six solutions highlight that administering proper justice can require coming to terms with the fact that justice does not always lend itself to black-and-white rules. As one example, the Second Circuit's acknowledgment that its standard specifically does not address a government-posed hypothetical of foreign sabotage exposes its weakness as an ostensibly universal standard.[165] In the context of self-incrimination abroad, the challenge is finding clear standards that fit all contexts.

164 *See supra* Section II.B.

165 *Allen*, 864 F.3d at 88 (rejecting the Government's concerns about foreign sabotage as not relevant to the *Allen* case specifically when ruling on the admissibility of compelled testimony).

A. *Declining to Apply U.S. Constitutional Protections Abroad*

An extreme approach courts could take would be to allow all testimony from abroad, compelled and otherwise, into U.S. trials. This is not a likely nor advisable scenario, for the very reasons this Comment has struggled to define how best to serve American policy prerogatives—the admissibility of compelled testimony is a complex and ethically fraught issue. The option is important to include as a starting point in the spectrum of potential courses of action for U.S. courts, but its utility ends there given the American value placed on constitutional protections.

B. *Basing Self-Incrimination on the Laws of Foreign Partners*

One potential line is where foreign governments have an equivalent to the U.S. Constitution's Fifth Amendment, U.S. authorities would be expected to use only testimony that meets the other government's legal standards. Such a standard would guard against the moral concerns about foreign sovereigns who entirely lack protections, raised in subsection III.B.1, because a U.S. court would still determine whether the foreign sovereign offered protections sufficient to be considered "due process." Once that threshold is met, the standard could be similar to the Foreign Corrupt Practices Act (FCPA)[166] context, where the government can only prosecute bribes that would also be considered bribery under both the law of the foreign country and under the FCPA.[167] By adapting our law to that of foreign countries, we would eliminate the possibility that a hostile government could manipulate their own laws to obstruct a U.S. prosecution.[168] In addition, we would be effectively balancing the policy consideration that foreign relations, including telling other countries how to conduct their criminal investigations, should be left to the political branches.[169]

166 15 U.S.C. § 78dd-1–dd-3 (2012).

167 Established by Congress in 1988, the FCPA "Local Law Defense" requires the defendant "establish that the payment was lawful under the foreign country's written laws and regulations at the time of the offense." U.S. DEP'T OF JUSTICE CRIMINAL DIV. & SEC. & EXCH. COMM'N ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 23 (Nov. 14, 2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [https://perma.cc/6AYK-DBA4].

168 *See supra* notes 77–79 and accompanying text.

169 *See* United States v. Balsys, 524 U.S. 666, 697 (1998) (highlighting that powers with respect to foreign relations are specifically enumerated to the political branches under Article II, § 2, cl. 2 of the U.S. Constitution). Note that this is also the rationale used for courts to sidestep scrutiny of extraditions to foreign partners on the basis of torture or other unconstitutional procedures/treatment. *See* John T. Parry, *International Extradition, The Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1975 (2010). As such, a local law deference standard would be consistent with U.S. policy in other contexts.

At the same time, because different governments conceive of the protection against self-incrimination in dramatically different ways,[170] Fifth Amendment protections would be left open to confusion and vulnerable to circumvention by close international law enforcement cooperation, especially if the "due process" sufficiency standard was overly relaxed. In *Allen* there was significant discussion of the nature of immunity offered by U.K. regulators to Robson and the requirement that he review what in the U.S. would be considered tainted testimony.[171] Such fact-specific nuances would then impact testimony's Fifth Amendment protections, forcing U.S. prosecutors to argue the intricacies of other countries' privileges against self-incrimination.[172] Worse, U.S. prosecutors could instruct their foreign counterparts to ask a list of specific questions prohibited by the Fifth Amendment but allowed under their own laws, and then send the answers to U.S. prosecutors. If a foreign partner did not have what judges would consider sufficient "due process" protections, this proposal could preclude formal cooperation and evidence sharing altogether. Human rights advocates might argue this to be a positive outcome, including its resulting pressure on regimes without due process, but it puts a tremendous strain on U.S. law enforcement where they attempt to hold criminals accountable already taking advantage of other countries' rule of law challenges.[173] Furthermore, this approach would condition American constitutional rights on the laws of other countries, which would have negative implications for our sovereignty and the strength and consistency of our constitutional protections. Taken alone then, this option creates serious problems for the sanctity of American values.

170 *See supra* note 92.

171 *See* United States v. Allen, 160 F. Supp.3d 684, 688-90 (S.D.N.Y. 2016) (noting that the ruling in *Kastigar* affords "immunity from both direct use and derivative use of [their] compelled testimony").

172 Certainly prosecutors could get official advisory opinions from their foreign counterparts under current practice, but the struggle of parsing out the nuance in whether other countries have "substantially similar" immunity practices and whether those practices are "substantially similar" in a particular case would create significant fact-specific uncertainty. *See, e.g.*, United States v. Peterson, 812 F.2d 486, 492 (9th Cir. 1987) (allowing for a good faith exception where U.S. authorities relied on assurances of propriety from counterparts in the Philippines); United States v. Ramcharan, No. 04-20065-CRSEITZ, 2008 WL 170377, at *9 (S.D. Fla. Jan. 14, 2008), *aff'd*, 353 F. App'x 419 (11th Cir. 2009) (observing that U.S. officials properly relied on assurances about Bahamanian wiretap law from local authorities).

173 For example, U.S. law enforcement often cooperates with Saudi Arabian and Israeli authorities on national security issues that can turn into criminal prosecutions. If either country was judged to compel testimony in contravention of due process protections, U.S. prosecutors might shy away from partnerships fearing that compelled testimony they gathered might taint a future U.S. criminal investigation or U.S. witnesses at trial.

C. *Allowing Testimony After Reasonable Efforts Against Taint*

Alternatively, formal law enforcement cooperation in investigations could be exempted from scrutiny as long as U.S. investigators do not intentionally direct foreign investigators to obtain evidence that would otherwise be considered unconstitutional. An underlying assumption of this policy would be that the Fifth Amendment right against self-incrimination applies abroad, but reasonable best efforts by prosecutors to avoid compelled testimony could cure otherwise irreparably tainted testimony. In the *Allen* case, rather than a full separate filter team of attorneys[174], the Department of Justice might have satisfied their burden with, perhaps as one example, clear and consistent requests to Robson that he not share information from the Conti and Allen transcripts, as well as meetings with the U.K. authorities explaining what information could or could not be shared.

As examples, a potential "reasonable efforts" standard for international law enforcement cooperation could be modeled on *Upjohn* warnings[175] or Jencks Act disclosures.[176] *Upjohn* warnings require lawyers representing companies to make clear to individual employees that they do not represent the individuals themselves but only their employer.[177] The standard for clearly communicating *Upjohn* warnings to a corporation's employees seems appropriate because much of the efforts by U.S. prosecutors to avoid taint will be good faith, clear communication with foreign authorities about what is/isn't acceptable under U.S. law.[178] The "good faith efforts" framework could also be informed by the international applicability of Jencks Act disclosures, wherein prosecutors are expected by some courts to make good faith efforts to obtain copies of prosecution witness statements in the possession of

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

175 Upjohn Co. v. United States, 449 U.S. 383 (1981).

176 18 U.S.C. § 3500 (2012).

177 *See* JONATHAN BEN-ASHER, AM. BAR ASS'N, ISSUES IN INTERNAL INVESTIGATIONS OF EXECUTIVES 14-17 (2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/err/papers/issues_in_internal_investigations.authcheckdam.pdf [https://perma.cc/55D6-RXDH] (outlining the obligations of *Upjohn* warnings and their traditional components as laid out in the Model Rules of Professional Conduct and by the American Bar Association).

178 As outlined in the ABA Model Rules of Professional Conduct Rule 4.3, the company's lawyer "shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 2016).

foreign governments.[179] However, that analogy is constrained by the complexities in Jencks Act case law.[180]

Any form of a "reasonable best efforts" test has interesting implications for law enforcement. Because of the heavy *Kastigar* burden on the prosecution, avoiding such a hearing would also save judicial resources without detracting from the goal of preventing government overreach. The threat of a *Kastigar* hearing would encourage good faith efforts by prosecutors, but accidental missteps by foreign counterparts would not occasion a mistrial or concern U.S. investigators to the point of diverting departmental resources to establish brand new filter teams to support a case. This proposal would keep control, and responsibility, entirely under the purview of U.S. law enforcement authorities, stopping the inevitable dismissal of cases based on foreign counterpart actions that would occur under other standards through no fault of U.S. authorities.[181]

An odd consequence of this proposal is that the privilege against self-incrimination would no longer be an absolute protection against the use of irreparably tainted testimony at trial. Instead, while the privilege would be acknowledged to apply to foreign government–compelled testimony, some otherwise inadmissible testimony would be allowed to enter trials simply because it was collected by foreign agents and then leaked to U.S. prosecutors or witnesses despite American best efforts to avoid leakage.

Importantly, defining "taint" is a fundamentally different exercise than judging an allowable degree of taint. Under strict taint wall standards as seen in the *North* case,[182] the question becomes whether or not taint occurred.

---

179 *See* United States v. Yousef, 327 F.3d 56, 129 (2d Cir. 2003) (applying a good-faith efforts standard to a failed U.S. prosecutorial attempt to obtain all relevant materials from foreign law enforcement); *see also* United States v. Paternina-Vergara, 749 F.2d 993, 998 (2d Cir. 1984) (holding that prosecutors are at most required to use good-faith efforts to procure foreign law enforcement materials and finding U.S. officials met that burden).

180 *See* United States v. Reyeros, 537 F.3d 270, 285 n.20 (3d Cir. 2008) (declining to extend the *Paternina-Vergara* ruling); United States v. Friedman, 593 F.2d 109, 119-20 (9th Cir. 1979) (finding that the U.S. government was not required under the Jencks Act to produce information seized by the Chilean government but not addressing any sort of "best efforts" standard); *cf.* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1225 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990) (distinguishing U.S. law enforcement obligations from those articulated in *Paternina-Vergara* on the grounds that the U.S. government was engaged in a "joint venture" with foreign law enforcement officials).

181 *Cf. supra* note 91 (noting from practitioners that the Second Circuit's *Allen* decision will increase the prosecutorial burden to a degree that in some cases prosecutions will be abandoned). The *Balsys* Court was particularly concerned with this issue in its holding on the converse of the *Allen* situation. *See* United States v. Balsys, 524 U.S. 666, 698 (1998) ("We therefore must suppose that on Balsys's view some evidence will in fact be lost to the domestic courts, and we are accordingly unable to dismiss the position of the United States in this case, that domestic law enforcement would suffer serious consequences if fear of foreign prosecution were recognized as sufficient to invoke the privilege.").

182 United States v. North, 910 F.2d 843, 872-73 (D.C. Cir. 1990) (judging the taint wall insufficient against a much higher *Kastigar* standard that required proof "that the witness was never exposed to North's immunized testimony, or that the allegedly tainted testimony contain[ed] no evidence not 'canned' by the prosecution before such exposure occurred").

Under this proposal, irreparable taint stipulated to have occurred under any standard could be admissible at trial. This result would be a novel legal development and a step backward for strong constitutional protections. The relatively low bar set by a reasonable best efforts standard for prosecutors that allows for admittedly unconstitutional testimony to enter U.S. trials violates our values and creates some potential for prosecutorial manipulation. Overall, a standalone "reasonable best efforts" test would create significant vulnerabilities in constitutional protections.

D. *Setting a Clear Line for Cooperative Internationalism*

Another option is to set a clear line based on the *Balsys* concept of cooperative internationalism.[183] Such a test would question U.S. law enforcement control over testimony and create more generally an on–off standard of applicability. From the current precedent, there would seem to be a sliding scale for cooperative internationalism: at one extreme is *Balsys*, finding no Fifth Amendment protections because the foreign authorities act entirely separately from U.S. authorities,[184] and at the other extreme is *In re Terrorist Bombings*, where Fifth Amendment protections are implicated when foreign governments allow U.S. officials to enter their territory and conduct interrogations of suspects themselves.[185] Somewhere between these two extremes is the threshold for what could constitute cooperative internationalism, which the *Balsys* Court only briefly addresses.[186] As discussed in Section II.B., current practices could, on a case-by-case basis, be found to constitute cooperative internationalism. The *Balsys* Court seems to identify a few factors: (1) substantially similar criminal codes aimed at prosecuting offenses of an international character,[187] (2) evidence that prosecutors were intentionally granting immunity with the intention of providing that evidence for prosecutions in the partner country, and (3) so

183 *See supra* Section II.B.

184 *Balsys*, 524 U.S. at 692.

185 *See In re* Terrorist Bombings of U.S. Embassies in East Africa v. Odeh, 552 F.3d 177, 181 (2d Cir. 2008); *cf.* United States v. Yousef, 327 F.3d 56, 82-83 (2d Cir. 2003).

186 *See Balsys*, 524 U.S. at 696 (stating that a cost–benefit analysis would be necessary to determine whether cooperative internationalism should be found).

187 Note that efforts to standardize criminal codes were underway well before *Balsys* was decided, as Mutual Legal Assistance Treaties and Extradition Treaties have long relied on the concept of dual criminality—that something must be a crime in both countries—in order to offer international evidence gathering or extradition assistance. For a general discussion of Mutual Legal Assistance Treaties and international law enforcement cooperation channels, including a discussion of dual criminality, see Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 WM. & MARY BILL RTS. J. 209 (2002) and specifically page 214 n.15 for a citation to the U.S. extradition treaty with Egypt dating back to 1874.

little differentiation between the two enforcement authorities that prosecution could not be "fairly characterized as distinctly 'foreign.'"[188] These stringent factors can be interpreted to implicate a quasi-agency doctrine, requiring that the foreign government have acted as an agent of the U.S. government.

The problem with the *Balsys* test alone, as argued by some, is that it allows for significant manipulation by prosecutors and removes any Fifth Amendment burdens from them so long as foreign counterparts are kept somewhat at arm's length.[189] Furthermore, this approach would raise many technicalities: What if prosecutors are only acting under cooperative internationalism on certain aspects of a case? What if prosecutors cooperate in bad faith with foreign counterparts knowing the results will be useful to circumvent the Fifth Amendment even if they are not working particularly closely together? What if other governmental officials, like the State Department or members of Congress, intervene to ensure the "right questions" from an American perspective are asked by foreign authorities to avoid U.S. prosecutorial involvement?[190] By defining the applicability of the Fifth Amendment in terms of this single dimension, the standard would leave much room for abuse of discretion by prosecutors to chip away at the constitutional privilege against self-incrimination.

E. *Recommending a Hybrid*

Ultimately, I suggest that courts adopt a middle ground, combining the *Balsys* test, which measures the extent of international cooperation,[191] with a requirement of good faith that is presumed where prosecutors make reasonable best efforts to prevent taint. First, courts would analyze the closeness of coordination between U.S. and foreign law enforcement under the cooperative internationalism standard, likely approximating the joint venture standard outlined in the

---

188 *Balsys*, 524 U.S. at 698 ("If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly 'foreign.'").

189 *See* James C. Moon, *Fifth Amendment Apogee: How the Supreme Court's Ruling in* United States v. Balsys *Checked American Ideas of Personal Liberty at Our Borders*, 32 CONN. L. REV. 351, 377-79 (1999) (arguing that the *Balsys* decision was an invitation to government overreach and too quickly relieves prosecutors of the Fifth Amendment burden).

190 This concern would likely not be as significant because Fifth Amendment privileges against self-incrimination apply to other U.S. governmental bodies like executive branch employers and Congress, as discussed in Section III.C, so it does not seem a stretch to assume that those entities could also trigger charges of "cooperative internationalism."

191 *Balsys*, 524 U.S. at 698 (postulating that the threshold for cooperative internationalism is based on the relative level of coordination in which two governments engage).

voluntariness analysis of subsection III.B.1. In circumstances where cooperative internationalism is found, there would be a black-and-white application of the privilege against self-incrimination. Foreign government–compelled testimony would not be admissible in U.S. courts. For situations judged to demonstrate less than cooperative internationalism, foreign government–compelled testimony would be admissible in U.S. courts unless bad faith efforts by prosecutors called into question the true nature of international cooperation in that case. Accordingly, U.S. prosecutors would be expected to take reasonable efforts in good faith to prevent taint of their witnesses, evidence, and other aspects related to trial. As in the FCPA context,[192] respecting the laws of countries where a slightly different right to self-incrimination exists could be considered good faith efforts on the part of a prosecutor.

Although unorthodox, this solution best recognizes the unique, third party nature of foreign governments. It has the benefit of establishing some Fifth Amendment protections while minimizing the number of cases lost due to taint leakage. Such a policy would leave prosecutors wide discretion in their dealings with foreign governments and would allow them to put faith in their best judgments. It would also remedy the intellectual consistency issue of a reasonable best efforts standard, focusing the analysis on the overall foreignness of the testimony rather than the actions of U.S. prosecutors related to tainted testimony. More practically, because of the increasing globalization of economies and crime,[193] prosecutors need to have clear guidelines, which this would provide, and flexibility when dealing with an issue that, in some cases, will simply be out of the control of U.S. law enforcement. A standard like this proposed hybrid would accommodate the nuances of cases likely to arise in this constitutional grey area and would effectively balance constitutional protections and the rule of law.

F. *Requiring Full Fifth Amendment Protections*

A sixth path is to follow the Second Circuit and require that all Justice Department investigations go beyond even the measures the Department took in *Allen*. Although this would be resource intensive, it would also provide the most effective safeguard of a defendant's Fifth Amendment rights by eliminating the possibility of even an accidental leakage between a foreign and domestic prosecution. However, given the spike since 2008 in

192 *See supra* Section IV.B.

193 *See* UNITED NATIONS OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT ii (2010), https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf [https://perma.cc/W8UQ-SMLM] (discussing the unprecedented pace of economic globalization and new transnational criminal developments it has spurred).

international white collar crime investigations, and with international law enforcement cooperation accompanying that spike, this path may be unsustainable in the long run, or may significantly damage the rule of law with regards to international crimes.[194] Inevitably, errors by foreign counterparts or unintentional mistakes by U.S. authorities will lead to case dismissals where prosecutors could otherwise secure convictions. In addition, this policy would be susceptible to manipulation by foreign powers, who could sabotage U.S. trials by intentionally publicizing tainted information. Though the Second Circuit dismissed such a concern in its ruling as no longer truly "involuntary" testimony,[195] one can easily think of situations where a corrupt regime could obscure how voluntary testimony truly was, and a U.S. court would not be well-equipped to draw the line between corrupt voluntary testimony and legitimately compelled testimony. Also, it seems odd that the U.S. government would only accept corruptly compelled testimony and would reject as unconstitutional testimony collected legitimately under the rule of law in another country. If anything, this outcome contravenes the reliability justification for a voluntariness standard discussed in subsection III.B.1, because testimony contrived by a foreign government for the purpose of stymieing a U.S. investigation is not likely to be reliable. More fundamentally, defendants in international crimes would functionally receive stronger protections than defendants in purely domestic crimes, as prosecutors face complex international evidentiary burdens that prevent them from pursuing cases they would have no trouble prosecuting domestically.[196] Given that international crimes implicating U.S. jurisdiction in this context are far more likely to be perpetrated by those with the resources to travel and communicate internationally, this discrepancy privileges rich defendants over poor defendants.[197] When dealing with an

194 *See generally* Lara Kroop Delamarre, *Preparing for DOJ's International Investigations*, LAW360 (Feb. 15, 2017, 11:46 AM), https://www.law360.com/articles/891511/preparing-for-doj-s-international-investigations [https://perma.cc/4LCK-KDLG] (highlighting the DOJ's increased focus on pursuing international white collar crime); *The Fraud Section's Foreign Corrupt Practices Act Plan and Guidance*, U.S. DEP'T OF JUSTICE CRIMINAL DIV. (Apr. 5, 2016), https://www.justice.gov/criminal-fraud/file/838416/download [https://perma.cc/FVX5-FFVS] (demonstrating the DOJ's commitment of resources to FCPA cases, which often involve cooperative prosecutions with foreign governments).

195 United States v. Allen, 864 F.3d 63, 88 (2d Cir. 2017) ("[S]hould 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.").

196 *See supra* note 91.

197 At the same time, note that the full scope of transnational crime is hard to quantify or define, though it includes many crimes traditionally committed by those with resources. *Cf.* COUNCIL ON FOREIGN RELATIONS, THE GLOBAL REGIME FOR TRANSNATIONAL CRIME (2013) https://www.cfr.org/report/global-regime-transnational-crime [https://perma.cc/FP8M-ZAEH] (discussing current trends in types and scope of transnational crime, including increased trafficking of drugs and counterfeit medicines, environmental crimes like illegal logging, and arms smuggling). However, this argument is predicated

issue as complex as foreign government–compelled testimony, it is hard to establish a straightforward answer.

CONCLUSION

As highlighted in the post-trial *Kastigar* hearing from *United States v. Allen*[198] (though seemingly denied in the Second Circuit opinion[199]), there is no national consensus in current jurisprudence on whether compelled testimony elicited by a foreign government violates the Fifth Amendment. Yet there will come a time when other circuits facing cases like *Allen* will need to address the admissibility of foreign government–compelled testimony. While analogous Supreme Court precedent in *Balsys* seems to speak to the issue through its reasoning and provides a model for determining admissibility through its warnings on cooperative internationalism, the practical application of any doctrine will be fact-specific until a sufficient number of these cases reach the courts. Courts considering similar cases in the future can find ammunition for applicability in the silent assumptions of *Bram*, where the historical practice of applying the Self-Incrimination Clause in international cases dates back to 1897. They might also adopt principles, particularly on voluntariness and due process, from the *Miranda* warnings case law. Other similarly-situated entities as compared to U.S. law enforcement, like Congress, can also provide insight into how a non-U.S. law enforcement entity should be treated with regards to U.S. constitutional obligations.

Pulling from this amalgamation of U.S. policies and traditions, possibilities for how courts will rule under the current case law are numerous. Among six different points along the potential spectrum of protections, this Comment recommends a hybrid policy balancing constitutional protections and reasonable efforts by prosecutors by emphasizing the closeness of coordination between U.S. law enforcement and their foreign counterparts, as well as efforts by prosecutors, where cooperation is not exceptionally close, to prevent taint. Different courts may choose different approaches to enforcing Fifth Amendment protections on foreign government–compelled testimony, but it is important that the jurisprudence on this question evolve quickly and clearly so as not to waste excessive government resources on unprosecutable or unwinnable cases. International law enforcement cooperation is skyrocketing, and with it will come new challenges for our government. Although this may require courts to take a more active role in foreign affairs, it reflects the new realities of globalization: justice is no longer a local concern.

---

on the assumption that law enforcement authorities will pursue predominantly the leaders of international criminal organizations, rather than the lowest-level members who may lack means.

198 United States v. Allen, 160 F. Supp. 3d 684, 690 n.8 (S.D.N.Y. 2016).

199 *Supra* note 6.