

District Court Opinion Criticizes Government “Outsourcing” of Investigations

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Last week, in a decision that is sure to receive close scrutiny by federal prosecutors and regulators—and by the corporate institutions and lawyers who deal with them—the Chief Judge for the Southern District of New York, Colleen McMahon, criticized the government for having “outsourced” to a bank the government’s investigation of financial fraud.¹ Because of that “outsourcing,” the Court ruled, interview statements obtained by bank counsel from an employee later indicted by the Department of Justice (“DOJ”) and convicted after trial were “compelled” in violation of the employee’s Fifth Amendment right against self-incrimination. The Court therefore analyzed whether the government’s prosecution had been tainted by use of the interview statements, a conclusion that would require invalidation of the conviction and dismissal of the indictment. The Court ultimately found no taint and upheld the conviction, but only after sharply rebuking the government for the degree to which it had directed the investigation by the bank’s outside counsel in a case where the company had no real choice but to cooperate.

While the ultimate impact of this decision remains to be seen—both sides are likely to appeal and unique facts may confine its scope—the potential effects should be considered now. Prosecutors and regulators will take care in how they interact with corporate entities and their counsel, both to protect pending investigations and to avoid the pitfalls that informed the Court’s decision here.

THE “OUTSOURCING” CONCLUSION AND FINDING OF A FIFTH AMENDMENT VIOLATION

Gavin Black, a former bank trader, was convicted at trial in October 2018 of fraudulent manipulation of the London Inter-Bank Offered Rate (“LIBOR”) index. He moved, post-trial, to dismiss his indictment and conviction on the ground that his prosecution “was predicated on and infected by” statements he had made when interviewed by the bank’s

¹ This decision was issued on May 2, 2019 in *United States v. Connolly et al.*, 1:16-cr-00370, ECF No. 432, in the U.S. District Court for the Southern District of New York.

outside counsel during its investigation. Black argued that he made the statements under threat of termination because the bank would have fired him had he declined to be interviewed by company counsel. He further argued that the bank's counsel effectively was acting as an agent of the government at the time of his interviews, and therefore his statements were "compelled" in violation of his Fifth Amendment right against self-incrimination.

In advancing this argument, Black invoked *Garrity v. New Jersey*, 385 U.S. 493 (1967), holding that when a public employer obtains statements from its employees under threat of termination, such statements are considered involuntary, and their use for criminal prosecution violates the Fifth Amendment. Courts have extended the *Garrity* rule to private employers whose conduct is "fairly attributable to the government."

The Court readily found that Black had been compelled "upon pain of losing his job" to sit for multiple interviews with the bank's outside counsel. Thus, the key question under *Garrity*, the Court said, was whether the bank's internal investigation (and specifically the investigative steps it took with respect to Black) could be fairly attributed to the government. The Court answered that question in the affirmative—finding that the bank's investigation "was neither voluntary nor internal to" the bank, but rather had been outsourced and directed by the government, such that the bank's interviews of Black were "Government-engineered." Accordingly, the Court concluded that Black's interview statements had indeed been compelled in violation of the Fifth Amendment.

In reaching this conclusion, the Court itself underscored that "[t]his was no ordinary 'outside' investigation." The Court emphasized four key factors:

- The Commodity Futures Trading Commission (the "CFTC") had sent the bank an aggressively worded letter near the start of the investigation, stating the agency's expectation that the bank would, through external counsel, conduct an investigation and report the results to the CFTC on an ongoing basis. The Court deemed the CFTC's letter a demand, not a request, citing the testimony of the bank's outside counsel that there was nothing "voluntary" about the investigation following the CFTC's letter.
- After opening its criminal investigation, DOJ attorneys waited more than three years before interviewing the bank's employees; instead, DOJ monitored the bank's counsel's interviews and waited for the bank to submit a "white paper" summarizing the bank's findings before taking affirmative investigative steps of its own.
- The government gave "considerable direction" to bank counsel over a multi-year period on what to do, when to do it, and how to do it. For example, the government directed what "immediate" investigative actions bank counsel should take; directed

that certain employees, including Black, be re-interviewed by bank counsel “before Thanksgiving”; instructed outside counsel to approach a particular interview “as if he were a prosecutor”; and created an environment of government control such that the bank asked permission before interviewing Black (“*its own employee*,” emphasis in the opinion).

- The government and bank counsel engaged in “some 230 phone calls” and “30 in-person meetings” during which the bank provided real-time updates and the government raised additional requests (what the Court described as “marching orders”).

Taken together, the Court concluded that, rather than conduct its own substantive parallel investigation to the bank’s internal investigation, the government had “outsourced the important developmental stage of its investigation to [the bank] ... and then built its own ‘investigation’ into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the Bank and its lawyers.”

In so holding, the Court acknowledged that the bank possessed and vindicated entirely legitimate, private interests and responsibilities by cooperating with the government “to the uttermost.” Indeed, the bank’s extensive cooperation earned it praise from the government and benefits for how the bank’s own criminal exposure was resolved. Still, the Court found that the close nexus between the government and the bank in this particular investigation carried constitutional implications for the defendant’s right against self-incrimination.

DENIAL OF RELIEF UNDER KASTIGAR, FINDING NO “TAINT”

Having found a Fifth Amendment violation, the Court turned to Black’s claim for relief under *United States v. Kastigar*, 406 U.S. 441 (1972), assessing whether the government’s criminal prosecution of Black had been tainted by use of Black’s improperly compelled interview statements. The Court denied the motion, finding no taint and also denying Black’s request for an evidentiary hearing on that issue. In essence, the Court determined that none of the evidence presented to the grand jury or later to the trial jury had derived, directly or indirectly, from Black’s interview statements (which the government did not seek to introduce at trial). Furthermore, even if the government had relied on Black’s interview statements to gain an understanding of the LIBOR process and develop investigative leads, the Court found such “tangential uses” too insubstantial to taint the government’s case.

IMPLICATIONS FOR GOVERNMENT INVESTIGATIONS

Judge McMahon's ruling is a rare decision, in a high-profile case, to wrestle with concepts of "voluntariness" and "coercion" in the context of a criminal investigation where the government exerted existential pressure on a bank. The most important aspect of the decision is its analysis of the point at which government engagement with corporate counsel risks converting an internal investigation into a state one.

It is too soon to tell the long-term impact of this opinion, for a few reasons. First, the decision is likely to be challenged on appeal and poses substantial issues relating to *Garrity* and *Kastigar* that could lead to reversal in either direction. Second, even if the Court's decision is affirmed on appeal, the specific facts and Judge McMahon's assessment of the record before her may distinguish it from other cases. Not only was the level of the government's involvement in directing the bank's investigation unusually high, but the Court also appears to have been skeptical of the particular prosecution team.

For now, the decision is likely to have some immediate effects:

- In coming months, and until any appellate challenges have been resolved, expect prosecutors and regulators to be more careful in how they approach interactions with company counsel during investigations, to avoid accusations or findings that heavy-handed government direction converted company investigative counsel into state actors. Also expect prosecutors and regulators to keep notes of their communications with company counsel, to rebut such allegations. Relatedly, prosecutors and regulators may be less transparent about their views of the evidence, expectations of counsel, and independent investigative efforts.
- Expect prosecutors to be less willing to hold off for long periods of time on conducting interviews of company employees, even if companies request the opportunity to complete their interviews or internal investigation first.
- The Court's decision should not impact the validity of company policies that strictly require employees to cooperate with company investigations when asked to do so. That said, companies may wish to consider memorializing contemporaneously the company's private, independent reasons for undertaking internal investigations and conducting employee interviews.

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