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INTERNAL INVESTIGATIONS

You May Already Be a Government Agent: *United States v. Carson* And What Will Turn a Corporate Internal Investigation Into 'State Action'



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A company has hired you to investigate allegations that its employees violated federal criminal law. The Department of Justice is doing its own investigation, and the company wants to cooperate. But in an unexpected turn, the employees claim that you—a private lawyer—violated their Fourth Amendment rights when you reviewed their email without a warrant and violated their Fifth Amendment rights when you interviewed them without *Miranda* warnings. Because of your cooperation with the government's investigation, the employees argue that your actions constitute ''state action'' limited by the U.S. Constitution.

Can too much coordination with law enforcement really make you a state actor? How do you know when you've crossed the line? The bad news is that courts are divided as to what standard to apply—and the *worse* news is that neither of the competing standards draws a clear line. Here is a primer on the standards in an internal investigation context and some tips to make sure you stay on the ''private party'' side of whatever standard your court may choose.

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Not Just a Hypothetical Concern: The Case of *United States v. Carson*

A major U.S. law firm recently found itself facing just such a state-actor claim in *United States v. Carson*.[1] Control Components Inc. and its parent company (collectively CCI) asked outside counsel to investigate

[1] No. 8:09-cr-00077 (C.D. Cal. April 8, 2009).

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whether employees had violated the Foreign Corrupt Practices Act and to disclose any potential violations to DOJ.[2]

Early in the investigation, the law firm interviewed CCI employees who were the subjects of the investigation.[3] The law firm communicated with DOJ both before and after the interviews, provided documents to DOJ, made witnesses available for interview, and generally cooperated fully with DOJ's parallel criminal investigation.[4]

The United States eventually charged certain CCI employees with violating the FCPA. The defendants moved to suppress the statements they made in their interviews, arguing that CCI and its counsel ''were *de facto* public actors when they implicitly threatened to terminate Defendants' employment if they did not cooperate and participate in [the] interviews.''[5] The defendants claimed that because they were not advised of their rights against self-incrimination, the statements made in their interviews must be suppressed.[6]

The problem for law firms conducting internal investigations is that courts have used two different standards for determining whether a private actor's conduct should be considered state action in this context: the ''instrument or agent'' test and the ''sufficiently close nexus'' test.

The Instrument or Agent Test

The ''instrument or agent'' test derives from the 1971 U.S. Supreme Court search and seizure case *Coolidge v. New Hampshire*.[7] In *Coolidge*, police officers interviewed the wife of a murder suspect, who gave the officers four guns belonging to her husband. The officers took the guns and other items and eventually arrested the husband for murder. One key question before the court was whether the wife's production of these items to the officers subjected the husband to a search and seizure for purposes of the Fourth Amendment. The Supreme Court held that the test was ''whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings.''[8] Because the police did not coerce the wife and were not obligated to refuse her offer for them to take the guns, the court found that the wife did not act as ''the 'instrument' or agent'' of the police.[9]

The Supreme Court did not elaborate on how to apply the ''instrument or agent'' test at the time. However, in 1981, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Walther*[10] proposed two principles that have guided the analysis of subsequent appellate courts in criminal investigation contexts. In *Walther*, an airline employee opened a suspicious-looking suitcase and found white powder. The employee had previously been an informant for the Drug Enforcement Administration, had received cash rewards for reporting other drug transactions, and understood there was a chance he would receive cash this time. The employee contacted a DEA agent, who determined the substance was cocaine and arrested the suitcase owner.

The *Walther* court first noted that ''the presence of law enforcement officers who do not take an active role in encouraging or assisting an otherwise private search [is] insufficient to implicate fourth amendment interests, especially where the private party has [] a legitimate independent motivation for conducting the search.''[11] The court then propounded two general factors to determine whether the airline employee's conduct should be considered state action:

(1) government knowledge of and acquiescence in the intrusive conduct; and

(2) intent of the performing party to assist law enforcement efforts rather than to further a private motivation.[12]

These two factors have been employed by at least seven other courts of appeals weighing similar Fourth Amendment claims.[13] Before treating a private party as a government agent, these courts generally have required evidence beyond mere government knowledge and acquiescence[14]—evidence such as whether the pri-

[2] Id. at docket no. 774 (C.D. Cal. May 22, 2012) (order denying defendants' motion to dismiss the indictment). Hereinafter ''*Carson* Order.''

[3] *Carson* Order at 1-2.

[4] *Carson* Order at 2-4; see also docket no. 573 (defendants' notice of motion and motion to suppress defendants' statements, at 3-5, hereinafter *Carson* Motion).

[5] *Carson* Motion at 2.

[6] *Carson* Motion at 2.

[7] 403 U.S. 443 (1971).

[8] Id. at 487.

[9] Id. at 488.

[10] 652 F.2d 788 (9th Cir. 1981).

[11] Id. at 792. The Ninth Circuit reaffirmed the *Walther* agency analysis in *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994).

[12] *Walther*, 652 F.2d at 792.

[13] See, e.g., *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003) (applying agency test in holding that anonymous computer hacker who told police that defendant possessed child pornography was not acting as government agent, and thus hacker's search of defendant's computer files did not implicate Fourth Amendment); *United States v. Jarrett*, 338 F.3d 339, 344-45 (4th Cir. 2003) (applying agency test in holding that government did not know of and acquiesce in hacker's search of defendant's computer for child pornography in a manner sufficient to transform hacker into government agent); *United States v. Leffall*, 82 F.3d 343, 347 (10th Cir. 1996) (applying agency test in holding that airline employee was not acting as instrument or agent of government when he opened suspicious-looking package); *United States v. Pierce*, 893 F.2d 669, 673-74 (5th Cir. 1990) (same); *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir. 1990) (applying agency test in holding that Fourth Amendment did not apply to informant entering defendant's property and viewing marijuana being grown through greenhouse window); *United States v. Feffer*, 831 F.2d 734, 738-39 (7th Cir. 1987) (applying agency test in holding that taxpayers' employee was not instrument or agent of government when she delivered incriminating records to Internal Revenue Service); *United States v. Howard*, 752 F.2d 220, 227 (6th Cir. 1985) (applying agency test in holding that insurance company investigator was not subject to Fourth Amendment because his intent in conducting search was ''entirely independent of the government's intent to collect evidence for use in a criminal prosecution''), vacated on other grounds, 770 F.2d 57 (1985).

[14] See *Jarrett*, 338 F.3d at 347 (''we have required evidence of more than mere knowledge and passive acquiescence by the Government before finding an agency relationship''); *United States v. Smythe*, 84 F.3d 1240, 1242-43 (10th Cir. 1996) (''knowledge and acquiescence . . . encompass the requirement that the government must also affirmatively encourage, initiate or instigate the private action''); *United States v. Koenig*, 856 F.2d 843, 850 (7th Cir. 1988) (''It is only by the exercise of

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vate actor searched at the government's request, and whether the government offered a reward.[15]

The 'Sufficiently Close Nexus' Test

The other standard courts use to determine state action is the ''sufficiently close nexus'' test, first articulated by the Supreme Court in the constitutional torts context in *Jackson v. Metropolitan Edison Co.*[16] In *Jackson*, a customer sued a private utility corporation under 18 U.S.C. § 1983 for cutting off her electricity without due process of law—that is, without sufficient notice, a hearing, or an opportunity to pay the outstanding amount of her bill. She argued that the utility company was a de facto state actor that deprived her of property without due process.

To determine whether the utility company was acting as an agent of the state bound by the 14th Amendment's Due Process Clause, the Supreme Court asked ''whether there [was] a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.''[17] In *Jackson*, the court held that although the utility had a partial monopoly over electricity services that were highly regulated and the state utility commission approved the service termination, the state was not sufficiently connected to make the utility's conduct attributable to the state.

The Supreme Court further developed the ''sufficiently close nexus'' test in *Blum v. Yaretsky*.[18] In *Blum*, the question was not whether a private defendant could be held to constitutional standards applicable to the government but whether the government defendant could be sued for actions of a private party. Yet the court discussed the same ''close nexus'' analysis to determine ''when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.''[19]

Among other things, *Blum* explained that ''a State normally can be held responsible for a private decision only when it has exercised *coercive power* or has provided such *significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State.''[20] ''Mere approval of or acquiescence in the initiatives of a private party,'' the court stated, ''is not sufficient to justify holding the State responsible for those initiatives.''[21] A private entity may be considered a state actor when it has ''exercised powers that are 'traditionally the exclusive prerogative of the State,' '' such as limiting who can vote in government elections.[22] In a later decision, the court also added that a private actor may become a state actor if the actor ''operates as willful participant in joint activity with the State or its agents,'' ''is entwined with governmental policies,'' or ''when government is entwined in its management or control.''[23]

Under the ''sufficiently close nexus'' test, the party seeking to establish that action of a private party violated the Constitution must be able to point to the specific act or actions of the government that motivated the private action, thus establishing the nexus between the private party and the government.

Which Standard Applies In the Self-Incrimination Context?

In search and seizure cases under the Fourth Amendment, appellate courts apply the ''instrument or agent'' test to determine state action. In due process cases under the Fifth Amendment, courts apply the ''sufficiently close nexus'' test to determine state action, the same standard used in the 14th Amendment context.[24] But the caselaw is less clear regarding the applicable standard in the self-incrimination context of the Fifth Amendment.

For example, in *D.L. Cromwell Investments Inc. v. NASD Regulation Inc.*, employees of an investment company argued that the investigatory arm of the National Association of Securities Dealers violated their

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some form of control that the actions of one may be attributed to another. Mere knowledge of another's independent action, does not produce vicarious responsibility absent some manifestation of consent and the ability to control.''); *Walther*, 652 F.2d at 792 (''Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of fourth amendment standards.'').

[15] See, e.g., *Malbrough*, 922 F.2d at 462.

[16] 419 U.S. 345 (1974).

[17] Id. at 351.

[18] 457 U.S. 991 (1982).

[19] *Blum*, 457 U.S. at 1004 (italics in original). The Supreme Court held, in part, that the Medicaid recipients failed to establish ''state action'' in the nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care.

[20] *Blum*, 457 U.S. at 1004 (emphasis added) (citing *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson*, 419 U.S. at 357; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

[21] *Blum*, 457 U.S. at 1004-05.

[22] *Blum*, 457 U.S. at 1005 (citing *Jackson*, 419 U.S. at 353 (collecting cases); see, e.g., *Nixon v. Condon*, 286 U.S. 73 (1932).

[23] *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). In *Brentwood Academy*, the court stated that each of these facts ''can bear on the fairness'' of attributing private behavior to that of the government for purposes of the close nexus test. 531 U.S. at 296. Some circuit courts, however, have treated some or all of these facts as discrete tests for determining state action distinct from the ''sufficiently close nexus'' test. See, e.g., *Franklin v. Fox*, 312 F.3d 423, 444-45 (9th Cir. 2002) (''The Supreme Court has articulated four tests for determining whether a private individual's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test.''). Notwithstanding, the Supreme Court has not separated these relevant facts into their own formal tests. See, e.g., 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law*, § 16.4 n.1 (5th ed. 2012) (noting that the Supreme Court ''refuses to categorize its state action decisions, or even identify specific state action tests''); see also *Brentwood Acad.*, 531 U.S. at 295-96 (''No one fact is a necessary condition for finding state action, nor is any set of circumstances sufficient, for there may be some countervailing reason against attributing activity to the government.'').

[24] See, e.g., *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1409 (9th Cir. 1996) (applying ''close nexus'' test to Fifth Amendment due process claim and stating, ''The standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the strictures of the Fourteenth Amendment.''); *Gerena v. Puerto Rico Legal Servs Inc.*, 697 F.2d 447, 449 (1st Cir. 1983) (same); *Warren v. Gov't Nat'l Mortg. Ass'n*, 611 F.2d 1229, 1232 (8th Cir. 1980) (same).

Fifth Amendment right against self-incrimination by compelling them to submit to interviews or face sanctions authorized by NASD Rule 8210.[25] The Second Circuit applied the ''close nexus'' test to determine that the state action requirement was not met.[26]

To the contrary is *United States v. Day*, in which the defendant argued both that his statements to private security officers should be suppressed under the Fifth Amendment because he was not read *Miranda* warnings and that evidence recovered from his person should be suppressed under the Fourth Amendment.[27] The Fourth Circuit applied the ''instrument or agent'' test to determine that the private security officers were not state actors under both the Fourth and Fifth Amendments.[28]

Finally, in *United States v. Garlock*, a defendant convicted of embezzlement and making false teller account reports argued that her statements to bank examiners should have been suppressed because she was not read *Miranda* warnings.[29] In finding that the bank examiners were not state actors under both the Fourth and Fifth Amendment, the Eighth Circuit stated that the ''instrument or agent test'' was the applicable standard—but it then applied the ''sufficiently close nexus'' test.[30]

Given this divergence in opinions, the applicable state action test in the *Miranda* context is an open question. The Fourth and Fifth Amendments, however, share a similar purpose in protecting a defendant's rights in the criminal context.[31] Logically, the same standard as to what constitutes state action should be applied when a criminal defendant argues that evidence should be suppressed under both the Fourth and Fifth Amendments. Because the applicability of the ''instrument or agent'' test in Fourth Amendment cases is generally accepted, it is likely that the Fourth Circuit in *Day* correctly applied the ''instrument or agent'' test to the Fifth Amendment context as well.[32]

Carson Court Applied Both Standards

The *Carson* defendants argued that the law firm that conducted CCI's internal investigation was a state actor under both of the ''two distinct standards.''[33] By contrast, the government recognized the ''instrument or agent'' test in the Fourth Amendment context, but it asserted that cases in the Fifth Amendment context employed the ''sufficiently close nexus'' test.[34] The government then argued that the emails at issue showed ''no nexus'' between the company and the government.''[35]

Faced with choosing between two competing standards, the district court punted. It found that the facts ''[did] no[t] meet either test, and establish[ed] no more than a unilateral determination on the part of CCI and its parent to cooperate with the Government.''[36] Cooperation with the government did not, itself, make a party a state actor under either standard.[37]

Lessons Learned

The *Carson* court's finding was doubtless a relief to the law firm lawyers—who might otherwise have exposed their client or themselves to a lawsuit for violating the defendants' Fifth Amendment rights—and for the government—because the evidence was not suppressed. However, it is of little use to lawyers who conduct internal investigations in the future. But the muddle is not so bad as it seems. Although courts do not agree whether the lawyers' conduct will be measured by the ''instrument or agent'' test or the ''sufficiently close nexus'' test, neither standard prescribes a bright line and, in practice, the distinction between these standards may not be significant.[38]

Under either standard, when your client is cooperating with a government investigation, you should avoid putting the government in the position of approving or disapproving your actions. You may keep the govern-

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[25] 279 F.3d 155, 156-57 (2d Cir. 2002).

[26] *D.L. Cromwell Inv. Inc.*, 279 F.3d at 161-162.

[27] 591 F.3d 679, 681 (4th Cir. 2010).

[28] *Day*, 591 F.3d at 683 (holding that ''regardless of whether the Fourth or Fifth Amendment is at issue, [the court] appl[ies] the same test to determine whether a private individual acted as a Government agent''); cf. *United States v. Alexander*, 447 F.3d 1290, 1294-95 (10th Cir. 2006).

[29] 19 F.3d 441, 442 (8th Cir. 1994).

[30] *Garlock*, 19 F.3d at 443 (stating that the defendant had to show the bank investigators ''acted as an instrument or agent of the government,'' but then explaining that this test could be met ''by showing that the government exercised such coercive power or such significant encouragement that it is responsible for their conduct, or that the exercised powers are the exclusive prerogative of the government'' (internal quotation marks omitted)). See also *United States v. Sanchez*, 614 F.3d 876, 886 (8th Cir. 2010).

[31] See *Schmerber v. California*, 384 U.S. 757, 767 (1966) (explaining that the values protected by the Fourth Amendment ''substantially overlap'' the values protected by the Fifth Amendment).

[32] One possible reason to favor the ''instrument or agent'' test is that courts have expressly relied on common law agency principles, such as whether there was mutual consent between the government and a private party, to determine whether the private party was acting as a government agent—thus giving courts greater flexibility in resolving this highly factual inquiry. See *United States v. Koenig*, 856 F.2d 843, 847-48 n.1 (7th Cir. 1988) (applying common law agency principles to ''instrument or agent'' test in search and seizure case); see also *United States v. Ellyson*, 326 F.3d 522, 527 (4th Cir. 2003) (applying ''instrument or agent'' test in search and seizure case and stating ''Whether an agency relationship exists is a fact-intensive inquiry that is guided by common law agency principles.'').

[33] *Carson* Motion at 11-18.

[34] *Carson* at docket no. 673 (C.D. Cal. April 2, 2012) (government's opposition to motion to suppress defendants statements, at 11-12).

[35] Id. at 18.

[36] *Carson* Order at 7.

[37] *Carson* Order at 6 (citing *United States v. Ferguson*, 2007 WL 4240782 at *5 (D. Conn. Nov. 30, 2007)). The court found that the interviews were not compelled because none of the employees was threatened with termination and there was no evidence that the government encouraged CCI to threaten employees with sanctions if they failed to cooperate. *Carson* Order at 7-8.

[38] Although at first blush it may appear that state action may be more easily demonstrated under the ''instrument or agent'' test, in practice, courts applying this test have generally required at least some level of control, encouragement, or participation on the part of the government. See note 13, supra. Thus, the semantic differences between the standards should not generally affect the outcome of a case. See also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (noting that ''whatever the semantic formulation . . . the conduct of a private actor is not subject to constitutional challenge if such conduct is fundamentally a matter of private choice and not state action'' (internal quotation marks omitted)).

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ment informed, but you have to make your own choices: do not seek the government's input about what documents to review, whom to interview, or what questions to ask.

Similarly, be sure that your investigatory actions are justified by your client's own interests apart from its desire to cooperate. If law enforcement's needs instigated or motivated your investigative steps, you may be deemed to be a state agent.