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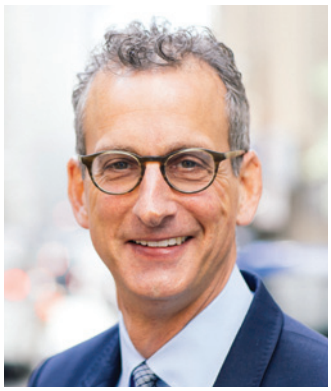
'U.S. v. Connolly': The Consequences of Outsourcing Government Investigations to the Private Sector

By **James Cavoli, Antonia Apps and Tawfiq Rangwala**



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In a sharp rebuke of the government that could result in meaningful changes to the way that prosecutors and defense attorneys approach internal investigations, the Chief Judge of the Southern District of New York held last Thursday that the DOJ had improperly outsourced its investigation of LIBOR manipulation at Deutsche Bank (the Bank) to the Bank and its outside law firm. See *United States v. Connolly*, Memorandum Decision and Order Denying Defendant Gavin Black's Motion for Kastigar Relief, 16 Cr. 0370 (CM) (S.D.N.Y.) (Mem.). The level of the government's involvement in the Bank's "internal" investigation, combined with the absence of any meaningful independent investigative efforts by the DOJ, led Judge Colleen McMahon to find that the Bank and its counsel "were de facto the Government." Id. at 2. As such, statements made by defendant Black during interviews by outside counsel were unusable by the government at trial. Id. at 40. While the court declined to dismiss the indictment under *Kastigar v. United States,* 406 U.S. 441 (1972)—because the government had not improperly used Black's compelled statements to outside counsel—the Connolly decision has significant implications for the manner in which the government deals with companies and their counsel going forward. If the government exercises too much control over internal investigations, it could jeopardize individual criminal prosecutions in a number of respects. The decision also arguably gives companies a basis for resisting onerous government requests and attempts by the government to micromanage corporate investigations.

The 'Garrity' Ruling

In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court ruled that statements obtained from an employee under threat of being fired by his government employer were "infected by coercion," and thus involuntary and inadmissible against them in a criminal trial. Id. at 496-97. The *Garrity* rule applies equally where the conduct of a private employer in obtaining statements from an employee is "fairly attributable to the government." *United States v. Stein*, 541 F.3d 130, 152 n. 11 (2d Cir. 2008). The conduct of a private actor is attributable to the state if there is "a sufficiently close nexus between the state and the challenged action of the … [private] entity [or person] so that action of the latter may be fairly treated as that of the State itself." *Jackson v. Metro. Edison. Co*., 419 U.S. 345, 351 (1974).

Judge McMahon concluded that Black was "compelled" to participate in interviews conducted by counsel for the Bank, given that his choice was either to cooperate with the Bank's investigation or find a new job. Mem. 6-7, 21. The only remaining question was whether the investigatory steps that the Bank took with respect to Black were attributable to the government. The court held that they were, finding that the Bank's investigation was "neither voluntary nor internal … ." Id. at 22.

To begin with, the impetus for the Bank's investigation was an April 2010 letter from the CFTC advising

that it "expect[ed]" the Bank to "cooperate fully," in part by engaging "external counsel" to conduct "a full review" regarding the Bank's LIBOR practices, "and report on an on-going basis the results of that review … ." Id. at 3. Judge McMahon found that "the CFTC's request that Deutsche Bank conduct a 'voluntary' investigation was a classic 'Godfather offer'—one that could not be refused." Id. at 26-27.

Judge McMahon catalogued a variety of additional facts and circumstances that, taken together, established that the Bank's investigatory steps with respect to Black were fairly attributable to the government. She found that the "federal agencies [involved in the LIBOR matter] gave considerable direction to the investigating … [private] attorneys, both about what to do and about how to do it." Id. at 4. For example, the CFTC instructed the Bank to interview specific individuals, and to conduct follow-on interviews of others who were identified as having been involved in the Bank's LIBOR rate submissions. In addition, the court found that "[t]he Bank's first interview of Black was conducted at the behest of the Government." Id. at 4-6, 22-23. The government also "directed" one lawyer for the Bank "on the precise manner in which he should ask questions"—the lawyer was told to "approach [an employee] interview as if he were a prosecutor." Id. at 7, 23.

The judge also found that the Bank and its counsel "coordinated extensively" with the SEC, CFTC and DOJ, each of which was investigating LIBOR. At a minimum, outside counsel's interactions with the government included 230 phone calls and 30 in-person meetings. Id. at 4, 14. Counsel for the Bank conducted almost 200 interviews, and provided summaries of each to the government, often reporting in real time or on a weekly basis. Id. at 11, 15. They also disclosed specific facts with respect to Black, including the manner in which he answered questions, the fact that he offered mostly exculpatory statements, and counsel's impression that Black did not want to be "helpful." All of these communications, Judge McMahon highlighted, took place "well before … the government made any effort to speak with Black." Id. at 10, 12-13. Moreover, in addition to collecting and reviewing 158 million electronic-documents and 850,000 audio files, and producing relevant materials, the Bank "digested the vast information it collected, highlighted the most important nuggets, and shared a blueprint [a white paper] for what prosecutors should expect should they finally interview Black on their own." Id. at 13-15, 23.

Significantly, Judge McMahon also pointed to what appeared to be the *absence* of investigative efforts by the government, finding that the government did virtually nothing to rebut Black's claim that the actions of the Bank and its counsel were fairly attributable to the government, despite ample opportunity to do so. What little the government did offer by way of rebuttal, the court found, was unpersuasive. Id. at 24-26, 28.

Judge McMahon concluded "that, rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to" the Bank: outside counsel "did everything that the Government could, should, and would have done had the Government been doing its own work." Id. at 23-24. "The Government violated *Garrity*, because Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the Government." Id. at 28-29.

The court in no way criticized the actions of the Bank or its counsel, recognizing that they rightly sought

Deutsche Bank AG headquarters on Wall Street. Photo: Victor J. Blue/Bloomberg

to obtain maximum possible cooperation credit. Id. at 14. Rather, Judge McMahon placed responsibility squarely at the government's doorstep.

The 'Kastigar' Ruling

Judge McMahon nonetheless denied Black's request for *Kastigar* relief because the government did not use Black's statements to outside counsel either before the grand jury or at trial. The government established an independent source for everything that the FBI Special Agent presented to the grand jury, and Black, during his belated proffer to the DOJ, told the government "everything" he had earlier told the Bank's lawyers. Id. at 40-43. To the extent the government may have relied upon outside counsel's initial interviews with Black to gain an understanding of LIBOR or identify evidence and leads, the court found that those actions were "merely tangential non-evidentiary uses" that do not violate Kastigar … ." Id. at 42.

Key Takeaways

In the years following the credit crisis, there was a significant increase in the number and scope of internal investigations by private companies, often at the request of the government. The LIBOR and FX investigations are prime

examples of that trend. Deutsche Bank's investigation of LIBOR rigging within its corporate ranks was the largest in the Bank's history, and the largest ever conducted by its outside counsel. Id. at 16. The level of involvement and direction provided by the government agencies involved—including civil enforcement bodies that bear little risk for micromanaging outside counsel's investigation because they cannot bring individual criminal prosecutions—may represent a high-water mark for government involvement in private internal investigations.

The implications of the *Connolly* decision go beyond the risk that the government may be unable to use the statements of a defendant made to outside counsel, or that charges may be dismissed due to *Kastigar* taint. The decision could also give rise to complicated pre-trial disclosure issues under *Brady v. Maryland*, 373 U.S. 83 (1963). If a private company or its outside counsel are found to have acted on behalf of the government in carrying out a corporate investigation, do prosecutors have an obligation under *Brady* to search the files of the company and the law firm for potentially exculpatory information? *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutors have a duty to learn of and disclose exculpatory information "known to the others acting on the government's behalf in the case") Would the government be forced to review possibly hundreds of detailed interview memos to ensure that all exculpatory statements are handed over? Any such obligation would, of course, be complicated by the fact that interview memoranda are typically afforded protection from disclosure under the work product doctrine and attorney client privilege. The simple solution is for the government to take a more hands-off approach to the internal investigations conducted by companies and their outside counsel, which would allow the government to receive the fruits of internal investigations without risking such negative consequences.

There is, of course, value in communicating with prosecutors to ensure that any internal investigation will focus on the areas of most interest to the government. Such discussions facilitate more targeted investigations and save corporate resources. The *Connolly* decision does not prevent that kind of dialogue—provided that the government relies on the judgment of outside counsel as to how to carry out the investigation, including when and how to conduct interviews and present findings to the government. In this regard, the ruling arguably gives outside counsel a basis to resist efforts by the government to micromanage internal investigations, since prosecutors will want to avoid arguments that outside counsel's investigation is "fairly attributable" to the government. It also underscores the need for companies to retain experienced counsel with the requisite knowledge and skill set to conduct robust internal investigations likely to satisfy the government and demonstrate a company's cooperation, without the need for detailed guidance from the government as to how to do so.

It will also be interesting to see if the *Connolly* decision causes the government to take earlier investigative steps in parallel with a company's internal investigation, rather than waiting for the internal investigation to mature before conducting interviews. Companies and counsel may also receive more "de-confliction requests"—requests from the government that a company defer interviewing one or more employees until after the government has had an opportunity to do so. This too will give rise to potentially complicated issues, since corporate boards and senior management have fundamental oversight and compliance responsibilities, and are expected (and incented) to ferret out and remediate corporate wrongdoing in a timely manner. This, of course, is not achievable if restrictions are placed on a company's ability to interview its own employees at the first sign of a problem (or if companies must worry that the government will frown upon, rather than reward, such proactivity).

In sum, while the *Connolly* decision highlights the risks for the government in outsourcing its investigative responsibilities and micromanaging outside counsel conducting internal investigations, by taking a more passive role the government can leverage the independent work of outside counsel and receive (and often use) the fruits of the internal investigation. It may also require the criminal authorities to work earlier and more closely with their civil counterparts to ensure that those regulators do not inject themselves too deeply into internal investigations where there is the potential for criminal prosecution of individuals. In some ways, the decision is a healthy wake-up call to government agencies to take care in the manner in which they communicate and interact with outside counsel representing companies that are seeking to obtain cooperation credit.

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