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

INTERNAL INVESTIGATIONS

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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.

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 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

¹ No. 8:09-cr-00077 (C.D. Cal. April 8, 2009).
² Id. at docket no. 774 (C.D. Cal. May 22, 2012) (order denying defendants' motion to dismiss the indictment). Hereinafter "Carson Order."
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.  

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."  

The defendants claimed that because they were not advised of their rights against self-incrimination, the statements made in their interviews must be suppressed.  

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.  

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."  

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.  

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 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." 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.  

These two factors have been employed by at least seven other courts of appeals weighing similar Fourth Amendment claims.
Before treating a private party as a government agent, these courts generally have required evidence beyond mere government knowledge and acquiescence—evidence such as whether the private actor searched at the government's request, and whether the government offered a reward. 15

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).

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.

Id. at 351.

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


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. 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
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...the "instrument or agent test" was the applicable standard—but it then applied the "sufficiently close nexus" test. finding that the bank examiners were not state actors under both the Fourth and Fifth Amendment, the Eighth Circuit stated that her statements to bank examiners should have been suppressed because she was not read Miranda warnings. 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. 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.

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

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. 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.

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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. 5 31 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.").

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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. 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.

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." 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. The government then argued that the emails at issue showed "no nexus" between the company and the government.

Carson Court Applied Both Standards

Faced with choosing between two competing standards, the district court punted. It found that the facts "[d]id 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." Cooperation with the government did not, itself, make a party a state actor under either standard.

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 in search and seizure cases or the "sufficiently close nexus" test, neither standard prescribes a bright line and, in practice, the distinction between these standards may not be significant.

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 government 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.
law enforcement's needs instigated or motivated your investigative steps, you may be deemed to be a state agent.