July 11, 2012

InsideCounsel.com

BUSINESS INSIGHTS FOR LAW DEPARTMENT LEADERS

WHITE COLLAR

You'd Better Watch What You Say: The Fifth Amendment's Role In Cross-Border Investigations

BY HARRY SANDICK AND JOSHUA A. GOLDBERG[1]

The government increasingly has turned its focus abroad, to cross-border investigations and prosecutions, garnering major headlines in cases involving the Foreign Corrupt Practices Act and global antitrust conspiracies. The United States often gathers evidence and seeks to take testimony in tandem with law enforcement personnel in other countries. When a corporate employee faces a request for a voluntary interview or even compelled testimony in one country, there is a fear that the testimony will be made available to prosecutors or regulators in other countries.

Such a situation creates hard choices for institutions and individuals in the United States. Space does not permit a full assessment of the many complicated issues related to cross-border investigations, but it is useful to review a few basic rules about the application of the Fifth Amendment's privilege against self-incrimination in the context of international criminal and regulatory investigations, as a window into this broader and timely subject.

First, the privilege against self-incrimination cannot be invoked in the United States based on a fear of prosecution by a foreign nation, as the Supreme Court held in *United States v. Balsys,* 524 U.S. 666 (1998). The United States may cooperate with other nations, but the Court rejected an analogy to the state/federal context, where a compelled and immunized statement given to state prosecutors cannot be used by federal prosecutors (and vice-versa).

The Court rejected the notion that "cooperative internationalism" offered the Government "new incentives . . . to facilitate foreign criminal prosecutions." However, in a forward-looking concluding section, Justice Souter prophesized that "cooperative conduct between the United States and foreign nations" might develop to a point "at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood." If the United States and its allies enacted similar laws and the United States granted immunity to compel people to provide testimony that then could be delivered to other nations, then the prosecution would be "as much on behalf of the United States as of the prosecuting nation[.]" But "mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other."

Second, the Fifth Amendment privilege against self-incrimination generally does not prevent United States prosecutors from offering a statement that was compelled by foreign law enforcement personnel in a foreign jurisdiction. United States courts have "declined to suppress un-warned statements obtained overseas by foreign officials" that might have violated *Miranda* if taken by U.S. agents.[2] Courts have held that suppression would not deter future unlawful conduct by U.S. officials; foreign officials are not limited by the Fifth Amendment.[3]

There are two exceptions to this general rule. First, the statements must have been made voluntarily in light of the totality of the circumstances, and cannot have been obtained through means that shock the conscience.[4] Second, the inculpatory statements must not have been made to foreign investigators as part of a "joint venture" between U.S. and foreign law enforcement, or to foreign investigators who functioned as mere "agents" of U.S. law enforcement.[5] In those circumstances, the traditional deterrence rationale animating our Fifth Amendment jurisprudence applies.

Nevertheless, it is difficult to prove that a confession was involuntary,[6] and such claims typically require a showing of state action.[7] Likewise, the "joint venture" doctrine is rarely applied and is of uncertain scope. Although the doctrine has been applied where U.S. agents substantially participated in an arrest and were present during the subsequent interrogation,[8] no "joint venture" was found in the following circumstances:

- U.S. agents submitted questions to be asked by Saudi authorities and then observed the interview;[9]
- U.S. officials requested the arrest of a fugitive living in Jordan, who was then interrogated by Jordanian authorities;[10]
- U.S. agent with a visible pistol was present in the same room in which the defendant was questioned by Mexican officials;[11]
- U.S. agent questioned a defendant arrested and detained by British officials, but prosecutors offered state ments from a separate un-warned interrogation by British officials; and
- U.S. agent served as an interpreter in an interview conducted by foreign law enforcement and thereby assisted in obtaining incriminating statements.

In short, the legal landscape puts few constraints on the U.S. government's collection of testimonial evidence that might be useful in foreign criminal prosecutions, or on its receipt of testimonial evidence from foreign

criminal prosecutions, or on its receipt of testimonial evidence from foreign law enforcement. Accordingly, counsel involved in cross-border investigations should explore the possibility of entering into agreements with prosecutors that will limit the use in one jurisdiction of statements made in another jurisdiction. Such agreements may be obtained when a witness has sufficient leverage – perhaps because of the federal government's desire to obtain the witness's cooperation. A negotiated approach will be advisable until the Supreme Court revisits the issue raised in Balsys and recognizes that we may have reached a point at which the "cooperative conduct" between the U.S. and foreign jurisdictions supports an expansion of the current interpretation of the Fifth Amendment.

[1] *The authors are both in the White Collar Defense and Investigations practice group at Patterson Belknap Webb & Tyler LLP. The authors also both served previously as Assistant U.S. Attorneys in the Southern District of New York. In private practice, both have represented clients in cross-border investigations conducted jointly by U.S. and foreign authorities. The authors thank Alicia Tallbe, an associate at their firm, for her assistance in writing this article.*

[2] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 202 (2d Cir. 2008). Police coercion is strongly presumed in the absence of *Miranda* warnings during a custodial interrogation. *See United States v. Patane*, 542 U.S. 630, 639 (2004).

[3] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d at 202.

[4] *See, e.g., id.* at 203 & n.18.

[5] *United States v. Ali*, 528 F.3d 210, 228 (4th Cir. 2008).

[6] *See, e.g., Brown v. Mississippi*, 297 U.S. 278 (1936) (suppressing a confession extracted through brutal torture).

[7] *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.").

[8] *See, e.g., United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978).

[9] *Ali*, 528 F.3d at 230.

[10] *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003).

[11] *Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980).