

Wall Street's Fall Guy: "Fast Track Justice" for Bernie Madoff

Madoff Did Not Exactly Take It On The Chin

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A few comments about last Thursday's hearing before Judge Chin on the Madoff matter may be warranted.

Reading the transcript with a lawyer's eye, it seems evident that Judge Chin had made up his mind as to what he was going to do before he walked into the courtroom. Giving people a right to speak was form, not substance. The transcript shows that it plainly affected nothing. The judge took no account of people's comments or logic when rendering his decisions. *Sic semper transcriptus*.

For judges to walk into courtrooms with their minds already made up, so that whatever is then said to them is of no moment, is hardly unusual. If anything, the reverse. Allowing lawyers or, as here, others to speak is often just a pro forma way of fooling people into thinking courts are open minded and objective. To doubters, to the naïve, all I can say is "Sorry, but those are often the facts." So too they plainly seem the facts here, notwithstanding that there were those who came thousands of miles to speak.

One of the judge's decisions was to deny bail and have "Madmanoff" locked up. Nobody but Madoff's lawyers objects to that. But it is curious that little has changed since another judge previously granted bail, and let Madoff stay in his penthouse, with access to his computer — and to who knows how much or what information — so that he could work for three months on keeping his money hidden, on keeping it beyond the reach of the feds (as by transfers and attempted transfers of money and property (remember the jewels?) to his wife and family.)

Judge Chin pointed out that Madoff has the motive and means to flee and therefore presented a risk of flight. This was all correct. But he had the same motive and means and presented the same risk three months ago, when a different judge merely put him in an ankle bracelet and under house surveillance, both of which could have been continued now if they in truth were sufficient. True, now he has pled guilty. But he had *confessed* to the FBI on December 11th. Am I wrong in thinking a confession is itself an admission of guilt, just like a plea of guilty is? Madoff knew in December that he would be going away for a long time. In fact, if you believe his allocution (his statement in court), he has known it for many years. So nothing about motive and means to flee and risk of flight had changed last Thursday. The only difference was that in December a judge, with the leniency typically extended to white collar criminals, let a man, who had 800 million dollars which he could use for fleeing from the jail time awaiting him, stay in his penthouse and use his computer to move and hide money, whereas Judge Chin said, defacto, enough already.

Judge Chin's other decision was to accept Madoff's guilty plea. The judge was in possession of *at least* one document showing that there were people who thought with good reason that accepting Madmanoff's guilty plea was a very bad idea, and heard one person who had come thousands of miles to say that, very briefly, in court.

But as the transcript makes evident, Chin had made up his mind to accept the guilty plea. This was a bad decision, I think. Rejection of the plea would have put pressure on Madoff to disclose much more to the feds, with whom he apparently is being uncooperative, including being uncooperative as to where all the money went. If the guilty plea were rejected, and remained rejected, there would be a trial at which lots of evidence would come out about how the dirty deed was done and who was involved, evidence that would likely — I personally think would certainly — implicate family members whom Madoff is therefore trying to protect, if he can, by pleading guilty. If the pressure of a possible trial at which hordes of facts would become public were put on him, Madoff could prove more tractable to the feds in exchange for a reduction in the punishment to be meted out to his family members. Such tractability could include telling feds where all the money is, including the money set aside for his family.

In response to any and all such objections to accepting Madoff's guilty plea, Judge Chin said only that "as the government has just said, it is continuing its investigation and this guilty plea certainly does not preclude the government from proceeding." That putative answer is actually a non answer. Not only does everyone know the government is continuing its investigation, but Judge Chin did not even mention, let alone assess, the relative advantages to the government's investigatory effort of accepting or rejecting the guilty plea at this time and thereby eliminating right now even the threat of a trial. This was bad. Very bad, in my estimation.

But there is, unfortunately, more.

I personally am not familiar with the law on whether a guilty plea should be accepted when the judge knows, suspects, or should know or suspect that the defendant is lying to him or holding back important information. But I'll bet the law says the judge can, or maybe it conceivably even says he should, reject the guilty plea, especially since the lies or continuing concealment show the defendant is not accepting full responsibility for what he did. Lying and holding back information is what Madoff did in his allocution if one believes the government.

For example, Madoff says *his best recollection* is that his Ponzi scheme began in the early 1990s. Can you imagine that? The operator of what might be the world's largest fraud ever, the man who probably had to keep huge amounts of relevant information in his head over fifteen or twenty years or so, claims he does not remember for certain when he started this fraud! He can only give his best recollection. Gimme a break!

Even more important, the government says the fraud started at least as far back as the *1980s*, *not* as "late" as the early 1990s. What's the chance that Madmanoff is *not* lying when he claims his best recollection is that he started his scheme in the early 1990s? Pretty low, if you ask me. *Why* is he lying about the starting date? That is an interesting question, is it not? But Judge Chin did not ask it, and seemed oblivious of the entire point.

Why did Madoff *start* the scheme, regardless of what the starting date was? He said

the reason for starting it was that

I had received investment commitments from certain institutional clients and understood that those clients, like all professional investors, expected to see their investments outperform the market. While I never promised a specific rate of return to any client, I felt compelled to satisfy my clients' expectations, at any cost.

Huh? He felt "compelled" to satisfy the clients' expectations "at any cost"? Just who were these supposed institutional clients whose expectations he had to fulfill at any cost, and why? His statements resonate of leg breakers or worse, not of institutional clients. In any event, what clients — and what *kind* of clients — were so important that he had to fulfill their expectation by a *massive fraud if he could not do so legitimately*. The question fairly screams from the transcript, as I would think it must have screamed from Madoff's allocution if one had been listening carefully and thinking about what was being said. Judge Chin was oblivious.

Another point, raised by the government in papers it filed prior to the hearing, so that Judge Chin could have read and absorbed the point at his leisure before the hearing, is similar in import. The government said Madoff had promised some people returns as high as 46 percent. Huh? *Forty-six* percent? Are you kidding me? Who were these people? Mafiosi with leg breakers or worse? People who knew what was going on and demanded such huge "earnings" in return for silence? Complete dummies who would believe you could make 46 percent year after year? — it is inconceivable that anyone could be that stupid, could believe this could be done honestly and legitimately. So the questions of who were the people who were promised returns like 46 percent, and why were they promised this, scream for an answer. But Judge Chin was oblivious.

Madoff claimed his Ponzi scheme had zip to do with his legitimate broker-dealer business. The feds said it helped finance that business. Once again, Judge Chin should have known that, if the feds were telling the truth, then Madoff was lying to his face. Once again the Chin was oblivious. It never even quivered.

So, if you ask me, the judge acted badly in accepting Madoff's guilty plea. He allowed Madoff to lie to his face and not to answer questions that cried out for answers. As well, by eliminating the possibility of a trial in which so much would come out, he potentially cloaked much or most of the facts in the non transparency for which the U.S. government and all its branches have been infamous since *at least* 1964, if not before. Now what we shall learn — and, maybe more importantly, what is kept from us — is totally within the discretion of the government, rather than *almost inevitably* being exposed at a trial due to the *exigencies* of trial. Bad. All very bad — unless one takes the position that what this country needs, and what Madoff's victims need, is *more* secrecy, not less.*

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