THE FIFTH AMENDMENT AND THE GRAND JURY

By Sara Sun Beale and James E. Felman

One of the most complex and difficult areas of current grand jury law is the intersection of the grand jury's subpoena power and the Fifth Amendment rights of those subpoenaed. Grand juries issue subpoenas for only one reason—to obtain evidence of a crime. It follows that those subpoenaed will be called upon at times to produce documents or give testimony that might tend to incriminate them. Because this tension is inherent in the nature of the grand jury process, one might assume that the applicable law would be fairly well settled. As we explain below, however, in a number of important areas there is considerable uncertainty and ongoing evolution. Although we refer below principally to federal cases, the constitutional principles we discuss are equally applicable to state grand jury proceedings.

Our discussion is divided into two parts—(1) subpoenas issued to individuals for their own personal documents or testimony, and (2) subpoenas issued to individuals as custodians of the records of entities. Within each part we have further subdivided our discussion between subpoenas seeking documents and subpoenas seeking testimony.

Subpoenas to individuals

Subpoenas to individuals may seek documents, testimony, or both. We begin with a discussion of testimonial subpoenas, and then turn to the additional and more difficult issues presented by document subpoenas.

Individual subpoenas for testimony. Individuals have a clearly established Fifth Amendment right not to answer incriminating questions. When a witness is subpoenaed to appear before a grand jury to give testimony that may tend to be incriminating, the typical practice is for the witness's counsel to advise the government—in writing—of the witness's intention to assert his or her Fifth Amendment rights. In federal proceedings, Department of Justice policy provides that under these circumstances "the witness ordinarily should be excused from testifying." (UNITED STATES ATTORNEYS' MANUAL § 9-11.154 (1997).)

It is important to note, however, that a witness does not have any right under the Fifth Amendment to be excused

from appearing before a federal grand jury. The privilege against self-incrimination may not be asserted in a blanket fashion. Accordingly, if a prosecutor insists on an appearance by a witness who intends to assert the privilege against self-incrimination, the witness must listen to each question and determine on a question-by-question basis whether or not the answer may tend to incriminate. (*See, e.g., In re Grand Jury Subpoena*, 739 F.2d 1354, 1359-60 (8th Cir. 1984).) Some state courts, however, have interpreted their state constitutions to prohibit compelling a potential defendant to appear before a state grand jury. (*See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE, § 6:10 (2d ed. 1997).) Under federal law and the law of most states, counsel is not permitted to accompany the witness into the grand jury room, and must prepare the witness in advance to assert the privilege, leaving the grand jury room to consult with counsel as needed. (*See id.* at § 6:28.) However, there are 20 states in which some witnesses have the right to have counsel, and in these states counsel may generally advise the witness, though counsel may not be able to address the grand jury or enter objections. (*See id.* at § 6:27.) If permitted to accompany a witness, one of counsel's chief concerns should be to ensure that the witness asserts the privilege against self-incrimination appropriately.

Individual subpoenas for documents. The Fifth Amendment was originally interpreted to protect all private papers from compelled production, *Boyd v. United States*, 116 U.S. 616 (1886), but the Supreme Court has abandoned that interpretation. Under the current understanding of the Fifth Amendment, the courts draw a distinction between the content of subpoenaed documents and the actions required to produce such documents, giving greater protection to the act of production and raising many thorny issues.

It is now settled that an individual may not withhold documents from production pursuant to a grand jury subpoena on the ground that the content of the documents may tend to incriminate the individual. (*Fisher v. United States*, 425 U.S. 391 (1976).) There is, however, an exception to this rule when an individual was compelled by the government to incriminate himself or herself by creating the documents in the first place. (*Shapiro v. United States*, 335 U.S. 1 (1948).)

Although an individual has no Fifth Amendment right to resist the production of documents because their *content* might be incriminating, the Court has recognized that the mere *act of producing* subpoenaed documents may carry separate incriminating implications. As the Court explained:

> The act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [individual producing the records]. It would also indicate the [individual]'s belief that the papers are those described in the subpoena.

(*Fisher*, 425 U.S. at 410.)

Fisher held that the Fifth Amendment protects an individual against any compulsion to incriminate himself or herself by such an act of production, because the conduct of producing the documents is essentially testimonial in nature.

The scope of the Fifth Amendment privilege extends only to instances where the compelled act of production would, in fact, carry incriminating implications. Under some circumstances, the individual's production of the subpoenaed documents will not be deemed to be incriminating because it conveys nothing the government does not already know. In *Fisher,* where the government subpoenaed documents that it was already aware of, the Court observed that "[t]he existence and location of the [subpoenaed] papers are a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." (425 U.S. at 411.) Under these circumstances the Court held there was no Fifth Amendment right to withhold the documents because compliance was more like "surrender" of them than "testimony" about them. (*Id*; *see also United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) (no Fifth Amendment protection where existence and location of documents a "foregone conclusion").)

A much different factual setting was presented more recently, however, in *United States v. Hubbell*, 530 U.S. 27 (2000). There, the government sought categories of documents the existence and location of which it had no prior knowledge. The Court held that "the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to

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disclose the existence and location of particular documents fitting certain broad descriptions," *id.* at 41, in which it was "unquestionably necessary for [the witness] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena." (*Id.* at 43.) Under these circumstances, the Court held that Hubbell's Fifth Amendment rights encompassed the compelled production of the documents pursuant to subpoena.

There is thus is a critical distinction between "foregone conclusion" acts of production—which have no Fifth Amendment protection under *Fisher*—and "fishing expedition" acts of production that are protected under *Hubbell.* Locating the dividing line between them turns on the level of the government's prior knowledge of the existence, location, and authenticity of the documents to be produced. If the case falls on the right side of the line, a witness faced with a potentially incriminating act of production may lawfully refuse to produce the documents altogether.

Litigation in the lower courts has begun to flesh out both the standard under *Hubbell* and the procedure for determining whether that standard has been met. The District of Columbia and the Ninth Circuit have established a "reasonable particularity" standard to determine "whether an act of production is sufficiently testimonial to implicate the Fifth Amendment." (*United States v. Ponds*, 454 F.3d 313, 320-21 (D.C. Cir. 2006); *In re Grand Jury Subpoena*, 383 F.3d 905, 910 (9th Cr. 2004).) Under this standard, a witness who believes the act of producing documents in response to a grand jury subpoena may add to the government's arsenal of incriminating evidence may move for a protective order prior to producing the documents. The burden then falls on the government to establish its knowledge of the existence, possession, and authenticity of the subpoenaed documents with "reasonable particularity" such that the communication inherent in the act of production can be considered a forgone conclusion. (*Ponds*, 454 F.3d at 324.) It may be necessary in this process for the witness to submit the documents in question to the court for in camera review. (*See, e.g., United States v. Bell*, 217 F.R.D. 335 (M.D. Pa. 2003) (utilizing *in camera* review); *United States v. Cianciulli*, 2002 WL 1484396 (S.D. N.Y. 2002) (same).)

If the government carries its burden, it is entitled to production of the documents. If the government fails to carry its burden, it may obtain the documents only by extending both use and derivative use immunity to the witness. Where the government elects to confer immunity, the scope of the immunity extends not merely to the evidence of the act of producing the documents, but also to the *contents* of the documents themselves. (*Ponds*, 454 F.3d at 321-22.) Moreover, the contents of the documents obtained through the grant of immunity may not be used in *any* way, including merely refreshing the recollection of another witness. (*Id.* at 322.)

Given the implications of conferring immunity regarding the contents of subpoenaed documents, the government will likely be reluctant to confer such immunity on a target of its investigation. Moreover, the government may not need to use subpoenas in the cases where it could most easily establish the act of production would be a forgone conclusion. When it has information regarding the existence and location of the documents it seeks, this information may rise to the level of probable cause, which would enable the government to obtain a search warrant. But when the government is truly in the dark about what documents may be in the possession of a witness, the Fifth Amendment provides significant protections to a witness who prefers to keep the lights out.

Subpoenas to records custodians

Many federal crimes investigated with the use of a grand jury involve activities by legal entities as well as individuals. Such entities include not only corporations, but also labor unions and most partnerships. Grand juries typically obtain a legal entity's documents by issuing a subpoena to the custodian of the entity's records, and we first discuss the issues directly related to the production of such documents. We then turn to the additional issues raised by subpoenas seeking testimony related to the production of documents (such as authentication testimony) and subpoenas issued to former employees in possession of entity documents.

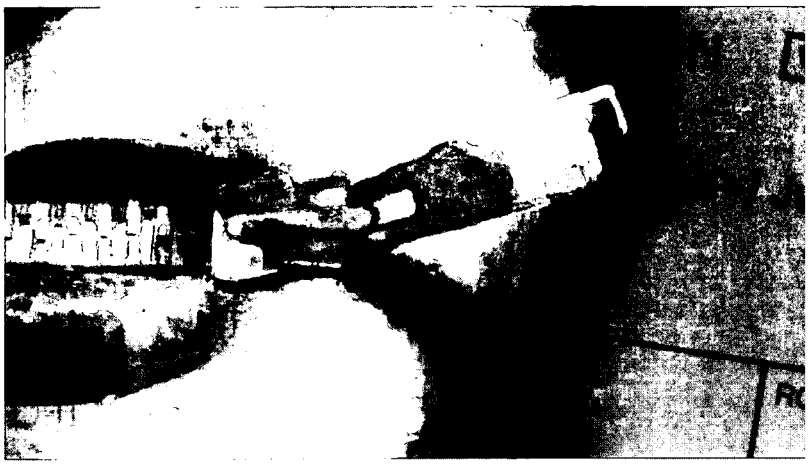
Records custodian subpoenas for documents. The Fifth Amendment law regarding entities themselves is well established: artificial legal entities have no privilege against self-incrimination under the Fifth Amendment. (*United States v. White*, 322 U.S. 694, 700-01 (1944).) The Supreme Court has offered various justifications for the collective entities doctrine, but the strongest factor was probably necessity; a recognition of the privilege would have made it nearly impossible to enforce the antitrust laws and many other statutes regulating corporate activity. (*See generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE, § 6:12 (2nd ed. 1997). Accordingly, corporate records must be produced in response to a grand jury subpoena regardless of their tendency to incriminate the entity. (*United States v. Doe*, 465 U.S. 605 (1984).) In the ordinary course of events, this makes grand jury subpoenas for corporate records straightforward. Even if the documents tend to incriminate not only the entity but also certain individuals associated with or employed by the entity, the documents must nevertheless be produced because they are the property of the entity and not the individuals. Where given a choice, entities typically designate as their custodians persons with no potential criminal exposure.

The picture becomes more complex, however, where

the documents sought may tend to incriminate not only the entity, but also the records custodian personally. Although the entity has no Fifth Amendment privilege, an individual records custodian does have Fifth Amendment rights, but those rights are quite different than they would be if the subpoena sought personal records. The Supreme Court has long held that an individual cannot rely on a personal privilege against self-incrimination to avoid producing the records of an entity held by the individual in a representative capacity—even if the content of those records might be personally incriminating. (*Bellis v. United States*, 417 U.S. 85 (1974).) When an individual becomes a representative of an artificial entity, he or she undertakes certain obligations, including the duty to produce documents subpoenaed from the entity by the government. When acting in a representative capacity, the custodian acts for the entity, not the custodian. Because the entity has no privilege against self-incrimination, its agent likewise has no privilege.

Although the custodian must produce the corporate records regardless of the degree to which their *content* might incriminate the custodian, the Supreme Court has been more solicitous of the custodian's right to avoid incrimination as a result of the communicative aspects of *the act of production*. The Court addressed this tension between the custodian's Fifth Amendment rights regarding the act of production and the grand jury's entitlement to the records of the entity lacking any Fifth Amendment rights in *Braswell v. United States*, 487 U.S. 99 (1988). The Court solved the dilemma with a compromise: the custodian must produce the records even if the act of producing them would incriminate the custodian, but the government is prohibited from making direct use of the act of production in any subsequent prosecution of the custodian. Because the custodian acts as a representative or agent, the custodian's acts are deemed to be the act of the entity and not that of the custodian personally. If the custodian is later tried on criminal charges and the government uses the documents the custodian produced, the government is permitted to inform the jury that the corporation produced the records. The government may not, however, disclose to the jury that the records were produced on behalf of the corporation by the custodian.

Although the *Braswell* Court did not use this term, it effectively created a limited form of immunity, which is automatic and self-executing. There need be no communication from the government nor order of the court conferring this protection on the custodian. It would be prudent, however, for counsel representing custodians to accompany the document production with a letter confirming that the documents are being produced by the custodian in a representative rather than individual capacity and that the custodian will be entitled to the protections of *Braswell* in



connection with the production.

Note, however, that the informal immunity conferred by *Braswell* is limited to the government's direct use of the custodian's act of production. It does not appear to extend to the government's *derivative* use of the custodian's act of production in its investigation and prosecution of the custodian. (*See In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173, 182 (2d Cir. 1999).) Thus evidence discovered as a result of knowledge gleaned from corporate documents produced by the custodian may later be introduced to incriminate the custodian. In contrast, Fifth Amendment rights may only be overcome through a grant of both use and derivative use immunity. Under the rationale of *Braswell,* however, the custodian was not compelled to give up his or her Fifth Amendment claims, so the custodian is not entitled to true use and derivative use immunity. Instead, the limitation on the government's use of the evidence gained from the custodian—though it functions as a form of immunity—simply flows from the recognition that these acts are deemed to be the acts of the corporation, not of the custodian as an individual.

Braswell's automatic use immunity for custodians functions best when the entity at issue has many individuals associated with it, so that a jury would have no reason to assume that the documents in question were produced by the custodian on trial. But what about a custodian who is the only individual associated with the entity, such as a corporation with a single shareholder who is also the sole employee? Under this scenario, the protection of *Braswell* will be largely illusory, because the jury will almost certainly infer that if the documents were produced by the entity, the only person who could have done so is the defendant. The *Braswell* Court recognized this difficulty but declined to address it:

> We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian [can] establish,

by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

(*Braswell*, 487 U.S. at 118-19 n.11.)

This question remains an open one, though the lower courts addressing the issue after *Braswell* have declined to afford any additional protections for custodians of one-person entities. (*See, e.g.*, *United States v. Amato*, 450 F.3d 46 (1st Cir. 2006); *In re Grand Jury Subpoena*, 21 F.3d 226 (8th Cir. 1994); *United States v. Stone*, 976 F.2d 909 (4th Cir. 1992).) Nevertheless, while the issue remains unresolved by the Supreme Court, counsel representing custodians of one-person legal entities would be prudent to raise it and, if nothing else, preserve the matter for further review.

On the other hand, a sole proprietorship—meaning a business owned by an individual rather than an entity such as a corporation or partnership—is treated for Fifth Amendment purposes as an individual. A sole proprietorship has no established institutional existence separate from its owner, and is regarded as the owner's alter ego. (*See Bellis v. United States,* 417 U.S. 85, 87-88 (1974); *Herman v. Galvin*, 40 F. Supp. 2d 27, 28-29 (D. Mass. 1999); *In re Tower Metal Alloy Co.*, 200 B.R. 598, 605-06 (Bankr. S.D. Ohio 1996).) Thus subpoenas to sole proprietorships should be addressed under the framework we discussed above regarding subpoenas to individuals.

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Records custodian subpoenas for testimony. In conjunction with its efforts to obtain documents, a grand jury may subpoena the custodian of records to testify before the grand jury in order to authenticate the documents. *Braswell* held that the records custodian producing the records may also be compelled to give testimony to "identify" the documents. (*Braswell*, 487 U.S. at 114.) There remains, however, the question whether the custodian may be required to go beyond merely "identifying" the records and also "authenticate" them for purposes of the business records exception to the hearsay rule. Such testimony involves issues such as whether documents were kept "in the course of a regularly conducted business activity" and whether "it was the regular practice of that business activity to make" such documents. (*See* FED. R. EVID. 803(6).)

There is a split among the lower courts on the applicability of the Fifth Amendment to such inquiries. The Sixth Circuit has held that the custodian may be compelled to give such testimony, albeit subject to *Braswell* use immunity protection. (*In re Trial Subpoena Duces Tecum to Custodian of Records*, 927 F.2d 244 (6th Cir. 1991).) The District Court for the District of New Jersey reached the opposite conclusion, reasoning that "[c]ompelling respondent to provide oral testimony about how the documents were created, maintained, and circulated by officers and employees is different in kind, and potentially independently incriminating, from producing the documents and testifying that they are those records called for by the subpoena." (*In re Grand Jury*, 869 F. Supp. 298, 306 (D. N.J. 1994).) Neither the Supreme Court nor any other circuit courts appear to have addressed this question. The line between answering these "business records exception" questions and answering questions regarding the "business activity" itself is a fine one. Counsel representing custodians under such circumstances would be prudent both to preserve the issue and be vigilant to prevent the client's answers from straying beyond that necessary to identify (or, in the Sixth Circuit, authenticate) the records at issue.

Records custodian subpoenas to former employees. Subpoenas to records custodians ordinarily go to current employees of the entity whose documents are sought, but subpoenas may also be issued to former employees in possession of entity documents. The Supreme Court has not spoken on this issue, and the federal circuits are presently split on the question whether former employees are treated differently than current employees. Both the Eleventh and District of Colombia Circuits have ruled that former employees subpoenaed for corporate records are treated just like current employees who serve as record custodians, i.e., they have no Fifth Amendment privilege beyond *Braswell* use immunity. (*In re Grand Jury Subpoena*, 957 F.2d 807 (11th Cir. 1992); *In re Sealed Case*, 950 F.2d 736 (D.C. Cir. 1991).)

The Second and Ninth Circuits have reached a different conclusion. Both of those circuits treat former employees subpoenaed for documents of their former employers as if the records were those of the individual and not the entity. Accordingly, in those circuits former employees subpoenaed for corporate records have the same Fifth Amendment rights they would have if the subpoena sought personal records. (*In re Grand Jury Subpoena*, 383 F.3d 905, 909 (9th Cir. 2004); *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173 (2d Cir. 1999); *In re Grand Jury Proceedings*, 71 F.3d 723 (9th Cir. 1995).) In those circuits, the courts employ the standards we discuss above relating to subpoenas to individuals. ■