

Mistaking the Fifth: No Fifth Amendment Privilege for a One-Person Corporation

by Maureen Coghlan

The United States Court of Appeals for the Third Circuit recently held that a sole owner and employee of a “professional association” cannot refuse to comply with a subpoena issued to his or her medical practice based on a Fifth Amendment privilege against self-incrimination.¹ This is because the owner would be producing documents in his or her capacity as a corporate records custodian and not as an individual, given that the practice maintains a separate corporate identity independent from the owner. A jury could not consider the act of producing business records as any admission by the owner.² In so holding, the Third Circuit joins the First, Second, and Fourth circuits, all of which have held that a corporate custodian, who is also a corporation’s sole owner and employee, cannot invoke the Fifth Amendment to avoid producing documents.³

The Fifth Amendment Privilege

The Fifth Amendment directs that no person “shall be compelled in any criminal case to be a witness against himself.”⁴ The United States Supreme Court explained that the “privilege against self-incrimination” is a somewhat inaccurate description of the constitutional protection afforded by the Fifth Amendment.⁵ Defendants can be compelled to engage in conduct or acts that may provide incriminating evidence, for example providing a blood sample, a writing sample, or—perhaps most memorably—compelling a defendant to try on a glove.⁶ Similarly, documents created in response to a regulatory requirement, such as tax returns, may be used against a defendant because the defendant is not being *compelled* to disclose information in the documents solely for the purpose of a criminal prosecution.⁷

However, the Supreme Court also recognizes that the act of producing documents “may have a compelled testimony aspect,” insofar as compliance with a subpoena would require a witness to admit that certain documents exist, that the documents are in the defendant’s possession or control, and that the documents are authentic.⁸ Thus, a subpoenaed party may resist

producing documents by asserting a Fifth Amendment privilege based on the “act of production doctrine.”⁹ The appellants in *In re Grand Jury Empanelled on May 9, 2014*, argued that requiring John Doe, D.O., who was the sole owner and employee of a medical practice, to comply with a subpoena to the practice essentially would compel Doe to admit that certain documents existed and were responsive to the government’s subpoena.¹⁰

The Third Circuit rejected Doe’s “act of production” argument, holding that the “collective entity doctrine” applied such that Doe could not invoke a Fifth Amendment privilege.¹¹ The collective entity doctrine recognizes that “an individual cannot rely on the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.”¹² Courts have applied the collective entity doctrine to corporations, unincorporated associations like labor unions, and now “professional associations,” a type of corporation that doctors may form under New Jersey law.¹³

Corporations are Not Entitled to Invoke a Fifth Amendment Privilege

In holding that the records custodian of a one-person corporation could not invoke a Fifth Amendment privilege, the Third Circuit cited the United States Supreme Court’s “robust application of the collective entity rule” in both *Bellis v. United States* and *Braswell v. United States*.¹⁴ In *Bellis*, the Court rejected a law firm partner’s argument that the partnership acted as his alter ego, such that compelling disclosure of partnership records violated his Fifth Amendment privilege.¹⁵

In *Braswell*, the Court rejected the argument that compelling a defendant, who acted as records custodian and held authority over the corporation’s business affairs, to respond to a subpoena violated his Fifth Amendment privilege.¹⁶ The Third Circuit applied this same logic to John Doe’s medical practice, holding that Doe could not simply “discard the corporate form” to argue

that compliance with the subpoena would compel Doe to testify against himself through the act of producing documents.¹⁷ Simply put, “no privilege can be claimed by the custodian of corporate records, *regardless of how small the corporation may be.*”¹⁸ This remains so even if “the Supreme Court has demonstrated an increasing proclivity to extend a greater degree of protection to corporate entities,” as evidenced by decisions like *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby Stores, Inc.*, where the Court held that corporations are protected by the First Amendment.¹⁹

Although a Corporate Custodian’s Act of Production Cannot Be Deemed an Admission by the Individual, Corporate Records Can Be Used Against a Records Custodian

A records custodian’s act of producing documents is understood to be an act of the corporation, and not a personal act.²⁰ “The Government is therefore prohibited from making any evidentiary use of the ‘individual act’ against the custodian.”²¹ However, “[i]t is permitted...to use the corporation’s act of production against the custodian.”²² The Supreme Court explained this reasoning in *Braswell*:

The Government may offer testimony—for example, from the process server who delivered the subpoena and from the individual who received the records—establishing that the corporation produced the records subpoenaed. The jury may draw from the corporation’s act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena. And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents. Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation’s act of production and other evidence in the case.²³

However, the *Braswell* Court did “leave open the question whether the agency rationale supports compelling a records custodian to produce corporate records when the

custodian is able to 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.”²⁴ Doe argued before the Third Circuit that the *Braswell* hypothetical was exactly his situation, but the Court rejected the argument on two grounds.²⁵ First, the *Braswell* Court clearly held that a records custodian may not resist a subpoena because the act of production may incriminate him or her.²⁶ Second, the Third Circuit found that a jury would not “inevitably” conclude that Doe produced the records because Doe employed other staff when the records were created and, although he fired all of his employees while litigating his motion to quash the government’s subpoena, he did hire “independent contractors” to maintain his medical practice’s records.²⁷

Sole Proprietors or Practitioners May Invoke a Fifth Amendment Privilege

Courts do recognize that a Fifth Amendment privilege “applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual’s private life.”²⁸ The *contents* of the documents held by a sole proprietor or practitioner may not be protected by the Fifth Amendment, especially when the proprietor was not *compelled* to create the documents.²⁹ As explained above, however, the sole proprietor’s *act of production* may have “testimonial aspects” and an “incriminating effect.”³⁰ It is important to note that this “act of production” argument will not apply where the government can establish that the existence of the sole proprietor’s records was a “foregone conclusion,” such that there is no need to introduce the proprietor’s act of having produced the documents into evidence.³¹

In sum, the Third Circuit’s decision in *In re Grand Jury Empanelled on May 9, 2014* reaffirmed certain key principles with regard to the Fifth Amendment and corporations, records custodians, and sole proprietors. Corporate record custodians may not resist subpoenas on Fifth Amendment grounds, but evidence of the custodian’s act of production may not be considered an admission by the custodian as an individual. In contrast to a one-person corporation, a sole practitioner may succeed in invoking the Fifth Amendment to resist a subpoena where the practitioner’s act of production would mean admitting documents exist, are in his or her possession, and are authentic. ■

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Endnotes

1. See *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 256 (3d Cir. 2015).
2. *Id.* at 258.
3. See *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d 155, 158-59 (2d Cir. 2010); *Amato v. United States*, 450 F.3d 46, 53 (1st Cir. 2006); *United States v. Stone*, 976 F.2d 909, 912 (4th Cir. 1992), *cert denied*, 507 U.S. 1029 (1993).
4. U.S. Const. amend. V.
5. See *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).
6. *Id.*
7. *Id.* at 35. See also *Baltimore City Dep't of Social Svcs. v. Bouknight*, 493 U.S. 549, 556 (1990) (“The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State’s public purposes unrelated to the enforcement of its criminal laws.”).
8. *Id.* at 36.
9. See *United States v. Doe*, 465 U.S. 605, 612-13 (1984).
10. *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 258-59 (3d Cir. 2015).
11. *Id.*
12. *Id.* at 258 (quoting *Bellis v. United States*, 417 U.S. 85, 88 (1974)).
13. See *Bellis v. United States*, 417 U.S. at 89 (citing *United States v. White*, 322 U.S. 694, 699-700 (1944)).
14. *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 258-59 (3d Cir. 2015) (citing *Braswell v. United States*, 487 U.S. 99 (1988); *Bellis v. United States*, 417 U.S. 85 (1974)).
15. *Bellis*, 417 U.S. at 96-97.
16. *Braswell*, 487 U.S. at 109.
17. *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 261 (3d Cir. 2015).
18. *Id.* at 259 (quoting *Bellis*, 417 U.S. at 100).
19. *Id.* at 261 n.1 (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).
20. See *Braswell*, 487 U.S. at 110.
21. *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 261 (3d Cir. 2015).
22. *Id.* (citing *Braswell*, 487 U.S. at 118).
23. *Braswell*, 487 U.S. at 118.
24. *Id.* at n.11.
25. *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255, 261 (3d Cir. 2015).
26. *Id.* (citing *Braswell*, 487 U.S. at 119).
27. *Id.* at 257, 261.
28. *Bellis*, 417 U.S. at 87-88 (citing *Boyd v. United States*, 116 U.S. 616 (1886); *Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (5th Cir. 1969)).
29. See *United States v. Doe*, 465 U.S. 605, 612 (1984).
30. *Id.* at 612-13.
31. See *United States v. Fisher*, 425 U.S. 391, 411 (1975) (“The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons, ‘no constitutional rights are touched.’” (quoting *In re Harris*, 221 U.S. 274, 279 (1911))).