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Brian Baggott
Suffolk University Law School

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A RETURN TO CERTAINTY: WHY GRAND JURY SUBPOENAS SHOULD SUPERSEDE CIVIL PROTECTIVE ORDERS

*An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.*¹

I. INTRODUCTION

Civil protective orders have become commonplace in today's society where parties are increasingly concerned with keeping their disputes private and foreclosing the potential for future liability.² Along with the widespread use of civil protective orders though, the grand jury co-exists as an entity with broad investigative powers, including the ability to obtain a subpoena from a presiding court.³ Grand jury subpoenas often request evidence previously shielded by a civil protective order issued in a separate matter.⁴ At this critical juncture, an individual's expectation of privacy derived from a civil protective order directly conflicts with the historical and judicial imperatives of the grand jury.⁵ During the twenty-four years since the courts first addressed this conflict, the various circuits of the

¹ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

² See Frederick N. Egler, Jr., *Can You Keep a Secret? Preserving Confidentiality in Life, Health & Disabling Litigation*, 29 THE BRIEF 8, 10 (2000) (discussing role of protective orders in preserving commercial and private information); see also Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999) (describing protective orders as furthering modern civil litigation's overall secretive nature).

³ See *Branzburg v. Hayes*, 408 U.S. 665, 687-88 (1972) (describing ability to subpoena witnesses as essential to grand jury's historic function); see also *United States v. Williams*, 504 U.S. 36, 48-49 (1992) (acknowledging relationship between grand jury and presiding court in compelling witnesses). The Court specifically stated, "the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required." *Id.*

⁴ See, e.g., *In re Grand Jury Subpoena*, 138 F.3d 442, 443 (1st Cir. 1998) (stating factual conflict between current subpoena and prior protective order); *United States v. Janet Greeson's A Place for Us, Inc. (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*, 62 F.3d 1222, 1223 (9th Cir. 1995) (describing conflict between protective order in insurance suit and pending grand jury subpoena); *Palmieri v. New York*, 779 F.2d 861, 863-64 (2d Cir. 1985) (establishing facts surrounding conflict between civil protective order and grand jury subpoena).

⁵ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1471 (4th Cir. 1988) (stating analysis of conflict involves consideration of three interests).

United States Court of Appeals have wavered between three different standards in resolving the matter.⁶

The purpose of this note is to analyze the current standards used in resolving conflicts between grand jury subpoenas and civil protective orders, and to advocate for an absolute standard in favor of grand jury subpoenas. Part II of this note discusses and evaluates the three competing interests involved in the conflict between protective orders and grand jury subpoenas. In evaluating these competing interests, this note asserts that the concern surrounding any abrogation of the privilege against self-incrimination by sustaining a grand jury subpoena is unwarranted and misplaced. Part III examines and details the multiple standards the courts of appeals have adopted. Finally, Part IV critiques the three current standards and concludes that the compelling need test is fundamentally improper and that the modified per se rule is both unnecessary and impractical. The courts should adhere to the per se rule that the Fourth Circuit first announced, whereby civil protective orders must give way to grand jury subpoenas.

II. BACKGROUND

Any analysis of the conflict between civil protective orders and grand jury subpoenas must begin with a consideration of the three primary interests at stake.⁷

A. *Effective and Efficient Dispute Resolution*

In considering the primacy of a grand jury subpoena over a civil protective order, the interest most directly affected is the goal of maintaining an efficient and effective legal system.⁸ In furthering this goal, civil protective orders serve to shield parties and witnesses involved in civil litigation from the broad discovery power that the Federal Rules of Civil Procedure (FRCP) authorize.⁹ To mitigate the harmful effects of broad

⁶ See *In re Grand Jury Subpoena*, 138 F.3d at 445 (stating subpoena prevails unless exceptional circumstances compel otherwise); *In re Grand Jury Subpoena*, 836 F.2d at 1474 (adopting per se rule in favor of grand jury subpoena); *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (stating protective order prevails absent compelling need or improvidence in issuance).

⁷ See *In re Grand Jury Subpoena*, 836 F.2d at 1471 (stating three competing interests involved in determining grand jury's authority); see also *In re Grand Jury*, 286 F.3d 153, 158-62 (3d Cir. 2002) (analyzing conflicting interests in upholding subpoena).

⁸ See FED. R. CIV. P. 1 (stating scope and purpose of rules). The rule states in relevant part that the Rules "shall be construed . . . to secure the just, speedy, and inexpensive determination of every action." *Id.*

⁹ See *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 368-69 (9th Cir.

discovery, the 1970 amendments to the FRCP established protective orders to balance the Federal Rules' liberal approach to discovery against the paramount concern of parties' privacy and confidentiality.¹⁰ Essentially, a court will issue a protective order that limits discovery in a matter when the parties have shown "good cause" for requiring such an order.¹¹ Therefore, upon showing "good cause" a court may restrict the scope of information obtained through discovery, thereby encouraging litigants to testify and to avoid invoking any hindering testimonial privileges.¹²

Although civil protective orders further the goal of effective and efficient dispute resolution, courts possess other tools that further the same goal, notwithstanding a party's assertion of the Fifth Amendment privilege against self-incrimination.¹³ One such alternative available to a court is to stay potentially harmful discovery until the completion of all relevant grand jury investigations or until the relevant statute of limitations has lapsed.¹⁴ Moreover, any assertion of an individual's Fifth Amendment

1982) (stating purpose behind civil protective orders); 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2036 (2d ed. 1994) (explaining goals and purposes behind issuing civil protective orders). Rule 26(b)(1) defines the scope of discovery in civil litigation in broad terms and includes "any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or tangible things and the identity and location of persons having knowledge of any discoverable matter." FED. R. CIV. P. 26(b)(1).

¹⁰ See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (stating protective orders necessary consequence of broad discovery); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 441 (1991) (describing importance and purpose of civil protective orders).

¹¹ See FED. R. CIV. P. 26(c). The Rule states in relevant part: "for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

¹² See *In re Grand Jury Subpoena*, 836 F.2d at 1472 (admitting value of protective orders in facilitating resolution of civil disputes); *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 295-96 (2d Cir. 1979) (arguing protective orders discourage assertions of testimonial privileges and maintain trial efficiency); Miller, *supra* note 10, at 483 (describing impact of protective orders on litigation system). In terms of discovery, "[t]he importance of protective orders lies in their usefulness in safeguarding litigants against many of the damaging side effects of discovery while still facilitating that process." *Id.*

¹³ See *In re Grand Jury Subpoena*, 836 F.2d at 1476 (asserting courts possess alternative tools to ensure effective litigation); Robert Heidt, *The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases*, 91 YALE L. J. 1062, 1065-71 (1982) (describing alternatives available to courts when parties invoke testimonial privileges).

¹⁴ See *Shaffer v. United States*, 528 F.2d 920, 922 (4th Cir. 1975) (suggesting government either provide immunity or stay discovery until statute of limitations has lapsed). Shaffer filed suit against the government in an attempt to attain a refund and abatement of his tax liability on his wagering income. *Id.* at 921-22. At the same time, however, Shaffer was under indictment for federal gambling charges and consequently invoked his Fifth Amendment privilege. *Id.* Rather than dismiss the case and deprive Shaffer of his right to sue, the court of appeals ordered the district court to stay the proceeding until the government either offered immunity or until the statute of limitations had lapsed. *Id.* at 922.

privilege against self-incrimination must be justified and pass constitutional muster.¹⁵ Another alternative to ensuring the integrity of civil litigation is to shift the burden of proof to the asserting defendant, especially when a defendant's assertion of his Fifth Amendment privilege significantly affects the plaintiff's ability to present a *prima facie* case.¹⁶ These alternatives, as well as the permissible inferences in a civil action from a defendant's assertion of his Fifth Amendment privilege, accomplish the same goal of providing an efficient and effective legal system.¹⁷

B. The Origins and Authority of the Grand Jury

As an institution, grand juries date back to medieval England during the reign of King Henry II, and they most recently received their mandate from the United States Constitution.¹⁸ The primary function of the grand jury is to "provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."¹⁹ Furthermore, because the grand jury derives its authority from the Bill of Rights rather than the power-granting Articles of the Constitution, courts have declared that the grand jury is "a constitutional fixture in its own right."²⁰ In its role as a vehicle for instigating criminal proceedings and its constitutional mandate, the grand jury exists today as an investigative body independent of both governmental and individual interference.²¹

¹⁵ See *Nat'l Acceptance Co. v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983) (stressing judge must deem party's assertion of privilege justified). Though the threshold showing for a valid assertion is minimal, the assertion must be based on something more than "a fanciful possibility of prosecution." *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979).

¹⁶ See *United States v. N.Y., New Haven, & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957); *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 111 (1941) (stating burden placed on defendant with peculiar knowledge of fact to come forward); Ajit V. Pai, Comment, *Should a Grand Jury Subpoena Override a District Court's Protective Order?*, 64 U. CHI. L. REV. 317, 339 (1997) (arguing burden shifting prevents successful bad faith invocations of privilege); Heidt, *supra* note 13, at 1107-08.

¹⁷ See *In re Grand Jury Subpoena*, 836 F.2d at 1476 (stating effectiveness of alternatives in maintaining efficient judicial system).

¹⁸ See U.S. CONST. amend. V. The Fifth Amendment states in relevant part: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *Id.* See R. H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983) (pointing to Assize of Clarendon as grand jury's first appearance).

¹⁹ *Costello v. United States*, 350 U.S. 359, 362 (1956) (detailing history and function of grand jury in United States).

²⁰ *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (1973)); see also *supra* note 18; *United States v. Williams*, 504 U.S. 36, 47 (1992) (discussing broad authority and power of grand jury).

²¹ *Williams*, 504 U.S. at 47 (describing independence and autonomy of grand jury).

History and the United States Constitution require that a grand jury be given broad investigative powers, including the authority to compel the production of evidence and testimony through subpoenas.²² The broad and expansive role of the grand jury in today's society is evident in the Supreme Court's reluctance to hinder its function by refusing to require the inclusion of some fundamental evidentiary rules in grand jury proceedings.²³ This unfettered power and lack of judicial restrictions are consistent with the principle that the grand jury exists as an investigative body wholly independent from the judiciary.²⁴ In the face of a protective order aimed essentially at precluding a grand jury from having access to certain evidence, failing to uphold a grand jury subpoena substantially limits its independence and frustrates its goal of attaining "every man's evidence."²⁵

investigations). In *Williams*, Justice Scalia observed:

[T]he whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been . . . at arm's length.

Id. See also *United States v. Calandra*, 414 U.S. 338, 343 (1974) (highlighting latitude and independence afforded to grand jury); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (describing historical significance of grand jury).

²² See U.S. CONST. amend. V; FED. R. CRIM. P. 6 (outlining role and function of grand jury); *Williams*, 504 U.S. at 48 (arguing grand jury's independence evident in broad scope of power to investigate wrongdoings); *Calandra*, 414 U.S. at 343 (describing vital function of grand jury in legal system); *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972) (stressing fundamental principles involved in function of grand jury). The scope of a grand jury's authority has been encapsulated by the maxim that "the public . . . has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950). See also Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 825 (2000) (suggesting grand jury should possess even broader investigative powers).

²³ See *Calandra*, 414 U.S. at 349-50 (refusing to extend exclusionary rule to grand jury proceedings). The Court stated that extending the exclusionary rule to grand jury proceedings would create disputes that "would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Id.* See, e.g., *Williams*, 504 U.S. at 55 (stating no requirement prosecutor disclose exculpatory evidence to grand jury); *United States v. Dionisio*, 410 U.S. 1, 15 (1973) (declaring no need for showing of reasonableness by grand jury in issuing subpoena); *Costello*, 350 U.S. at 364 (refusing to require application of hearsay rule in grand jury proceedings).

²⁴ *Williams*, 504 U.S. at 48 (stating grand jury generally free from interference by presiding judge); *Calandra*, 414 U.S. at 343 (emphasizing judge does not preside over or monitor grand jury proceedings).

²⁵ See *United States v. Janet Greeson's A Place for Us, Inc. (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*, 62 F.3d 1222, 1226-27 (9th Cir. 1995) (stating concern with judicial interference into grand jury proceedings by upholding protective orders); *Williams v. United States (In re Grand Jury Proceedings)*, 995 F.2d 1013, 1016 (11th Cir. 1993) (recognizing significant interest in grand jury's need for information and independence); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1474 (4th Cir. 1988) (stating

C. Fifth Amendment Concerns

Just as important as the potential for unwarranted interference with grand jury proceedings, the conflict between a civil protective order and grand jury subpoena raises concerns about an individual's privilege against self-incrimination under the Fifth Amendment.²⁶ Given that protective orders serve as an instrument to preserve confidentiality, courts issue a large number of protective orders to induce deponents to testify or give evidence that they would otherwise avoid offering by invoking their Fifth Amendment privilege.²⁷ Using protective orders to preserve a deponent's confidentiality creates the false impression that the deponent has exercised his privilege. As a result, courts have argued that allowing a grand jury subpoena to trump a protective order abrogates the deponent's Fifth Amendment privilege.²⁸ This concern is misplaced for two reasons: (1) protective orders cannot functionally and absolutely preserve a deponent's confidentiality; and (2) the judiciary cannot authorize de facto grants of immunity via protective orders.²⁹

protective order would interfere with grand jury investigation).

²⁶ See, e.g., *Janet Greeson's A Place for Us, Inc.*, 62 F.3d at 1224-25 (outlining Fifth Amendment implications); *In re Grand Jury Subpoena*, 836 F.2d at 1471 (recognizing possibility for Fifth Amendment implications in analyzing validity of grand jury subpoena); *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 297 (2d Cir. 1979) (declining to rule on Fifth Amendment issues after upholding protective order).

²⁷ See *Williams*, 995 F.2d at 1014 (stating *Williams*' motivation in moving for protective order to avoid possible self-incrimination); see also *Pai*, *supra* note 16, at 331 (stating primary function of protective orders is to induce deponents to testify).

²⁸ See *In re Grand Jury Subpoena*, 836 F.2d at 1479 (Sprouse, J., dissenting). Expressing its concerns regarding potential Fifth Amendment implications, the dissent stated that the deponent "testified only in reliance on the district court's pledge to protect their potentially self-incriminating remarks from the grand jury." *Id.* See also *Martindell*, 594 F.2d at 296-97 (distinguishing facts based on deponents reliance on confidentiality provision contained in protective order). But see *In re Grand Jury Subpoena*, 836 F.2d at 1474-75 (stressing protective orders not substitute for Fifth Amendment privilege and not affected by subpoena).

²⁹ See, e.g., *Janet Greeson's A Place for Us, Inc.*, 62 F.3d at 1225-26 (reiterating shortcomings of protective orders in safeguarding deponents' Fifth Amendment rights); *Williams*, 995 F.2d at 1015 (summarizing district court's reasoning in upholding protective order); *In re Grand Jury Subpoena*, 836 F.2d at 1475-476 (citing judiciary's lack of authority and potential flaws in protective orders). The Fourth Circuit Court of Appeals rejected the district court's assertion that the protective order prevailed "because *Williams* relied on the Rule 26(c) protective order and waived his Fifth Amendment right to remain silent, he was entitled to have the order enforced." *Williams*, 995 F.2d at 1015. See also *Pai*, *supra* note 16, at 331-33 (arguing concern about deponent's Fifth Amendment rights misplaced).

1. Protective orders are not absolute and cannot be used as a substitute for an individual's invocation of his or her Fifth Amendment privilege against self-incrimination.

Although protective orders are similar to the privilege against self-incrimination in that they provide a deponent with expectations of confidentiality and privacy, protective orders are "not a substitute for invocation of the Fifth Amendment privilege."³⁰ Protective orders are not synonymous with the privilege against self-incrimination and grants of immunity primarily because protective orders cannot absolutely prevent confidential information from being disclosed.³¹ Unfortunately, protective orders that successfully induce a deponent to reveal incriminating information are always susceptible to run a party leaking the information to the public or to law enforcement officials.³² Once the incriminating or confidential information is leaked, a protective order cannot guarantee that the government will not use the information against the deponent.³³ Furthermore, the issu-

³⁰ *In re Grand Jury Subpoena*, 836 F.2d at 1475.

³¹ *See Janet Greeson's A Place For Us, Inc.*, 62 F.3d at 1224-25 (summarizing reasons why individuals cannot totally rely on protection of protective orders); *In re Grand Jury Subpoena*, 836 F.2d at 1476 (discussing ways in which protective orders fail to act similar to privilege against self-incrimination); WRIGHT & MILLER, *supra* note 9, at § 2018 (expressing doubt as to whether court could tailor order to degree of statutory immunity); *cf. In re Grand Jury*, 286 F.3d 153, 160 (2002) (quoting *Martindell*, 594 F.2d at 295). The court stated that "[w]hile protective orders are in many cases important facilitating devices, they are not, as the Second Circuit describes them, part of the 'cornerstone of our administration of civil justice,' and should almost always yield in the face of a grand jury subpoena." *Id.*

³² *See In re Grand Jury Subpoena*, 836 F.2d at 1476 (detailing risk of leaks of information and evidence to public); *see also* *Grove Fresh Distribs., Inc. v. John Labatt, Ltd.*, No. 95-2603, 1998 U.S. App. LEXIS 1836, at *10 (7th Cir. Feb. 5, 1998) (stating record clearly indicated attempts of individual to leak information and violate confidentiality); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 222, 227 (6th Cir. 1996) (stating facts where sealed documents under protective order were leaked to *Business Week* journalist).

³³ *See Janet Greeson's A Place For Us, Inc.*, 62 F.3d at 1225 (cautioning against presumptuous reliance on protective orders); *In re Grand Jury Subpoena*, 836 F.2d at 1476 (noting lack of assurance of immunity in protective orders); Heidt, *supra* note 13, at 1095 (stating protective orders always susceptible to violation by parties). In distinguishing the assurances provided by a grant of immunity, Heidt observed:

a protective order in a civil case carries no similar assurance. Such an order allows the response, or at least information derived from the response, to spill out at trial, appeal, or some other hearing, where it could be discovered and later used by prosecutors. No protective order could provide the absolute protection . . . required against direct or indirect use by prosecutors. The court can hardly hold all proceedings—including the trial and appeal—in secret, seal all records indefinitely, and prevent all participants from supplying information to the government.

Id.

ing court can always modify a protective order, although the standard for determining the propriety of such a modification is vague.³⁴ Additionally, civil protective orders are merely “stopgap” measures in the discovery process because they will become ineffective when the incriminating information is revealed at trial.³⁵ Perhaps the most compelling evidence that protective orders do not equate to the privilege against self-incrimination is that deponents often assert their Fifth Amendment privilege even though they already obtained a protective order in the same matter.³⁶

2. Protective orders are valid only to the extent that they do not violate any statute or the separation of powers doctrine.

A civil deponent has only two options to preserve his privilege against self-incrimination: assert the Fifth Amendment privilege or seek immunity from the government.³⁷ In attempting to seek immunity, the power and discretion to award such protection rests exclusively with the executive branch of the government.³⁸ When a court upholds a protective order in the face of a grand jury subpoena, the deponent is protected from

³⁴ See *Martindell*, 594 F.2d at 296 (enunciating compelling need rule). Specifically, a protective order will not be modified “absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.” *Id.* See also *United States v. Davis*, 702 F.2d 418 (2d Cir. 1983) (explaining types of extraordinary circumstances under standard).

³⁵ See *In re Grand Jury*, 286 F.3d at 161 (summarizing degree of protection of protective orders); *In re Grand Jury Subpoena*, 836 F.2d at 1476 (stating protective orders often act as temporary benefits to litigants). Most recently, the Third Circuit, elaborating on the temporary protection that protective orders afford stated, “deponents who have reason to fear not just embarrassment or economic disadvantage, but possible criminal charges as well, should be aware that a protective order alone cannot protect them from a grand jury investigation. *Id.*”

³⁶ See *In re Grand Jury Subpoena*, 836 F.2d at 1476 (distinguishing protective orders based on their ineffectiveness on deponent’s right to exercise privilege).

³⁷ See 18 U.S.C. § 6003 (2002) (authorizing immunity to compel testimony shielded by witnesses assertion of Fifth Amendment privilege). The statute states in relevant part: “In the case of any individual who has been called to testify . . . the United States District Court . . . shall issue . . . an order requiring such individual to give testimony . . . which he refuses to give . . . on the basis of his privilege against self-incrimination.” *Id.* See generally *Pai*, *supra* note 16, at 332 (describing viable options to witnesses in preserving privilege against self-incrimination).

³⁸ See § 6003 (stating order compelling testimony given only on request of United States Attorney); *Pillsbury v. Conboy*, 459 U.S. 248, 261 (1983) (stating power to grant immunity rests in hands of executive); *Janet Greeson’s A Place For Us, Inc.*, 62 F.3d at 1224 (recognizing power to grant immunity rests in executive branch under federal law). “No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity.” *Id.*

any related criminal investigation.³⁹ In other words, the judiciary has essentially given the deponent immunity, at least temporarily.⁴⁰ Although protective orders preserve a deponent's confidentiality, they cannot act as de facto grants of immunity in the face of a grand jury subpoena, and therefore, upholding a grand jury subpoena does not abrogate a person's Fifth Amendment rights.⁴¹

III. THE CURRENT STATE OF THE LAW

Since the courts first addressed the conflict between protective orders and grand jury subpoenas in 1979, the federal courts of appeals have created three separate and distinct legal standards, each attempting to strike the proper balance among three competing interests.⁴²

A. The Compelling Need Standard

In *Martindell v. International Telephone and Telegraph Corporation*,⁴³ the Second Circuit addressed the conflict between a civil protective order and the government's interest in gaining access to the information that the order protects.⁴⁴ *Martindell* arose in the context of a stockholders' derivative suit alleging that certain officers and directors of International Telephone and Telegraph Corporation had wasted the company's assets in an effort to influence the 1970 elections in Chile.⁴⁵ During litigation, the plaintiffs deposed several witnesses under a protective order that limited use of the transcripts exclusively to pending litigation.⁴⁶ Subsequently and

³⁹ See *Janet Greeson's A Place For Us, Inc.*, 62 F.3d at 1224 (declaring civil protective order de facto grants of immunity when upheld over grand jury subpoenas); *Williams v. United States (In re Grand Jury Proceedings)*, 995 F.2d 1013, 1015 (describing how protective orders relate to immunity); *In re Grand Jury Subpoena*, 836 F.2d at 1475 (11th Cir. 1993) (stating how deponents desired de facto grant of immunity by attaining protective order).

⁴⁰ See *Janet Greeson's A Place For Us, Inc.*, 62 F.3d at 1224.

⁴¹ See *supra* notes 37-39 and accompanying text (discussing executive power to grant immunity). In warning of the dangers of construing protective orders into grants of immunity, the court in *In re Grand Jury Subpoena* stated that doing so "would usurp the proper authority of the executive branch to balance the public interest in confidentiality against the interest in effective criminal investigation." 836 F.2d at 1475.

⁴² See, e.g., *In re Grand Jury Subpoena*, 138 F.3d 445 (1st Cir. 1998) (creating modified per se rule); *In re Grand Jury Subpoena*, 836 F.2d at 1474 (establishing per se rule in favor of grand jury subpoena); *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (creating compelling need standard).

⁴³ 594 F.2d 291 (2d Cir. 1979).

⁴⁴ *Id.* Specifically, the government sought access to the deposition transcripts for subsequent use in its investigation into possible violations of federal law that included perjury, conspiracy, and obstruction of justice. *Id.* at 293.

⁴⁵ See *id.* at 293.

⁴⁶ See *id.*

through an informal request to the presiding judge, the government sought access to the protected transcripts for use in its investigation into suspected violations of federal law.⁴⁷ The district court denied the government's request based on the deponent's reliance on the protective order and the potential constitutional issues that complying with the government's request would raise.⁴⁸

On appeal, the Second Circuit upheld the district court's decision, stating that the function of protective orders in securing "the just, speedy, and inexpensive determination" of civil disputes "represents the cornerstone of our administration of civil justice."⁴⁹ Encouraging the full disclosure of all relevant evidence, the court stressed that failing to uphold protective orders would discourage witnesses from giving testimony and, consequently, undermine the civil litigation system.⁵⁰ Although the court recognized and considered law enforcement's interest in obtaining all relevant evidence, the majority ultimately concluded that the government's broad investigative powers included alternatives to the "exploitation of the fruits of private litigation."⁵¹ After balancing these competing interests, the court stated the rule as follows: "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties."⁵² By denying the government's unorthodox requests, the court fashioned a rule that other courts would subsequently utilize in analyzing grand jury subpoenas.⁵³

In *United States v. Davis*,⁵⁴ the Second Circuit elaborated on the standard announced in *Martindell* by attempting to define exactly what type of extraordinary circumstances would justify overriding a protective order.⁵⁵ Unlike *Martindell*, the court confronted a grand jury subpoena

⁴⁷ See *id.* The government's request was based on the Justice Department's opinion that the testimony was relevant at least to the credibility and truthfulness of the witnesses. *Id.* The court noted the unusual method by which the government requested access to the information and stated that the proper procedure was to either obtain a grand jury subpoena for the information or to seek permissive intervention under Rule 24(b) of the FRCP. *Id.* at 294.

⁴⁸ See *Martindell*, 594 F.2d at 293.

⁴⁹ *Id.* at 295 (quoting FED. R. CIV. P. 1).

⁵⁰ See *id.* at 295.

⁵¹ *Id.* at 296 (quoting *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976)).

⁵² *Id.* at 296. The court further explained the rule by stating that "such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation, either as evidence or as the subject of a possible perjury charge." *Id.*

⁵³ See *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985).

⁵⁴ 702 F.2d 418 (2d Cir. 1983).

⁵⁵ See *id.* at 422-23 (distinguishing facts from *Martindell*).

requesting access to transcripts from a deposition taken in accordance with a limited protective order from a bankruptcy proceeding.⁵⁶ In permitting access to the transcripts and documents, the *Davis* court made several distinctions from *Martindell* that arguably constitute extraordinary circumstances.⁵⁷ In denying the deponent's argument to prohibit access to the deposition transcripts, the court emphasized that the deponent had never produced evidence of a formal protective order.⁵⁸ Furthermore, the deponent had failed to show that, but for the oral "understanding of confidentiality," he would not have testified.⁵⁹ Despite the written protective order sealing various business documents, the court allowed the government access because the terms of the order permitted the parties themselves to disclose the documents, and because the documents were unprivileged and created prior to the litigation.⁶⁰ Although the grand jury gained access to the transcripts and business documents, the Second Circuit in *Davis* continued to abide by the compelling need rule, but with some indication as to what might constitute extraordinary circumstances.⁶¹

Two years after *Davis*, in *Palmieri v. New York*,⁶² the Second Circuit explicitly extended the compelling need rule to instances where the government sought to modify a protective order or requested access to documents via a grand jury subpoena.⁶³ In this private antitrust action, several defendants contested a district judge's order permitting the New York Attorney General access to a settlement agreement and testimony from the private action.⁶⁴ During discovery in the private litigation, a magistrate judge issued a protective order preventing disclosure "to any government agency or instrumentality" and indicated that the defendants had

⁵⁶ See *id.* at 420-21 (setting forth facts of case). During the bankruptcy proceeding, the deponents, after requesting a protective order, came to an "understanding" whereby limited protection would be given only to those portions of the testimony that were later labeled as confidential or accusatory. *Id.* Furthermore, the Bankruptcy Court issued a written protective order that restricted access to and use of confidential information contained in business records belonging to the deponent. *Id.* However, the written order also contained the following provision: "Nothing herein shall preclude IDT from disclosing any confidential information to any person or entity." *Id.* at 420.

⁵⁷ See *id.* at 423-24 (stating reasons why deponents reliance on *Martindell* is misplaced).

⁵⁸ See *id.* at 422-23.

⁵⁹ See *id.* (stating lack of formal protective order and evidence of reliance support government's case). The court also stressed the fact that the deponent had failed to comply with the terms of the "understanding of confidentiality" and that, unlike *Martindell*, the government had demanded access in the usual form of a grand jury subpoena. *Id.*

⁶⁰ See *United States v. Davis*, 702 F.2d 418, 423 (2d Cir. 1983) (refusing to enforce written protective order).

⁶¹ See *supra* notes 54-59 and accompanying text.

⁶² 779 F.2d 861 (2d Cir. 1985).

⁶³ See *id.* at 863 (reciting facts involving motions to modify protective order and grand jury subpoena).

⁶⁴ See *id.* at 862 (reciting facts of case).

relied significantly upon the order when testifying.⁶⁵ Despite the protective order, the Attorney General attempted to intervene in the action and obtain a modification of the order, and shortly thereafter served a grand jury subpoena upon the plaintiff in the private action.⁶⁶ Although the government was enjoined from questioning the plaintiff in front of the grand jury, the district court granted the Attorney General's motion to modify the order, thereby enabling the government to have access to the settlement negotiations.⁶⁷

In reversing the district court's order, the Second Circuit reaffirmed the compelling need rule enunciated in *Martindell* and emphasized that the deponents' had placed considerable reliance on the protective orders.⁶⁸ The court, however, was unable to determine whether the district court improvidently granted the sealing orders and therefore remanded the case back to the district court.⁶⁹ The appeals court explained that if the magistrate judge, at the time he issued the order, "should have recognized that the settlement would likely further criminal activity, then he acted improvidently in granting those orders."⁷⁰ Once again, the Second Circuit reaffirmed the use of the compelling need rule and also attempted to clarify what would constitute improvidence or exceptional circumstances.⁷¹

The most recent case affirming the compelling need rule, *United States v. Doe*,⁷² involved a grand jury subpoena ordering a court-appointed bankruptcy examiner to submit as evidence all deposition transcripts and unprivileged documents relating to Eastern Airlines' bankruptcy.⁷³ Eastern Airlines filed for bankruptcy in March of 1989, and a court-appointed examiner conducted a detailed investigation into some of the Eastern's alleg-

⁶⁵ See *id.* at 863-64 (stating grounds and circumstances surrounding protective orders).

⁶⁶ See *id.* at 864 (describing government's actions in attempting to gain access to information).

⁶⁷ See *Palmieri v. New York*, 779 F.2d 861, 864 (2d Cir. 1985) (summarizing district court's decision in granting government's motion).

⁶⁸ See *id.* at 864-65 (noting increased burden for government in light of appellants' heavy reliance). Specifically, the court viewed the appellants' reliance "as evidenced by their unwillingness to engage in settlement negotiations without the protections afforded, raises a presumption in favor of upholding those orders. *Id.* at 865.

⁶⁹ See *id.* at 866 (indicating inability to determine if order wrongfully granted). The government had argued that the settlement agreement itself was an act in furtherance of criminal activity and that the order sealing the agreement was improvidently granted. *Id.* at 865.

⁷⁰ *Id.* at 865.

⁷¹ See *id.* at 865-66 (reviewing record for evidence of improvidence or extraordinary circumstances).

⁷² (*In re Grand Jury Duces Tecum Dated April 19, 1991*), 945 F.2d 1221 (2d Cir. 1991).

⁷³ See *id.* at 1222-24 (outlining facts of district court proceedings).

edly fraudulent transactions.⁷⁴ Eastern asserted that because of its involvement in an intense labor dispute, it would not voluntarily comply with the examiner unless the court guaranteed the confidentiality of all information obtained.⁷⁵ As a result, the examiner, counsel for Eastern, and other interested parties entered into a written stipulation to keep the depositions confidential, which the court formalized under an order signed by the presiding judge.⁷⁶ Shortly thereafter, the United States Attorney for the Eastern District of New York obtained the grand jury subpoena ordering the examiner to produce all specified documents and transcripts.⁷⁷ The district court denied the parties' motions to quash the subpoena, reasoning that the order was an express agreement to withhold evidence of a crime from the government and therefore against public policy.⁷⁸

On appeal, the Second Circuit reversed the district court's order and remanded the case, holding that the district court had mistakenly placed the burden of proof on the examiner.⁷⁹ The court also stated that the district court failed to make a finding as to whether the order was improvidently granted or whether any extraordinary circumstances existed in the government's favor.⁸⁰ In reaching its conclusion, the Second Circuit responded to the Fourth Circuit's criticism that upholding protective orders constituted an improper grant of immunity by reiterating that a court can always modify a protective order when there is evidence of compelling need.⁸¹

B. The Per Se Rule

The Fourth, Eleventh, and Ninth Circuits have all expressly rejected the *Martindell* test and have held that grand jury subpoenas must prevail over otherwise valid protective orders.⁸²

⁷⁴ See *id.* at 1222.

⁷⁵ See *id.* (reciting facts indicated in record). The record also indicates that time was of the essence in resolving the bankruptcy proceedings and that the examiner "was under enormous pressure to expedite his investigation in the interests of creditors who were owed billions of dollars, the traveling public and thousands of Eastern employees whose jobs depended on a prompt reorganization." *Id.*

⁷⁶ See *id.* at 1222-23 (reviewing stipulation and order issued by court).

⁷⁷ *United States v. Doe (In re Grand Jury Duces Tecum Dated April 19, 1991)*, 945 F.2d 1221, 1223 (2d Cir. 1991) (outlining procedural posture).

⁷⁸ See *id.* at 1223 (summarizing district court's holding).

⁷⁹ See *id.* at 1224 (stating grounds for remand).

⁸⁰ See *id.*

⁸¹ See *id.* at 1224-25 (rejecting Fourth Circuit's per se rule).

⁸² See *Janet Greeson's A Place For Us, Inc.*, 62 F.3d at 1227 (adopting per se rule favoring grand jury subpoenas over protective orders); *Williams v. United States (In re Grand Jury Proceedings)*, 995 F.2d 1013, 1020 (4th Cir. 1988) (rejecting compelling need rule); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1478 (4th Cir. 1988) (stating otherwise valid protective order not enough to quash grand jury subpoena).

1. Fourth Circuit – *In re Grand Jury Subpoena*⁸³

The Fourth Circuit has only heard one case involving the conflict between a protective order and a grand jury subpoena, and in that case the court established the per se rule that two other circuits would later adopt.⁸⁴ The conflict arose after a district court refused to quash a grand jury subpoena ordering the plaintiffs' counsel to turn over protected deposition transcripts from a previous civil insurance action.⁸⁵ The court, drawing on *Martindell* and its progeny, recognized that the conflict required consideration of three competing interests: "the authority of a grand jury to gather evidence in a criminal investigation; the deponents' right against self-incrimination; and the goals of liberal discovery and efficient dispute resolution in civil proceedings."⁸⁶

The court first addressed the potential harm to the traditional role of the grand jury if it upheld a protective order over a grand jury subpoena.⁸⁷ Relying on grand juries' broad investigatory authority, the court concluded that giving precedence to protective orders would compromise the principle that "[a] grand jury, subject only to the limitations of the Fifth Amendment, has the right to all relevant evidence."⁸⁸ Specifically, the court considered that, in practice, protective orders shield uncoerced, inconsistent testimony and, therefore, cannot continue to frustrate the government's need for this information.⁸⁹

The court disagreed with the deponents' assertions that their Fifth Amendment right against self-incrimination was at risk, stating that "the

⁸³ 836 F.2d 1468 (4th Cir. 1988).

⁸⁴ See *supra* note 79.

⁸⁵ See *In re Grand Jury Subpoena*, 836 F.2d at 1469-70 (describing facts leading up to appeal). Following the 1985 collapse of Community Savings & Loan (Community), whose parent company was Equity Programs Investment Corporation (EPIC), a special grand jury in the district of Maryland was established to investigate the circumstances surrounding the collapse. *Id.* The deponents, various officers and directors of EPIC, were eventually deposed in connection with a civil suit by various mortgage insurance companies who had been harmed by Community's collapse. *Id.* Prior to giving their testimony, the deponents, after being denied a stay, attained a protective order that, among other things, explicitly stated that "the sealed depositions . . . shall not be made available to any state or federal investigating agency or authority." *Id.* Following a hearing in a Maryland district court, the judge denied the deponents motions to quash the subpoenas. *Id.* at 1470.

⁸⁶ See *id.* at 1471 (laying out scope of analysis).

⁸⁷ See *id.* at 1471 (describing historical powers and significance of grand jury).

⁸⁸ See *id.* at 1474 (declaring balance must end in favor of grand jury's powers and needs).

⁸⁹ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1475 (4th Cir. 1988) (stating how civil protective order may impede grand jury investigation). The court, in responding to the deponents arguments, stated that "[i]t is misguided to contend that the government's ability to gather other evidence of criminal misconduct undermines this interest. The grand jury has the right to gather all relevant evidence." *Id.* at n.10.

deponents' fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of protective orders."⁹⁰ The court stressed that the deponents had the option of either invoking their Fifth Amendment privilege or seeking a grant of immunity to protect their interests; otherwise they had waived those rights when they testified in reliance on the protective order.⁹¹ Furthermore, separation of powers principles and other statutory restrictions prevent protective orders from acting as *de facto* grants of immunity by precluding grand jury access.⁹²

The court next considered the degree to which protective orders facilitate civil litigation and prevent undue delay by encouraging deponents to offer otherwise damaging testimony.⁹³ Because a protective order will only facilitate litigation to the extent that it can prevent the disclosure of incriminating information, the court concluded that protective orders' significance is substantially diminished by the potential for leaks, modification, and disclosure at trial.⁹⁴ Furthermore, protective orders are but one of many tools that courts can use to encourage parties to offer testimony and comply with the discovery process.⁹⁵

After discussing and considering the effects on the three primary interests articulated, the Fourth Circuit stated that a court should enforce a grand jury subpoena "despite the existence of an otherwise valid protective order."⁹⁶ In its holding, the court explicitly rejected any balancing test such as the compelling need rule.⁹⁷ The Fourth Circuit argued that because protective orders are issued at the request of a party in an independent civil action, courts are unable to balance the interests of non-party law enforcement officers.⁹⁸ Lastly, the court stated that even if it could conduct an accurate balancing, the inherent unpredictability of such tests would only

⁹⁰ See *id.* at 1471 (addressing concerns about deponents' Fifth Amendment rights).

⁹¹ See *id.* at 1471-72 (discussing Fifth Amendment implications of testifying in reliance of protective order). The court further explained that any adverse risks and inferences of invoking one's privilege against self-incrimination were permitted in civil actions under various Supreme Court decisions. *Id.* at 1472.

⁹² See *id.* at 1475 (stating giving protective order "paramount effect" would usurp executive branch's power).

⁹³ See *id.* at 1473 (addressing purpose and function of protective orders in furthering efficient dispute resolution).

⁹⁴ See *id.* at 1475-76 (arguing protective orders not absolute thereby lessening significance).

⁹⁵ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988) (listing alternatives available to district courts).

⁹⁶ See *id.* at 1477 (enunciating per se rule favoring grand jury subpoenas).

⁹⁷ See *id.* at 1477-78 (rejecting balancing test and stating dangers of ad hoc balancing).

⁹⁸ See *id.* at 1477 (stating ad hoc balancing improper at time of issuance of protective order). The court also argued that the lower courts lack the constitution authority to conduct the proper balancing because "the balancing of the interests of law enforcement against other needs is properly for the executive department." *Id.* at 1478.

encourage deponents to invoke their Fifth Amendment privilege, thereby undermining the civil litigation system.⁹⁹

2. Eleventh Circuit – *Williams v. United States*¹⁰⁰

The Eleventh Circuit has only addressed one case involving the use of a protective order and a grand jury subpoena, but, like the Fourth Circuit, this court adopted the *per se* rule.¹⁰¹ As in other cases, the Eleventh Circuit considered whether to uphold a grand subpoena requesting the protected notes of a deponent's deposition in a prior civil matter.¹⁰² In deciding the case, the Eleventh Circuit adopted the *per se* rule, largely in part because "the essential and historic purpose served by the grand jury outweighs the utility served by Rule 26(c) protective orders."¹⁰³ Emphasizing the sanctity of the grand jury, the Eleventh Circuit explicitly departed from the Second Circuit's reasoning in denying that protective orders are the "cornerstone of our administration of civil justice."¹⁰⁴

In addition to rejecting the compelling need rule because of its improper deference to protective orders and failure to recognize the lack of power of federal courts to offer immunity, the court also emphasized the administrative dilemmas that the compelling need rule created.¹⁰⁵ Specifically, the court argued that the *Martindell* court did not adequately define

⁹⁹ See *id.* at 1478 (describing functional problems of compelling need rule).

¹⁰⁰ (*In re Grand Jury Proceedings*), 995 F.2d 1013 (11th Cir. 1993).

¹⁰¹ See *id.* at 1020 (adopting *per se* rule).

¹⁰² See *id.* at 1013 (stating basic facts of case). Williams, a former insurance salesman, had brought a civil action against his former employer, North American Life Assurance Company (North American), seeking allegedly unpaid commissions. *Id.* At the same time though, a grand jury had been instituted to investigate whether Williams had violated the mail and wire fraud statutes. *Id.* As would be expected, Williams took part in the depositions in his civil action only when shielded by a protective order prohibiting his testimony from being disclosed outside of that particular action. *Id.* Shortly after Williams' action had been settled, the federal grand jury issued a subpoena for the notes of Williams' deposition. *Id.*

¹⁰³ See *id.* at 1015.

¹⁰⁴ See *id.* at 1017 (stating court cannot agree with Second Circuit); see *supra* note 48 and accompanying text. In elaborating on its disagreement, the court stated:

"Protective orders are merely a facilitating device and should not be used to shield relevant information from a valid grand jury subpoena. We find absolutely nothing in Rule 26(c) or its advisory committee notes to support the notion that Congress, in passing on and enacting the Rule, intended to circumscribe the grand jury's authority and subpoena power as the [S]econd Circuit has done."

Id.

¹⁰⁵ See *Williams v. United States* (*In re Grand Jury Proceedings*), 995 F.2d 1013, 1018 (11th Cir. 1993) (stating flaw in applying *Martindell* standard).

the terms “improvidence,” “compelling need,” and “extraordinary circumstances.”¹⁰⁶ Furthermore, the court stated that even with clear definitions, the *Martindell* test failed to show how a prosecutor would demonstrate such needs or circumstances.¹⁰⁷ Finally, the court hypothesized the “Hobson’s choice” under the *Martindell* test, whereby judges must decide between violating a protective order and “denying the public its right to every man’s evidence.”¹⁰⁸

3. Ninth Circuit – *United States v. Janet Greeson's A Place For Us, Inc.*¹⁰⁹

Most recently, the Ninth Circuit adopted the per se rule in a case involving a grand jury subpoena request for copies of various discovery documents produced in connection with a prior insurance suit.¹¹⁰ The civil suit, which ultimately settled, arose when several medical insurance companies accused the defendant of fraudulent billing practices.¹¹¹ After a lengthy discovery period, the parties settled the matter and obtained a protective order from the district court sealing all discovery documents.¹¹² Shortly thereafter, a grand jury subpoenaed the counsel for one of the insurance companies requesting access to all documents produced during discovery in the prior action.¹¹³ Although the district court allowed the defendant to intervene and contest the validity of the subpoena’s requests, the court ultimately denied the defendant’s motion to quash the subpoena.¹¹⁴

The Ninth Circuit, in reaching its decision to adopt the per se rule, reviewed the jurisprudence surrounding both the compelling need rule and the per se rule, and concluded that the per se rule cases “convincingly explain that a grand jury subpoena should, as a matter of course, prevail over a protective order.”¹¹⁵ In acknowledging the merits of the Fourth and Eleventh Circuits’ decisions adopting the per se rule, the court deferred to

¹⁰⁶ See *id.* at 1018-19 (indicating inability to define “improvidence” and poor explanations of other terms).

¹⁰⁷ See *id.* at 1019 (describing how secrecy required in grand jury proceedings creates virtual impossibility for prosecutor).

¹⁰⁸ See *id.* at 1019-20 (describing strategic quandary). The court also described the potential conflict between different judges that would likely arise when one is asked to uphold a protective order, and the other to enforce the grand jury subpoena. *Id.*

¹⁰⁹ (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*), 62 F.3d 1222 (9th Cir. 1995).

¹¹⁰ See *id.* at 1222-23, 1226 (stating facts of case and adoption of per se rule).

¹¹¹ See *id.* at 1222-23 (describing factual scenario leading to appeal).

¹¹² See *id.* at 1223.

¹¹³ See *id.*

¹¹⁴ See *United States v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1222, 1223 (9th Cir. 1995).

¹¹⁵ See *id.* at 1226 (summarizing reasons for adoption of per se rule).

the costly effects of upholding protective orders and the goal of preserving the grand jury's independence.¹¹⁶ Finally, the court added that no language in Rule 26 indicated Congress' intent to "abrogate[e] the historical investigative powers of the grand jury" or to enable the judiciary to grant immunity.¹¹⁷

C. The Modified Per Se Rule

In the five years since the last decision adopting the per se rule, two circuits have departed from the current trend and created a third standard in analyzing protective orders and grand jury subpoenas – the modified per se rule.¹¹⁸

1. First Circuit – *In re Grand Jury Subpoena*¹¹⁹

In establishing the modified per se rule, the First Circuit sought to resolve a conflict created by a protective order and grand jury subpoena issued in connection with the beating of an undercover police officer by his fellow uniformed officers.¹²⁰ The civil protective order issued in a civil action by the injured officer against his attackers sealed all confidential information, including "any and all Internal Affairs Division (IAD) records."¹²¹ Several months after a stay in the civil proceedings, a grand jury investigating the attack issued a subpoena to the victim's counsel, ordering him to produce all depositions of one of the accused officers.¹²² The district court denied the accused officer's motion to quash, utilizing the *Martindell* standard and concluding that the interests in facilitating the criminal investigation were substantial.¹²³

The First Circuit, on appeal, rejected both the compelling need standard and the per se rule, stating that "[a] grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the sub-

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 1226-27 (stating further reasons for adopting per se rule). The court concluded its discussion of the lack of intent in the language of Rule 26 by stating, "[a] Congressional intent to cause such a significant shift in the allocation of traditional powers presumably would have been stated explicitly." *Id.*

¹¹⁸ See *In re Grand Jury*, 286 F.3d 153, 158 (3d Cir. 2002) (following First Circuit in adopting modified per se rule); *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir. 1998) (creating modified per se rule).

¹¹⁹ 138 F.3d 442 (1st Cir. 1998).

¹²⁰ See *id.* at 443 (stating procedural history of case).

¹²¹ See *id.*

¹²² See *id.* Shortly after the grand jury had been initiated, the government intervened in the civil matter and successfully motioned the court to stay the action, pending the completion of the investigation. *Id.*

¹²³ See *id.* at 443-44 (describing district court's reasoning).

poena can demonstrate the existence of exceptional circumstances.”¹²⁴ In rejecting the compelling need rule, the court found that the rule was ill-defined and misplaced the presumption of validity on the side of protective orders.¹²⁵ Furthermore, the court rejected the per se rule because of its alleged inflexibility and inability to account for the “idiosyncratic circumstances” that sometimes exist.¹²⁶ The court admitted that a grand jury subpoena will almost always prevail; however, it listed various practical factors that need to be considered under the new analysis.¹²⁷

2. Third Circuit – *In re Grand Jury*¹²⁸

In the most recent example of the conflict between civil protective orders and grand jury subpoenas, the Third Circuit followed the First Circuit’s reasoning and adopted the modified per se rule.¹²⁹ As in prior cases, the grand jury subpoena sought deposition transcripts, interrogatory answers, and other exhibits from a civil proceeding, despite a protective order limiting public disclosure of personal and corporate financial data.¹³⁰ The district court denied the plaintiff’s motion to quash, finding that the issuing court had improvidently granted the protective order.¹³¹

The Third Circuit affirmed the district court’s denial of the motion to quash and agreed with the First Circuit’s reasoning requiring a showing

¹²⁴ *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir. 1995) (enunciating new approach in resolving conflict).

¹²⁵ *See id.* at 444-45 (listing flaw in compelling need rule). “*Martindell* fails to pay proper respect to what we deem an issue of great importance: society’s profound interest in the thorough investigation of potential criminal wrongdoing.” *Id.*

¹²⁶ *See id.* at 445 (explaining shortcomings of per se rule). Though the court validated the per se rule’s goal, it stated that the rule’s lack of analysis “will trench upon legitimate concerns when (even if rarely) a solid case can be made for exceptional treatment. *Id.* (emphasis added)

¹²⁷ *See id.* at 445. The court listed the following factors: (1) the governments’s need for the information; (2) type of criminal charges; (3) potential harm to society of quashing the subpoena; (4) the positive effects of maintaining the parties confidentiality; (5) the degree to which maintaining the order will ensure timely resolution of the dispute; (6) potential harm to the party protected by the order; (7) the harm to all other moving parties involved in the litigation; (8) “and the harm to society and the parties should the encroachment upon the protective order hamper the prosecution or defense of the civil case.” *Id.*

¹²⁸ 286 F.3d 153 (3d Cir. 2002).

¹²⁹ *See id.* at 155.

¹³⁰ *See id.* at 156-7 (stating facts of case). Although all protected evidence was produced under a state court protective order, the state court in issuing the order adopted the term of a prior federal district court order. *Id.* at 158 n.4. The court’s analysis was unchanged because of the similarities in both terms and implicated interests in the orders. *Id.*

¹³¹ *See* 286 F.3d at 157 (describing district court’s reasoning). The court determined that there were inadequate evidence to support finding of good cause and that the protective order acted as an overbroad “umbrella” protective order. *Id.* at 157 n.3.

of exceptional circumstances to deny a grand jury subpoena.¹³² The court arrived at its decision after considering the current standards used in resolving the conflict, ultimately favoring the policies supporting both the per se and modified per se rule.¹³³ The court agreed with the Fourth Circuit's reasons for adopting the per se rule, but suggested that there might be situations where displacing a protective order in favor of a grand jury subpoena would severely harm the public's interest in a timely resolution of civil litigation.¹³⁴ The court, however, acknowledged "that enforcing a protective order grants a certain degree of quasi-immunity to a deponent."¹³⁵

IV. ANALYSIS

A. *The Compelling Need Rule Improperly Favors Protective Orders.*

The compelling need rule enunciated in *Martindell* improperly favors efficient dispute resolution via protective orders to the detriment of the public's interest in effective grand jury investigations.¹³⁶ The inherent importance of the grand juries in today's society is reflected in their wide authority to pursue investigations and their right to all relevant evidence.¹³⁷ By utilizing the compelling need rule and upholding protective orders in the majority of cases, courts will impede criminal investigations and marginalize grand juries despite the availability of sufficient alternatives and the constitutional restraints on grants of immunity.¹³⁸ Furthermore, the protection the compelling need rule gives to protective orders acts as a de facto use of the Fifth Amendment privilege against self-incrimination, except without any adverse consequences. The justifications for the compelling need rule mistakenly confuse the deference given to protective orders as necessary to protect a deponent's Fifth Amendment rights. Protective

¹³² See *id.* at 165 (reviewing holding).

¹³³ See *id.* at 158-62 (describing advantages and disadvantages to compelling need rule and per se rule).

¹³⁴ See *In re Grand Jury*, 286 F.3d 153, 159-63 (3d Cir. 2002).

¹³⁵ See *id.* at 164.

¹³⁶ See *supra* notes 83-89 and accompanying text (describing flaws of compelling need rule in establishing per se standard); see also *supra* note 121 and accompanying text (stating compelling need rule subverts society's interest in criminal investigations).

¹³⁷ See *supra* note 121 and accompanying text (deeming interest in criminal investigations paramount concern with rejecting compelling need rule).

¹³⁸ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1475 (4th Cir. 1988) (stating consequences of upholding protective orders against grand jury subpoenas). Specifically, the court stated that "a protective order, if given full effect, would impede the investigating function of a grand jury." *Id.*

orders cannot, and should not, be afforded equal or superior status to the privilege against self-incrimination.¹³⁹

By allowing protective orders to prevail over grand jury subpoenas, district courts are essentially issuing de facto grants of immunity.¹⁴⁰ Under federal law, only the executive branch of the government may issue grants of immunity.¹⁴¹ Formal or informal attempts by either the legislature or judiciary to grant immunity constitute a violation of federal law.¹⁴² Therefore, the deference to protective orders under the compelling need rule may result in situations where a court upholds a protective order and provides a deponent with use immunity, thereby violating federal law.¹⁴³

Notwithstanding a deponent's privacy concerns, viable alternatives to protective orders exist that encourage the efficient and timely resolution of civil action.¹⁴⁴ Specifically, the Fourth and Ninth Circuits have noted that a court realizing a deponent may invoke his Fifth Amendment privilege can delay discovery until a relevant grand jury investigation has concluded.¹⁴⁵ In certain cases a court may be able to avoid issuing a protective order if it concludes that the grounds upon which the deponent anticipates using his Fifth Amendment privilege are invalid. Finally, when the defendant may raise the privilege, a court can shift the burden of proof to the defendant because the defendant is in the best position to provide such proof.¹⁴⁶

B. Any Balancing Test is Unnecessary

Just as the compelling need rule mistakenly utilizes a balancing test to create a presumption in favor of protective orders, the modified per se rule does exactly the opposite by creating a balancing test favoring grand jury subpoenas.¹⁴⁷ Specifically, the modified per se rule would sustain a

¹³⁹ See *supra* notes 26-41 and accompanying text (describing how protective orders are not absolute and how only executive branch can grant immunity).

¹⁴⁰ See *supra* notes 37-41 and accompanying text.

¹⁴¹ See *supra* note 28 and accompanying text (describing entities authorized to grant immunity).

¹⁴² See *supra* note 38 (describing how only executive branch possesses power to grant immunity).

¹⁴³ See *supra* notes 43-81 and accompanying text. In fact, to some extent, each case utilizing the compelling need rule provide parties seeking protection from the order with some form of immunity. See *id.*

¹⁴⁴ See *supra* note 91 (stating availability of alternatives to district court).

¹⁴⁵ See *supra* note 14 (suggesting court can stay proceedings until investigation ends); see also (*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*), 62 F.3d 1222, 1225 (9th Cir. 1995) (summarizing and adding alternatives available to trial courts); *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988) (stating effects of staying proceeding).

¹⁴⁶ See *supra* note 16.

¹⁴⁷ See *supra* note 120-123 and accompanying text (stating modified per se rule).

protective order when a party to the civil action demonstrates that, among other things, the public interest in resolving the civil dispute outweighs the interest in pursuing the grand jury investigation.¹⁴⁸ Although the modified per se rule recognizes the importance of the grand jury's investigative functions, the rule requires a balancing of often ethereal interests that inevitably leaves some uncertainty in the minds of civil litigants.¹⁴⁹

There are several major problems with applying any balancing test to the conflict between civil protective orders and grand jury subpoenas.¹⁵⁰ First, the interests involved are either undeveloped or altogether non-existent.¹⁵¹ Upon application and issuance of a protective order, a corresponding grand jury investigation does not always exist.¹⁵² Although the litigant's interests in pursuing a protective order are likely fully developed at the time of issuance (absent an ongoing investigation), the state's interests will remain unclear until a grand jury issues a subpoena.¹⁵³ Though the compelling need rule and modified per se rule create opposing presumptions, they both require some degree of prefigured balancing when a protective order is involved.¹⁵⁴ This balancing is tenuous, if not impossible, when the state's interest is left undefined because a grand jury has not commenced its investigation.¹⁵⁵

Second, any balancing test thwarts both the interest of facilitating grand jury investigations and promoting efficient dispute resolution.¹⁵⁶ By definition, any balancing test will likely favor either protective orders or

¹⁴⁸ See *supra* note 123 and 130 and accompanying text (listing factors considered in analyzing exceptional circumstances); see also Ajit V. Pai, Comment, *Should a Grand Jury Subpoena Override a District Court's Protective Order*, 64 U. CHI. L. REV. 317, 340 (1997) (describing other considerations besides public interests in resolving dispute).

¹⁴⁹ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477-8 (1988) (discussing courts inability to balance unmaterialized interests); see Pai, *supra* note 143, at 346 (admitting problem of uncertainty in modified per se rule).

¹⁵⁰ See *supra* notes 8-12, 94 and accompanying text.

¹⁵¹ See *supra* note 94 and accompanying text (stating inability to properly and accurately balance interests at time of trial).

¹⁵² Cf. *In re Grand Jury Subpoena*, 836 F.2d at 1476 (stating practical inability of trial court to properly balance interests). While the court did not indicate when the grand jury investigation had commenced, the court stated that there was no attempt by the trial court to "consult with the United States attorney before entering into a protective order." *Id.* Without knowing the state's full interest in gaining access to the discovery materials, the court stated that any balancing at the time of original entry of the order would be ineffective. *Id.*

¹⁵³ *Id.*

¹⁵⁴ Compare *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (stating protective order will prevail absent showing of improvidence or extraordinary need), with *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir. 1998) (stating grand jury subpoena will prevail unless exceptional circumstances exist).

¹⁵⁵ See *supra* note 146 and accompanying text.

¹⁵⁶ See *supra* notes 8-12 and 18-21 and accompanying text (describing role of protective orders and grand juries).

subpoenas, depending on the facts of each case. This uncertainty may encourage a deponent to invoke his Fifth Amendment privilege even with a protective order.¹⁵⁷ While immunity is the only lawful substitute for the privilege against self-incrimination, the per se rule at least affords the deponent a definitive outcome if a grand jury subpoena requests protected information.¹⁵⁸

Although the modified per se rule generally results in grand jury subpoenas prevailing over protective orders, the possibility of an opposite result under the rule may still delay a grand jury investigation.¹⁵⁹ A deponent anticipating a grand jury investigation may, under the modified per se rule, seek a protective order, knowing that it would likely delay the grand jury.¹⁶⁰ Although a protective order may be issued for good cause, the vast number of orders in today's litigation suggests that a deponent will be successful in obtaining a protective order even without good cause.¹⁶¹ Even if the government can overcome the protective order, the deponent will have succeeded in obtaining his desired delay, causing needless litigation that the per se rule would have prevented.¹⁶²

C. The Per se Rule Should be the Proper Approach

The Fourth Circuit first enunciated the per se rule where grand jury subpoenas must prevail over otherwise valid protective orders.¹⁶³ When a grand jury subpoena requests protected information or testimony, the per se rule would, without balancing competing interests, allow the grand jury subpoena.¹⁶⁴ The deference given to grand jury subpoenas is largely based

¹⁵⁷ See *supra* note 36 (stating deponent may invoke privilege despite existence of protective order).

¹⁵⁸ See *supra* note 79 and accompanying text (defining per se rule excluding balancing test). While both the compelling need and modified per se rules create the possibility that either side may prevail, the per se rule conclusively establishes that grand jury subpoenas will always prevail. *Id.*

¹⁵⁹ See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1478 (4th Cir. 1988) (noting possibility of delay when protective order might prevail).

¹⁶⁰ *Id.*

¹⁶¹ See *supra* notes 2, 11 and accompanying text (describing standard and prevalence of protective orders).

¹⁶² See *In re Grand Jury Subpoena*, 836 F.2d at 1478 (suggesting delay more harmful when it only protects assertion of Fifth Amendment).

¹⁶³ See *supra* note 79 and accompanying text (stating per se rule adopted by Fourth, Eleventh and Ninth Circuits).

¹⁶⁴ See *id.*; see also *supra* notes 51 and 120 (stating compelling need rule and modified per se rule). Both rules require to a certain degree the balancing of the public's interest in a speedy resolution of the civil dispute against the grand jury's interest in obtaining all relevant evidence. *Id.*

on the historical role of the grand jury as an investigative body and any potential harm caused by delaying an investigation.¹⁶⁵

The certainty afforded to deponents in civil matters who may be questioning whether to offer their testimony is one of the major positive attributes of the per se rule.¹⁶⁶ While a protective order by no means a substitutes for a deponent's Fifth Amendment privilege, it ostensibly affords similar protections by maintaining the confidentiality of testimony or other discovery materials.¹⁶⁷ Deponents in civil matters, especially defendants, arguably consider these benefits of protective orders because asserting their Fifth Amendment privilege risks creating adverse, but permissible, inferences.¹⁶⁸

Despite the advantages of protective orders, the deponents' decision likely depends on whether a protective order will fail when opposed by a grand jury subpoena.¹⁶⁹ Logically, a deponent will be less inclined to offer testimony under a protective order if a grand jury subpoena will render it ineffective later.¹⁷⁰ Although this result is historically consistent with the imperatives of the grand jury, it is left in doubt under the modified per se rule and, more so, under the compelling need rule.¹⁷¹ Rather than knowing from the beginning whether a protective order will fail against a grand jury subpoena, a deponent who testifies in jurisdictions utilizing either balancing rule will run the risk that any offered testimony might later become exposed to a grand jury.¹⁷² The per se rule eliminates this uncertainty and gives the deponent a definitive answer if the grand jury demands his pro-

¹⁶⁵ See *supra* notes 18-25 and accompanying text (describing history, function, and interests of grand jury).

¹⁶⁶ See *supra* note 79 (stating grand jury subpoenas *must* prevail); see also *In re Grand Jury*, 286 F.3d 153, 163 (3d Cir. 2002) (admitting per se rule provides exceptional degree of certainty). Specifically, the court admitted that "we recognize the exceptional circumstances rule sacrifices some of the certainty which form on of the most attractive features of the per se rule. *Id.*"

¹⁶⁷ See *supra* notes 30-36 and accompanying text (proving protective orders not substitute for privilege against self-incrimination); see also *supra* note 11 (describing purpose of protective orders).

¹⁶⁸ Cf. Ajit V. Pai, Comment, *Should a Grand Jury Subpoena Override a District Court's Protective Order*, 64 U. CHI. L. REV. 317 (1997) (providing context of protective orders in civil matters). Although it is generally accepted that protective orders are not the equivalent of a Fifth Amendment privilege, "a court may therefore promulgate a protective order to induce him to testify rather than assert his Fifth Amendment privilege." *Id.*

¹⁶⁹ See Pai, *supra* note 162, at 346-7 (indicating consequences of testifying considered by deponents).

¹⁷⁰ See *id.*

¹⁷¹ See *supra* notes 51 and 120 (describing balancing function involved in compelling need rule and modified per se rule).

¹⁷² Compare *supra* note 50 (requiring compelling need to overcome protective order), with *supra* note 120 (requiring exceptional circumstances to overcome grand jury subpoena).

tected testimony.¹⁷³ The deponent has the clear choice between pleading the Fifth Amendment and facing the attendant inferences, or testifying under a potentially limited protective order.¹⁷⁴

Advocates of the modified per se and compelling need rule often criticize the per se approach as too rigid and inflexible.¹⁷⁵ Particularly, the modified per se proponents suggest that in very rare situations "both private parties and the public may be better served by maintenance of the protective order and completion of civil litigation."¹⁷⁶ This suggestion, however, is generally made in the context of enormous civil matters that often have later derivative criminal actions, such as bankruptcy proceedings and mass tort cases.¹⁷⁷ While it may be true that the public has a strong interest in seeing such civil matters resolved as quickly as possible, this interest should not come at the expense of the public's stronger interest in prosecuting criminal acts.¹⁷⁸

Although the per se rule may force a deponent to invoke his Fifth Amendment privilege and handicap various individuals in their roles as creditors, tort victims, or investors of the deponent, this does not justify abridging the public's interest in prosecuting criminal wrongdoing.¹⁷⁹ Moreover, if a deponent invokes his Fifth Amendment privilege in a civil matter, any inferences will be brought to bear and may actually assist in the resolution of the matter.¹⁸⁰

¹⁷³ See *supra* note 79, 97 and 106 and accompanying text (adopting per se rule allowing grand jury subpoenas to prevail).

¹⁷⁴ See *Pai*, *supra* note 162, at 346 (admitting uncertainty in modified per se rule). The uncertainty found in the modified per se rule is inherent in any ad hoc balancing test and is even more prevalent in the compelling need rule whose standards are still relatively vague. See *Williams v. United States*, 995 F.2d 1013 1018 (11th Cir. 1993).

¹⁷⁵ See *supra* notes 122 and accompanying text (describing per se rule as inflexible); see *Pai*, *supra* note 162 at 341 (alleging rigidity one of two major flaws in per se rule).

¹⁷⁶ *Pai*, *supra* note 162; See also *supra* note 123 (asserting per se rule failed to account for "idiosyncratic circumstances").

¹⁷⁷ See *supra* note 169 (criticizing per se rule). Among the two cases adopting the modified per se rule and the law review article cited within, the examples suggested as appropriate for maintenance of a protective order are catastrophic bankruptcy proceedings, mass tort cases and savings and loan insolvencies. *Id.*

¹⁷⁸ Cf. *In re Grand Jury Subpoena*, 138 F.3d 442 (1st Cir. 1998) (asserting grand jury interest will generally prevail). Though the court acknowledged that "society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh" protective orders, it is exactly this interest that is subverted in maintaining even the most exceptional protective orders. *Id.*

¹⁷⁹ See *supra* notes 83-85 and accompanying text (summarizing Fourth Circuit's deference to historical role of grand jury).

¹⁸⁰ See *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (permitting adverse inferences of defendant's silence in civil matters). In addition to the permissible inferences, the Fourth Circuit noted that "where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably face the choice of forsaking silence or losing a civil judgment, even if the defendant's silence is not used against him." *In re Grand Jury Subpoena*, 835 F.2d 1468, 1472 n.4 (4th Cir. 1988).

Consistency is an advantage where there are competing constitutional issues involving basic fundamentals of the judicial system. Despite assertions that the per se rule ignores the purpose of protective orders, it absolutely provides individuals with a definite consequence of giving evidence or testimony under a protective order.¹⁸¹ Consistency and predictability are the practical virtues of the per se rule.¹⁸²

V. CONCLUSION

The courts should adopt the per se approach to review conflicts between civil protective orders and grand jury subpoenas. The historical and judicial imperatives of the grand jury require courts to accommodate its investigative purpose whenever possible. Although civil protective orders help maintain an efficient legal system and often induce reluctant parties to testify, efficiency concerns and deponents' reliance should not prevail at the expense of society's larger interest in successful criminal investigations. Furthermore, courts can further the same interests that justify using protective orders through a variety of discovery tools and procedural motions, thereby obviating the need to quash a grand jury subpoena because of a civil protective order. Most importantly, allowing a grand jury subpoena to prevail does not implicate a deponent's Fifth Amendment concerns because protective orders are not absolute and because an opposite result would constitute an impermissible grant of immunity. Courts should avoid getting involved in the troublesome task of balancing vague and often unformed interests, especially when history and respect for such a venerable institution dictate otherwise.

Brian Baggott

¹⁸¹ See *supra* note 79 (describing per se standard).

¹⁸² See *supra* note 160 (citing certainty as quality of per se rule).