CONSTITUTIONAL LAW—FIFTH AMENDMENT—ACT OF PRODUCTION DOCTRINE DOES NOT APPLY TO CORPORATE CUSTODIANS—*Braswell v. United States*, 108 S. Ct. 2284 (1988).

The fifth amendment to the United States Constitution provides that "[n]o person shall be compelled in any criminal case to be a witness against himself."[1] Over a century ago, the United States Supreme Court interpreted this amendment to prohibit the compelled production of a party's private books and papers to convict him of a crime.[2] That reading of the fifth amendment, however, has been severely restricted by subsequent judicial interpretation.[3] While once viewed as protecting a fundamental

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1 U.S. CONST. amend. V.

2 Boyd v. United States, 116 U.S. 616 (1886). The *Boyd* Court held that members of a partnership may not be compelled to produce documents when the contents of those documents may personally incriminate the individual, because such an exercise would violate an individual's fifth amendment privilege against self-incrimination. *Id.* at 634-35. The *Boyd* Court's analysis focused on a content-based privacy standard. *See id.* at 630. Indeed, Justice Bradley, writing for the majority, linked the fourth and fifth amendments, stating that "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

One commentator has suggested that this privacy rationale underlying *Boyd* was utilized in an attempt to preserve common law property rights. Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951-64 (1977). These common law property rights, along with an individual's privilege against self-incrimination, formed an "impenetrable boundary around the individual's sphere of privacy . . . ." *Id.* at 955. For a more detailed analysis of the *Boyd* decision, see *infra* notes 26-34 and accompanying text.

3 *See* Fisher v. United States, 425 U.S. 391, 407 (1976) ("Several of *Boyd*'s express or implicit declarations have not stood the test of time.").

Two distinct legal propositions, each with its own line of cases, have contributed to the erosion of fifth amendment privilege against self-incrimination subsequent to *Boyd*. The first is that line of cases which utilize the content-based privacy rationale enunciated in *Boyd* to limit an individual's privacy rights in subpoenaed documents belonging to an organization. Known as the collective entity rule, this doctrine stands for the proposition that neither an organization, nor an individual acting on its behalf, may refuse to produce documents on the grounds that their contents may be personally incriminating. *See* Bellis v. United States, 417 U.S. 85, 93 (1974) ("[P]artnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records."); Couch v. United States, 409 U.S. 322 (1973) (taxpayer may not assert fifth amendment privilege to challenge summons directed to her accountant requiring production of taxpayer's books and records which were in the accountant's possession); United States v. White, 322 U.S. 694 (1944) (officer of labor union may not refuse to produce union records on the grounds that they are personally incriminating); Wilson v. United States, 221 U.S. 361 (1911) (corporate representative cannot assert an individual fifth amendment privilege to resist a

property right in the contents of one's private papers,[4] the fifth amendment presently is regarded as a safeguard against the process of compelling their production.[5]

The erosion of the fifth amendment privilege is particularly evident in the corporate context.[6] Indeed, the Court has long maintained that a custodian of records may not resist a subpoena to produce corporate records on the grounds that their contents may be personally incriminating.[7] The Court, however, has preserved a limited personal protection for non-corporate custodians of records when the act of producing certain documents would have testimonial incriminating aspects.[8] Recently, in *Braswell v. United States*,[9] the Court refused to afford corporate representatives even the limited protection still granted other individuals under the fifth amendment by holding the act of production doctrine inapplicable to corporate custodians.[10] Hence,

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subpoena to produce corporate documents which may be personally incriminating); Hale v. Henkel, 201 U.S. 43 (1906) (corporation does not enjoy fifth amendment privileges).

The second line of cases which has contributed to the erosion of fifth amendment principles commenced in 1976 when the Court embarked on a new standard for fifth amendment analysis in document production cases which effectively eradicated all previous content-based scrutiny. *See* Fisher v. United States, 425 U.S. 391 (1976). In *Fisher*, the Court determined that fifth amendment analysis should not focus on whether the contents of the subpoenaed documents are personally incriminating but, whether the compelled production of documents is testimonial and personally incriminating to the individual. *Id.* at 408. Known as the act of production doctrine, or compelled testimony standard, inquiry is based not on whether the documents listed in the subpoena are private, but instead the Court must determine if the acts required of the individual would result in compelled testimonial evidence. *Id.* at 409. *See also* Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 644 (1986) ("In analyzing a fifth amendment claim . . . a court must ask two questions: Did the government compel any incriminating evidence? If so, was the evidence testimonial in nature?").

Subsequently, in United States v. Doe, 465 U.S. 605 (1984), the Court reaffirmed the *Fisher* act of production analysis and extended it to sole proprietorships. *Id.* at 610-12. The Court also reaffirmed the *Fisher* analysis which held that private papers are not protected by the fifth amendment unless they involve compelled testimony. *Id.* Because the papers in *Doe* were voluntarily prepared, the Court ruled that they were not protected by the fifth amendment. *See id.* at 611-12.

[4] *See* Boyd v. United States, 116 U.S. 616 (1886).

[5] *See, e.g.*, United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976).

[6] *See* Wilson v. United States, 221 U.S. 361 (1911) (custodian may not assert his individual fifth amendment privilege to refuse to produce documents which may be personally incriminating); *see also* Hale v. Henkel, 201 U.S. 43 (1906) (corporations do not enjoy fifth amendment protections).

[7] *See infra* notes 34-45 and accompanying text.

[8] *See Doe*, 465 U.S. at 612-14; *Fisher*, 425 U.S. at 408-11.

[9] 108 S. Ct. 2284 (1988).

[10] *Id.* at 2292.

an individual may be compelled, in his role as custodian, to produce corporate documents even where the act of production might incriminate that individual personally.[11]

Randy Braswell was in the business of purchasing and selling equipment, land and timber, as well as oil and gas leases.[12] In 1980, Braswell restructured his business from a sole proprietorship to a Mississippi closed corporation, entitled Worldwide Machinery Sales, Inc.[13] One year later, Braswell established a second Mississippi corporation, Worldwide Purchasing, Inc., which he financed with the 100% interest he held in Worldwide Machinery Sales, Inc.[14] Braswell was the sole shareholder in each corporation.[15]

A federal grand jury sitting in the Southern District of Mississippi issued a subpoena compelling Braswell to produce the books and records of the two corporations.[16] The subpoena did not require Braswell to testify, but instead directed him to deliver the documents to the serving agent.[17] Braswell moved to quash the subpoena on fifth amendment grounds, claiming that the mere act of producing the documents would have incriminating testimonial aspects.[18]

The United States District Court for the Southern District of Mississippi denied the motion to quash.[19] In an unpublished opinion, the district court held Braswell in contempt for refusing to comply with the subpoena, concluding that the records of any corporation, regardless of its size, are not entitled to fifth amend-

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11 *See id.*

12 *Id.* at 2286.

13 *Id.*

14 *Id.*

15 *Id.* Both corporations kept regular books and records as required by law. *Id.* In addition, each filed separate tax returns. *Id.* Pursuant to Mississippi law, each corporation had three directors: Braswell, his wife, and his mother. *Id.* Braswell, however, maintained sole control and authority over each corporation's business affairs. *Id.*

16 *Id.* The subpoena required the following documents to be produced:

> receipts and disbursement journals; general ledger and subsidiaries; accounts receivable/accounts payable ledgers, cards, and all customer data; bank records of savings and checking accounts, including statements, checks, and deposit tickets; contracts, invoices—sales and purchase—conveyances, and correspondence; minutes and stock books and ledgers; loan disclosure statements and agreements; liability ledgers; and retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941.

Id. at 2286 n.1.

17 *Id.* at 2286.

18 *Id.*

19 *Id.*

ment protection.[20] Accordingly, the court determined that Braswell, as the custodian of the two corporations, was not entitled to invoke the privilege.[21] The United States Court of Appeals for the Fifth Circuit affirmed, holding that an individual does not enjoy fifth amendment protection from producing documents belonging to a collective entity.[22]

Recognizing a need to resolve a split in the circuits,[23] the Supreme Court granted certiorari in 1987.[24] The majority determined that corporate records are not privileged and that agents possessing such documents hold them in a representative rather than personal capacity.[25] Thus, the Court declared that corporate representatives, such as Braswell, may not resist a subpoena to produce records regardless of whether the act of production may personally incriminate them.[26]

To appreciate the significance of *Braswell*, it is necessary to trace the evolution of the Supreme Court's interpretation of the fifth amendment in document production cases. The Court first applied the fifth amendment to a court order requiring the production of documents in *Boyd v. United States*.[27] The *Boyd* Court determined that the fifth amendment proscribes the compulsory

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20 *In re* Grand Jury Subpoena (Braswell), No. 86-198 slip op. at 1 (S.D. Miss. Nov. 12, 1986), *aff'd sub nom. In re* Grand Jury Proceedings (Doe), 814 F.2d 190 (5th Cir. 1987) (per curiam), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988).

21 *Braswell*, 108 S. Ct. at 2286.

22 *In re* Grand Jury Proceedings (Doe), 814 F.2d 190, 192 (5th Cir. 1987) (citing Bellis v. United States, 417 U.S. 85, 88 (1974); Grant v. United States, 227 U.S. 74, 80 (1913)), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988).

23 The Sixth, Eighth, Ninth and Tenth Circuits have not recognized a fifth amendment privilege based on the act of production analysis in corporate settings. *See, e.g., In re* Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), *cert. denied*, 474 U.S. 1033 (1985); *In re* Grand Jury Subpoena (85-W-71-5), 784 F.2d 857 (8th Cir.), *cert. granted sub nom.* See v. United States, 479 U.S. 811 (1986), *cert. dism'd*, 479 U.S. 1048 (1987); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); *In re* Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984). However, the Second, Third, Fourth, Eleventh and D.C. Circuits have granted a fifth amendment privilege against self-incrimination to custodians of corporate records when the act of production will personally incriminate them. *See, e.g.*, United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67 (2d Cir. 1986); *In re* Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985); United States v. Lang, 792 F.2d 1235 (4th Cir.), *cert. denied*, 479 U.S. 985 (1986); *In re* Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987); *In re* Sealed Case, 832 F.2d 1268 (D.C. Cir. 1987).

24 Braswell v. United States, 108 S. Ct. 64 (1987).

25 *Braswell*, 108 S. Ct. at 2287, 2291.

26 *Id.* at 2292 (quoting Fisher v. United States, 425 U.S. 391, 411-12 (1976)).

27 116 U.S. 616 (1886).

production of an individual's private papers.[28]

In *Boyd*, the United States brought an action for forfeiture against a partnership for its failure to pay customs duties allegedly owed on a shipment of thirty-five cases of imported glass.[29] The United States District Court for the Southern District of New York ordered the petitioners to produce an invoice for a previous shipment.[30] The petitioners complied, preserving their constitutional claim for appeal.[31] The circuit court upheld the subpoena, but the Supreme Court reversed the decisions of the lower courts, holding that the directive of the trial court violated the fourth and fifth amendments.[32] Focusing on the contents of the papers at issue, the Court found that they were within a zone of privacy surrounding the individual into which the government could not penetrate.[33] Significantly, the Court made that deter-

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28 *Id.* at 634-35.

29 *Id.* at 617-18.

30 *Id.* at 618.

31 *See id.*

32 *Id.* at 634-35. The Court posited that an intimate relation existed between the two amendments. Specifically, the Court reasoned that:

> [T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Id. at 633.

33 *Id.* at 630. Justice Bradley, writing for the majority, derived that zone of privacy from the fourth and fifth amendments. *Id.* at 621-30. The Court stated that an individual's common law property rights as well as the protections of the fourth amendment, placed Boyd's papers beyond the reach of government seizure. *Id.* at 630. Justice Bradley found support for his fourth amendment holding by quoting at length from Lord Camden's opinion in Entick v. Carrington, 19 How. St. Tr. 1029 (1765), an English case concerning governmental seizure of private papers. *Boyd*, 116 U.S. at 626-29 (citing Entick v. Carrington, 19 How. St. Tr. 1029 (1765)). In *Entick*, Lord Camden ruled, on common law property grounds, that a person's private papers were protected against unreasonable searches and seizures. *Entick*, 19 How. St. Tr. at 1067. Similarly, Justice Bradley stated that an individual was protected by the fifth amendment from the government's use of an individual's private papers to incriminate him, regardless of whether a fourth amendment violation existed. *Boyd*, 116 U.S. at 633. Justice Bradley summarized his analysis by eloquently stating:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of

mination without reference to the business form of the parties asserting the privilege.[34]

Twenty years later, in *Hale v. Henkel*,[35] the Court limited the scope of *Boyd* by holding that a corporation could not assert a fifth amendment privilege to resist a subpoena to produce corporate documents.[36] After discussing the differences between corporations and individuals, the Court stated that the fifth amendment is exclusively a personal privilege unavailable to a corporation.[37] The Court reasoned that the corporate entity, as a

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some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

One commentator has noted that this passage has caused some minor confusion and varied interpretations. *See* Note, *supra* note 2, at 955-56. The author maintained that Justice Bradley's statement did not mean that both amendments were needed collectively to achieve the desired result. *Id.* at 955. Rather, these two amendments overlap and independently protect a person's private books and papers from government seizures. *Id.* at 955-56.

34 *See Boyd*, 116 U.S. at 630.

35 201 U.S. 43 (1906).

36 *Id.* at 70.

37 *Id.* at 69-70. The Court stated:

> [W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional right as a citizen. He is entitled to carry on his private business in his own way. . . . He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to incriminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law.
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> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sover-

creature of the state, was not entitled to the individual protections of the fifth amendment.[38]

Five years after *Hale*, in *Wilson v. United States*,[39] the Court held that a corporate representative could not assert an individual privilege against self-incrimination to resist a subpoena for corporate documents which may be personally incriminating.[40] Writing for the majority, Justice Hughes advanced two reasons in support of that holding.[41] First, the Court recognized that a corporation can act only through its agents.[42] Thus, permitting a corporate representative to resist a corporate subpoena by asserting an individual fifth amendment privilege would effectively shield all corporate records from public inspection.[43] Secondly, the Court stated that the officers had no reasonable expectation of privacy with respect to the contents of the corporate documents.[44] Specifically, the Court noted that a corporate officer holds corporate records pursuant to a duty which he has voluntarily accepted.[45] The Court therefore concluded that the state's

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> eignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

Id. at 74-75.

38 *Id.* The Court reasoned that "[w]hile an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Id.* at 75.

39 221 U.S. 361 (1911).

40 *Id.* at 385. In *Wilson*, a federal grand jury issued indictments against shareholders, directors and officers of United Wireless Telegraph Company, charging them with mail fraud and conspiracy. *Id.* at 367. A subpoena duces tecum was served on the company and Christopher C. Wilson, its president, requiring the production of business letters and telegrams pertinent to the investigation. *Id.* at 367-68. Mr. Wilson refused to produce the documents, claiming that they contained incriminating information necessary in the defense of his case. *Id.* at 369.

41 *See id.* at 376-86.

42 *Id.* at 376-77 (citing Commissioners v. Sellew, 99 U.S. 624, 627 (1878)).

43 *Id.* at 384-85. The Court held that "[t]he reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation." *Id.*

44 *See id.* at 380-82.

45 *Id.* at 381, 384-85. In accepting that corporate position, the Court stated that the officer is deemed to have waived his or her fifth amendment privilege with respect to the contents of the records of the corporation. *Id.* at 381-82. The Court reasoned:

> The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to [in]criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

power to inspect corporate books overrides the custodian's individual privacy interest enunciated in *Boyd*.[46]

In 1944, the Court in *United States v. White*,[47] synthesized the holdings of *Hale* and *Wilson* and extended them to unincorporated associations.[48] In *White*, the United States District Court for the Middle District of Pennsylvania issued a subpoena to an unincorporated labor union requiring it to produce certain business records.[49] In enforcing the subpoena, the Court held that an officer of a labor union could not refuse to produce union documents even if the records incriminated him personally.[50] In so holding, the majority refused to afford fifth amendment protection to the union representative on privacy grounds.[51]

The Court, drawing on *Hale* and *Wilson*, focused on the nature of the entity whose representatives were asserting the privilege.[52] The Court established a test for determining the scope of

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Id.

46 *Id.* at 385. *See also* Dreier v. United States, 221 U.S. 394 (1911) (companion case to *Wilson* which held that corporate records must be produced even when subpoena was directed at the corporation's secretary).

47 322 U.S. 694 (1944).

48 *Id.* at 700-01.

49 *Id.* at 695. In *White*, a federal grand jury was conducting an investigation of the Mechanicsburg Naval Supply Depot and issued a subpoena duces tecum to the local union of operating engineers. *Id.* The subpoena demanded that the union produce copies of its constitution, by-laws and documentation of the work-permit fees. *Id.*

50 *Id.* at 699. Justice Murphy stated:

> Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.

Id. (citations omitted).

51 *Id.* at 698-700. The Court reasoned that the requested records were open to inspection and thus, the documents were not private to the union representative. *Id.* at 699. Accordingly, the Court concluded that the documents "embod[ied] no element of personal privacy," and the representatives could not object to their compelled production. *Id.* at 700.

52 *See id.* at 699-701 (citing Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906)). The Court maintained that individuals, and not organizations, were protected by the fifth amendment privilege against self-incrimination. The Court reasoned that:

the privilege enjoyed by an entity's representatives.[53] That test is whether an "organization has a character so impersonal . . . that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."[54] The Court concluded that "[l]abor unions—national or local, incorporated or unincorporated—clearly meet that test."[55]

Curcio v. United States[56] signalled an important shift in the Court's perception of the fifth amendment in document production cases. In *Curcio*, a union official received two separate subpoenas requiring him to produce and testify regarding certain union documents.[57] Curcio refused to produce the subpoenaed documents or testify as to their whereabouts.[58] A unanimous Court held that a representative of an entity can assert his individual fifth amendment privilege in refusing to respond to questions which may incriminate him personally.[59] Recognizing that the questions propounded on Curcio sought information unrelated to the contents of the corporate documents,[60] the Court

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> The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

Id. at 700-01.

53 *Id.* at 701.

54 *Id.*

55 *Id.* The Court cited numerous reasons supporting its position that labor unions should not be afforded fifth amendment protections. *Id.* at 701-02. For instance, the Court noted that labor unions have their own constitutions, rules and by-laws which control their existence and operation. *Id.* at 701. Additionally, the Court stated that unions often own separate real and personal property. *Id.* at 702. Indeed, the Court concluded that labor unions, much like corporations, are distinct legal entities from their constituents, recognized as such under the law, and thus cannot be afforded fifth amendment protection. *Id.* at 703-04.

56 354 U.S. 118 (1957).

57 *Id.* at 119.

58 *Id.*

59 *Id.* at 128.

60 *Id.* at 125. The following questions were asked of Curcio at the grand jury proceeding concerning his knowledge of his union's books and records:

concluded that he may not be compelled to condemn himself by his own testimony.[61]

By focusing upon the testimony sought from the custodian rather than the contents of the subpoenaed documents, the *Curcio* Court recognized that the fifth amendment may protect an individual acting in a representative capacity.[62] Unlike the prior collective entity decisions which established that the contents of corporate records cannot give rise to a personal privilege against self-incrimination, the *Curcio* Court posited that such a privilege may arise when a custodian is compelled to testify and produce the documents.[63] In so ruling, *Curcio* implicitly suggested a fundamental change in the Court's fifth amendment analysis, from the privacy concerns first enunciated in *Boyd* to the testimonial compulsion element attendant to the act of production, which was to occur 20 years later.[64]

[H]ave you at any time been in custody of [the union's] books and records?

Mr. Curcio, have you ever had possession of the books and records of this local?

Did you have custody and control of these records last Thursday?

Do you have possession of those records or any of them today?

Do you have custody and control of any of those records today?

Where are any of those records today, if you know?

Who has any of those records today, if you know?

Where were any of these records or all of these records a week ago Thursday?

Where were any of these records a week ago Saturday?

Where were any or all of these records a week ago last Monday?

Where were any or all of these records yesterday?

Where are any or all of these records today?

Who, if you know, had any or all of these records a week ago last Saturday?

Who had any or all of these records a week ago yesterday?

Who has any or all of these records today?

Id. at 120 n.1.

[61] *Id.* at 124. In conclusion, the Court stated that "forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Id.* at 128.

[62] *See id.* at 124-28.

[63] *Id.* at 125.

[64] *See id.* The Court foreshadowed *Fisher*'s act of production analysis by stating that "[t]he custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena." *Id. See also* Couch v. United States, 409 U.S. 322, 348 (1973) (Marshall, J., dissenting) ("What is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order.").

In *Fisher v. United States*,[65] the Supreme Court again addressed the act of production issue initially recognized in *Curcio*. The *Fisher* Court consolidated two factually similar cases[66] and declared that the mere act of producing requested documents may, in certain circumstances, violate an individual's fifth amendment privilege against self-incrimination.[67] The two cases arose from Internal Revenue Service (IRS) investigations of certain individuals.[68] The IRS served subpoenas on the taxpayers' attorneys requiring them to produce their clients' records which the attorneys held pursuant to their fiduciary capacities.[69] The attorneys refused to comply with the subpoenas, asserting on behalf of the taxpayers that the fourth and fifth amendment protections as well as attorney-client privilege prohibited the documents' compelled production.[70]

Justice White, writing for the majority, held that the taxpayers[71] could not invoke a fifth amendment privilege in the subpoenaed documents.[72] Eschewing the privacy-based collective entity rule espoused in *Hale*, *Wilson* and *White*, the *Fisher* Court focused instead on the testimonial compulsion concerns first enunciated in *Curcio*.[73] The Court formulated radically new guidelines for deciding document production cases.[74] In particular, the Court, in a literal interpretation of the fifth amendment, maintained that

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65 425 U.S. 391 (1976).

66 United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), *aff'd*, 425 U.S. 391 (1976); United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), *rev'd sub nom.* Fisher v. United States, 425 U.S. 391 (1976).

67 *Fisher*, 425 U.S. at 410.

68 *Id.* at 394-95.

69 *Id.*

70 *Id.* at 395.

71 *Id.* at 396-97. Although the subpoenas were directed to the attorneys, the taxpayers' fourth and fifth amendment protections were asserted. *Id.* at 396. If the fifth amendment would have protected the taxpayer from producing the subpoenaed documents, the Court noted that these same privileges would have accrued to the taxpayers' attorneys. *Id.* The Court, however, was convinced that the taxpayers' privileges would not excuse the attorneys' compliance with the subpoena. *Id.*

72 *Id.* at 396-97.

73 *Id.* at 396. Justice White noted:

> It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. . . . But the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Id. at 399 (footnote omitted).

74 *Id.* at 397-411.

three elements comprise the privilege: compulsion,[75] self-incrimination,[76] and testimony.[77] Justice White first analyzed whether the information contained in the documents constituted compelled testimony which would incriminate the taxpayer.[78] The Court explained that because the papers contained the testimony of the accountants and not of the taxpayer, the testimonial element necessary for a fifth amendment violation did not exist.[79] The majority thus stated that because the papers were voluntarily prepared, the compulsion element necessary for a fifth amendment violation was also absent.[80]

More importantly, the Court announced that, in some cases, the mere act of producing requested documents could constitute a privileged testimonial act.[81] The Court reasoned that the production of documents could establish the subpoenaed party's knowledge of the existence, possession and authenticity of the papers.[82] Applying those principles to the facts in *Fisher*, the Court determined that the existence and possession of the papers at issue were "foregone conclusion[s]."[83] Additionally, the

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75 *See id.* at 397.

76 *See id.* at 398.

77 *See id.* at 408. As Justice White wrote:

> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self-incrimination, not [the disclosure of] private information."
>
> Insofar as private information not obtained through compelled self-incrimination testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against seizures without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described'. . . ."

Id. at 401 (citations omitted) (footnotes omitted).

78 *See id.* at 408-09.

79 *Id.* at 409. The Court noted that the workpapers were prepared by the accountant and did not contain testimonial declarations of the taxpayer. *Id.*

80 *Id.* at 409-10.

81 *See id.* at 410. Justice White proclaimed:

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

Id.

82 *Id.* at 410-12.

83 *Id.* at 411.

Court noted that production of the documents would not authenticate the documents because the taxpayers' accountants had actually authored them.[84] Accordingly, the Court concluded that the compelled production of the documents did not transgress the fifth amendment because they did not involve testimonial assertions.[85]

In 1984, the Supreme Court first applied the *Fisher* act of production analysis to a sole proprietorship in *United States v. Doe*.[86] *Doe* involved a grand jury investigation of the respondent who owned several sole proprietorships.[87] The grand jury issued five subpoenas to the respondent compelling him to produce all financial and business records pertaining to him and his companies.[88] The United States District Court for the District of New Jersey granted respondent's motion to quash, holding that the act of producing the documents had communicative aspects which may incriminate him,[89] and the Court of Appeals for the Third Circuit affirmed.[90]

Justice Powell, writing for the majority, conducted a two-part

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84 *See id.* at 413.

85 *Id.*

86 465 U.S. 605 (1984).

87 *Id.* at 606.

88 *Id.* at 606-07. The records sought in the third subpoena were objected to by the respondents, and thus, became the basis of the suit. Those records requested were:

> (1) general ledgers; (2) general journals; (3) cash disbursement journals; (4) petty cash books and vouchers; (5) purchase journals; (6) vouchers; (7) paid bills; (8) invoices; (9) cash receipts journal; (10) billings; (11) bank statements; (12) canceled checks and check stubs; (13) payroll records; (14) contracts and copies of contracts, including all retainer agreements; (15) financial statements; (16) bank deposit tickets; (17) retained copies of partnership income tax returns; (18) retained copies of payroll tax returns; (19) accounts payable ledger; (20) accounts receivable ledger; (21) telephone company statement of calls and telegrams, and all telephone toll slips; (22) records of all escrow, trust, or fiduciary accounts maintained on behalf of clients; (23) safe deposit box records; (24) records of all purchases and sales of all stocks and bonds; (25) names and home addresses of all partners, associates, and employees; (26) W-2 forms of each partner, associate, and employees; (27) workpapers; and (28) copies of tax returns.

Id. at 607 n.1.

89 *Id.* at 607-08. The district court required the respondent to produce only those documents which were required by law to be kept or disclosed to a public agency. *See In re* Grand Jury Empaneled March 19, 1980, 541 F. Supp. 1, 3 (D.N.J. 1981), *aff'd*, 680 F.2d 327 (3d Cir. 1982), *aff'd in part, rev'd in part sub nom.* United States v. Doe, 465 U.S. 605 (1984).

90 *In re* Grand Jury Empaneled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), *aff'd in part, rev'd in part sub nom.* United States v. Doe, 465 U.S. 605 (1984).

analysis to determine whether a fifth amendment violation existed.[91] The Court began by reversing the court of appeals' ruling that the contents of a sole proprietor's business records were absolutely protected.[92] After stating that the fifth amendment protects individuals from compelled self-incrimination,[93] and that the documents at issue were voluntarily prepared,[94] the Court concluded that the compulsion element was absent and the contents of the documents were not privileged.[95]

The Court next applied the *Fisher* act of production analysis.[96] The Court deferred to the trial court's finding that the act of producing the requested documents had testimonial aspects incriminating to the respondent.[97] The majority noted that, unlike *Fisher*, the government failed to demonstrate that the existence, possession and authenticity of the papers were "foregone conclusion[s]."[98] The Court concluded that the respondent could not, absent the granting of use immunity pursuant to the federal statute,[99] be compelled to produce those documents.[100]

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91 *Doe*, 465 U.S. at 610-14.

92 *See id.* at 611. In support of that proposition, Justice Powell wrote:

> Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Id. at 611-12 (footnote omitted).

93 *Id.* at 610.

94 *Id.*

95 *Id.* at 610-11.

96 *Id.* at 612-14.

97 *Id.* at 613. The Court explained:

> The District Court's finding essentially rests on its determination of factual issues. Therefore, we will not overturn that finding unless it has no support in their record. Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. We therefore decline to overturn the finding of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals.

Id. at 613-14 (citations omitted) (footnote omitted).

98 *Id.* at 614 n.13 (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)).

99 *Id.* at 615. The Court noted that use immunity could be granted pursuant to two federal statutes. *Id.* Specifically, the Court stated that 18 U.S.C. § 6002 (1982) provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presid-

In light of the fundamental shift in fifth amendment focus from privacy concerns to the testimonial compulsion element inherent in the act of production, the United States Supreme Court in *Braswell v. United States*[101] addressed the act of production analysis as it relates to a corporate custodian. The Court framed the issue to be "whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment."[102] Although the collective entity rule precisely established that the fifth amendment does not extend to either arti-

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ing over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Doe, 465 U.S. at 615 n.14 (quoting 18 U.S.C. § 6002 (1982)). Additionally, the Court noted that 18 U.S.C. § 6003 (1982) provides:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Doe, 465 U.S. at 615 n.14 (quoting 18 U.S.C. § 6003 (1982)). *See also* Kastigar v. United States, 406 U.S. 441 (1972) (upholding the constitutionality of statutory use immunity).

100 *See Doe*, 465 U.S. at 616. For a detailed discussion of the *Doe* decision, see Case Comment, United States v. Doe *and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records*, 40 U. MIAMI L. REV. 793 (1986) (authored by Glenn Gerena & Adalberto Jordan); Note, *The Fifth Amendment and Production of Documents After* United States v. Doe, 66 B.U.L. REV. 95 (1986) (authored by Barbara Daniels Davis).

101 108 S. Ct. 2284 (1988).

102 *See id.* at 2286.

ficial entities or the contents of business records,[103] the Court had not, prior to *Braswell*, applied the *Fisher/Doe* act of production analysis to a corporate custodian.[104]

Writing for the five-person majority, Chief Justice Rehnquist initially pointed out that Braswell was a corporate custodian, who, unlike the sole proprietor in *Doe*, could not assert a fifth amendment privilege.[105] The Court explained that its fifth amendment doctrine centered on a sharp distinction between individuals who may assert such a privilege and corporations or other artificial entities, which may not.[106] After thoroughly examining the evolution of the collective entity doctrine in document production cases, the Court refused to extend its act of production analysis to corporate custodians.[107] Because a corporate custodian possesses corporate records solely in a representative capacity, the Court reasoned that the act of producing such records is an act of the corporation, to which fifth amendment protections do not extend.[108] Consequently, the Court concluded that a custodian cannot refuse to produce subpoenaed corporate documents even if the act of production may have testimonial aspects which may incriminate him personally.[109]

The Court found support for that conclusion in collective entity cases decided prior to *Fisher*.[110] Although recognizing that those cases did not involve an act of production analysis,[111] the Court determined that "[t]he agency rationale undergirding the

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103 *See id.* at 2287.

104 *Id.* Despite this lack of precedent, the Court noted that the petitioner asserted, "that his act of producing the documents has independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits government compulsion of that act." *Id.*

105 *See id.* at 2290.

106 *Id.*

107 *Id.* at 2292. In support of its position, the majority cited to Justice Brennan's concurring opinion in Fisher v. United States, 425 U.S. 391 (1976). *Braswell*, 108 S. Ct. at 2292 (citing Fisher v. United States, 425 U.S. 391, 429 (1976) (Brennan, J., concurring)). In *Fisher*, Justice Brennan declined to join the majority's utilization of the collective entity cases to support the position that an "act of production is not testimonial." *Id.* (quoting Fisher v. United States, 425 U.S. 391, 429-30 (1976) (Brennan, J., concurring)). He did concede, however, that a corporate custodian is compelled to respond to a subpoena regardless of the fact that the act of production may be incriminating. *Id.* (citing Fisher v. United States, 425 U.S. 391, 429-30 (1976) (Brennan, J., concurring)).

108 *Id.* (citing Fisher v. United States, 425 U.S. 391 (1976)).

109 *Id.*

110 *Id. See, e.g.*, Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Dreier v. United States, 221 U.S. 394 (1911); Wilson v. United States, 221 U.S. 361 (1911).

111 *Braswell*, 108 S. Ct. at 2290.

collective entity decisions, in which custodians asserted that production of entity records would incriminate them personally, survives."[112]

The majority next rejected Braswell's argument that *Fisher* required application of the act of production doctrine to a corporate custodian.[113] Faced with the task of balancing the act of production privilege afforded individuals with the collective entity rule, the Court found the latter controlling.[114] The Court deemed a corporate custodian to have waived his individual privilege against self-incrimination[115] and stated that production of corporate records is not testimonial because such records are the property of the entity and must be relinquished by the custodian pursuant to his representative capacity.[116]

The Court then addressed the argument petitioner had extrapolated from *Curcio* and *Fisher*.[117] Because *Curcio* precluded the compulsion of testimony by a corporate custodian to the whereabouts of the entity's records,[118] and *Fisher* adjudged the act of production potentially testimonial,[119] the petitioner claimed that the compelled production of corporate documents invoked fifth amendment protections.[120] In rejecting petitioner's argument, the majority stressed that *Curcio* prohibited the compulsion of *oral* testimony[121] and thus did not extend to Braswell, who was not required to testify.[122]

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112 *Id.* at 2291.

113 *Id.* at 2290-91.

114 *Id.* at 2291. The *Braswell* Court stated:

> [B]y virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to [in]criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.

Id. at 2291 (quoting Wilson v. United States, 221 U.S. 361, 382 (1911)).

115 *See id.* Relying on *White*, the Court declared, "documents of the organization that are held by [custodians] in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Braswell*, 108 S. Ct. at 2291 (quoting United States v. White, 322 U.S. 694, 699 (1944)) (footnote omitted).

116 *Id.*

117 *Id.* at 2292-93.

118 *Id.* at 2293 (citing Curcio v. United States, 354 U.S. 118 (1957)).

119 *See* Fisher v. United States, 391 U.S. 408, 410 (1974). *See also* text accompanying *supra* notes 71-85.

120 *Braswell*, 108 S. Ct. at 2293.

121 *Id.* (emphasis added). *See* Curcio v. United States, 354 U.S. 118, 123-24 (1957).

122 *Braswell*, 108 S. Ct. at 2293-94.

Chief Justice Rehnquist cited public policy reasons to support the Court's holding.[123] Emphasizing a need to prosecute white-collar crime,[124] the Chief Justice warned that a contrary holding would improperly impede law enforcement attempts to obtain corporate records.[125] He reasoned that because a corporation always acts through its agents, allowing a representative to assert a personal privilege would preclude government access to corporate documents.[126]

The Court rejected the suggested alternative of allowing the corporation to designate a representative to produce documents where the primary custodian faces potential incrimination.[127] The Court characterized this alternative as unrealistic.[128] Because the primary custodian arguably is the only person privy to the location of documents, the Court then concluded that appointing an alternate custodian would be futile.[129]

The majority also rejected the alternative of granting statutory immunity to custodians who may be personally incriminated by the act of production.[130] The Court stressed the significant ramifications that would arise from such a procedure.[131] Specifically, the Court noted both prohibition against use of the immunized testimony against the custodian and the government's burden of proving that other evidence was derived from independent sources.[132] The Court then determined that granting immunity to corporate custodians would hamper the prosecution of white-collar crime.[133]

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123 *Id.* at 2294.

124 *Id.* at 2294 n.9. The majority considered white-collar crime "the most serious and all-pervasive crime problem in America today." *Id.* (citing Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

125 *Id.* at 2294.

126 *Id.* Justice Rehnquist quoted *White*, which stated, "[w]ere the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." *Braswell*, 108 S. Ct. at 2294 (quoting United States v. White, 322 U.S. 694, 700 (1944)).

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 2294-95.

133 *Id.* at 2295. The majority dismissed the dissent's contention that validation of an act of production privilege by corporate custodians would not undermine law enforcement efforts focused upon those custodians because only the custodians' act of production requires immunization. Chief Justice Rehnquist, however, posited that the "burden of proving an independent source that a grant of immunity places

The majority concluded by describing certain circumstances where evidence of the custodian's act of production may not be used against him personally.[134] While noting that the production of documents is a corporate act not imputable to its custodian,[135] the Court recognized that a jury may infer that a custodian in a prominent corporate position had incriminating knowledge of the existence and contents of the documents.[136] The Court, however, expressly declined to address the situation in which the evidence leaves a jury no other alternative but to conclude that the custodian produced the records.[137]

In a vigorous dissent, Justice Kennedy, joined by Justices Brennan, Marshall, and Scalia denounced the majority's holding that the collective entity rule automatically precludes fifth amendment protection of a custodian's act of production.[138] Although agreeing with the majority that the fifth amendment does not protect the contents of business records, the dissent contended that *Fisher* protects an individual regardless of his employment status.[139] The dissent argued that *Doe*, which extended fifth amendment protection to a sole proprietor's production of documents,[140] mandated its extension to a corporate custodian such as Braswell.[141] Justice Kennedy explained that *Doe* "did not depend on who owned the papers, how they were created, or what they said; instead, we rested on the fact that 'the act of producing the documents would involve testimonial self-incrimination.' "[142]

In so arguing, the dissent did not dispute the vitality of the collective entity rule but rather challenged its application in light of *Fisher* and *Doe*.[143] Emphasizing that all prior collective entity decisions concerned the contents of the corporate records, rather than the constitutional ramifications of the act of their produc-

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on the Government could . . . have just such a deleterious effect on law enforcement efforts." *Id.* at 2295 n.10.

134 *Id.* at 2295.

135 *Id.*

136 *Id.*

137 *See id.* at 2295 n.11.

138 *Id.* at 2296 (Kennedy, J., dissenting).

139 *See id.* Justice Kennedy focused on Braswell's contention that the fifth amendment protected him from forced production of records where "the act of production" will incriminate him. *Id.*

140 United States v. Doe, 465 U.S. 605, 613 (1984).

141 *Braswell*, 108 S. Ct. at 2297 (Kennedy, J., dissenting) (citing United States v. Doe, 465 U.S. 605, 613 (1984)).

142 *Id.* (quoting United States v. Doe, 465 U.S. 605, 613 (1984)).

143 *See id.*

tion,[144] the dissent asserted that production is inescapably an individual act.[145] In Justice Kennedy's view, the representative capacity of the individual is irrelevant to the existence of a fifth amendment privilege.[146] Noting both the subpoena's requirement that Braswell personally identify and deliver records and the government's concession that Braswell's act of production involved testimonial assertions, Justice Kennedy asserted that such production clearly represented an act personal to Braswell and not to the corporation.[147]

Justice Kennedy rejected the majority's interpretation of *Curcio*,[148] objecting to its perceived distinction between oral testimony and testimony in other forms.[149] Rather, Justice Kennedy contended that the *Curcio* holding embraces all testimony, through words or actions, which compels an individual to "disclose the contents of his own mind."[150] He therefore concluded that the disclosure of Braswell's personal knowledge concerning the possession and location of the documents rendered his production testimonial.[151] Braswell's act of production thus was tantamount to the oral testimonial act granted fifth amendment protection in *Curcio*.[152]

The dissent also disputed the majority's decision to render evidence concerning the act of production inadmissible in a subsequent prosecution of the custodian.[153] In granting such protection, the dissent contended that the majority implicitly acknowledged that the fifth amendment privilege protects the custodian individually.[154] Such an acknowledgement undercuts "the necessary support for the majority's case."[155]

Justice Kennedy further criticized the majority's public pol-

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144 *Id.* at 2298 (Kennedy, J., dissenting). *See* Wilson v. United States, 221 U.S. 361 (1911). In *Wilson*, the Court rejected a custodian's claim of privilege based upon his assertion that the contents of the corporate documents would incriminate him. *Id.* at 363. The Court held that a state's visitorial power over a corporation includes the ability to inspect corporate records. *Id.* at 385.

145 *Braswell*, 108 S. Ct. at 2298 (Kennedy, J., dissenting).

146 *Id.*

147 *Id.*

148 *Id. See* Curcio v. United States, 354 U.S. 118 (1957).

149 *See Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).

150 *Id.* (citation omitted). *See supra* note 61.

151 *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).

152 *Id.*

153 *Id.* at 2299-2300 (Kennedy, J., dissenting).

154 *Id.* at 2300 (Kennedy, J., dissenting).

155 *Id.*

icy analysis.[156] Reasoning that the scope of the fifth amendment cannot be lessened by a desire to facilitate prosecutions,[157] Justice Kennedy argued that the privilege against self-incrimination attaches universally and cannot be limited to situations in which it will not impede a governmental investigation.[158]

Finally, the dissent suggested that the granting of use immunity[159] would not impede governmental investigations because such grants of immunity would not deny governmental access to subpoenaed documents but would merely protect the individual producing them.[160] In rejecting the majority's contention that the acceptance of a corporate custodial position necessitates a waiver of fifth amendment privileges,[161] Justice Kennedy concluded that the mere assumption of an employment position cannot waive individual constitutional guarantees.[162]

The Supreme Court long ago recognized, in *Boyd*, that the fifth amendment bars the compelled production of one's private papers.[163] In analyzing that privacy-based, inherently personal privilege in subsequent cases, the Court refused to extend its protections to collective entities such as corporations.[164] Moreover, the Court declined to allow individual representatives of such entities to assert a personal privilege based on the incriminating contents of entity-owned documents.[165] Those collective entity decisions were faithful to the fundamental principle enunciated in *Boyd*: that privacy concerns predominate the fifth amendment.

Almost a century after *Boyd*, the Court in *Fisher* abruptly refocused its fifth amendment analysis, abandoning its privacy-based rationale in favor of determining whether the act of pro-

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156 *See id.* at 2301 (Kennedy, J., dissenting).

157 *Id.*

158 *Id.*

159 *See supra* note 99 and accompanying text (discussing federal use immunity statutes).

160 *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting). Justice Kennedy contended that only the individual invoking fifth amendment privileges would be protected. *Id.* Thus, the government would still be able to acquire the records and use the contents of the records against anyone. *Id.*

161 *Id.*

162 *Id.*

163 For a discussion of the *Boyd* decision, see text accompanying *supra* notes 26-33.

164 *See, e.g.*, United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

165 *See id.*

duction involves testimonial compulsion.[166] Absent such testimonial compulsion, *Fisher* and *Doe* mandate that no fifth amendment protections can arise, regardless of the personally incriminating nature of the contents of the documents.[167]

Braswell required the Court to apply its act of production doctrine to a collective entity scenario. The precise issue facing the Court was whether a custodian, despite having no personal privilege arising from the contents of the subpoenaed documents, could nevertheless invoke the fifth amendment if the act of producing those documents might incriminate him personally.[168] Purporting to find the collective entity doctrine controlling, the five-person majority answered the issue in the negative.[169]

While certainly foreseeable given *Fisher*'s radical departure from the Court's previous fifth amendment jurisprudence, *Braswell* is not a logically compelled extension of *Fisher*. By shifting the focus from privacy concerns underlying the fifth amendment to the act of production at its very surface, *Fisher* certainly made *Braswell* possible. And because *Fisher* arose in an individual rather than corporate context, it postponed the irreconcilable conflict between the rule it announced and the collective entity doctrine.

That conflict was squarely presented in *Braswell*. Faced with the Hobson's choice of misapplying *Fisher* and jeopardizing white-collar criminal investigations, the Court predictably chose the former. As a result, corporate custodians have lost not only the substantive privacy right denied by *Fisher*, but have also been denied the skeletal freedom from testimonial document production conferred by that decision.

Although correctly recognizing that corporate records are not protected by the fifth amendment, the *Braswell* Court conspicuously misapplied that concept, concealing the real issue behind a seemingly endless recitation of prior collective entity cases.[170] The collective entity rule was formulated in a series of carefully conceived decisions based upon the understanding that an individual does not have a privacy interest in the contents of entity-owned documents.[171] The Court later recognized in *Doe* that a

166 *See* Fisher v. United States, 425 U.S. 391, 410 (1976).
167 *See Fisher*, 425 U.S. at 409; United States v. Doe, 465 U.S. 605, 612 (1984).
168 *Braswell*, 108 S. Ct. at 2286.
169 *Id.* at 2292.
170 *Id.* at 2288-92.
171 *See supra* note 164.

sole proprietor could claim a fifth amendment privilege if the act of producing documents belonging to his business would prove personally incriminating.[172] While *Doe* reaffirmed that the act of producing documents is inherently a personal act triggering fifth amendment scrutiny, the *Braswell* Court nonetheless relied on the collective entity rule to conclude that any acts of a corporate custodian must necessarily be attributed to the corporation. This analysis ignores the obvious fact that the act of production protected under *Fisher* and *Doe* is personal to the custodian. Thus, by extending the collective entity rule beyond its intended purpose, the *Braswell* Court has effectively stripped even that minimal fifth amendment privilege from an entire class of individuals.

The cornerstone of the fifth amendment is its protection of individuals from compelled self-incrimination. If *Fisher* hung that protection by a slender reed the reed has now snapped. By holding that a corporate representative enjoys no individual privilege even where his compelled actions personally incriminate him, *Braswell* disavows the fifth amendment's fundamental purpose. Consequently, Randy Braswell represents a class of citizens—namely, corporate custodians—who lack the individual protections of the fifth amendment extended to others.

Thomas P. Scrivo

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[172] United States v. Doe, 465 U.S. 605, 612-13 (1984).