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*United States v. Doe* and its Progeny: A Reevaluation  
of the Fifth Amendment's Application to  
Custodians of Corporate Records

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# CASE COMMENT

## *United States v. Doe* and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records

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### I. INTRODUCTION

Since the early part of the twentieth century, when the Supreme Court of the United States decided *Hale v. Henkel*<sup>1</sup> and *Wilson v. United States*,<sup>2</sup> custodians of corporate records have been unable to invoke the fifth amendment privilege against self-incrimination when asked to produce corporate documents pursuant to a subpoena. The doctrine that the Supreme Court formulated in *Hale* and *Wilson*, which has become known as the "corporate entity exception," seemed an unassailable benchmark of fifth amendment jurisprudence until the

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1. 201 U.S. 43 (1906).

2. 221 U.S. 361 (1911).

Court's decision in *United States v. Doe*.<sup>3</sup>

In *Doe*, the Supreme Court held that the contents of a sole proprietor's business records were not privileged under the fifth amendment.<sup>4</sup> The Court also held that a sole proprietor could assert the fifth amendment privilege against compelled self-incrimination if the act of producing business records pursuant to a subpoena was both testimonial and incriminating in effect.<sup>5</sup> The *Doe* Court, by applying the "act of production" doctrine which it had enunciated in *Fisher v. United States*,<sup>6</sup> changed the focus of fifth amendment analysis for the production of documents and left unanswered whether the "act of production" doctrine would affect the "corporate entity exception" by extending fifth amendment protection to custodians of corporate records.<sup>7</sup>

Recently, three courts of appeals, in *In re Grand Jury Proceedings (Morganstern)*,<sup>8</sup> *In re Two Grand Jury Subpoenae Duces Tecum*,<sup>9</sup> and *In re Grand Jury Matter (Brown)*,<sup>10</sup> have addressed the issue left open in *Doe*.<sup>11</sup> Although the cases differ in rationale and result, they share a common theme<sup>12</sup> that may provide a framework for resolving the fifth amendment issues that are presented when custodians of corporate records are asked to produce business documents. This Comment proposes a rule<sup>13</sup> that would extend *Doe's* protection to custodians of corporate records and still allow investigative bodies to gain access to corporate business records by subpoena or summons.<sup>14</sup> Part II examines the fifth amendment's application to the production of documents and the development of the "corporate entity" and

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3. 465 U.S. 605 (1984).

4. *Id.* at 612.

5. *Id.* at 612-14.

6. 425 U.S. 391 (1976). The Supreme Court explained that "compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [defendant]. It also would indicate the [defendant's] belief that the papers are those described in the subpoena." *Id.* at 410 (citing *Curcio v. United States*, 354 U.S. 118, 125 (1957)).

7. See *infra* notes 68-69 and accompanying text.

8. 771 F.2d 143 (6th Cir.) (*en banc*), *cert. denied*, *Morganstern v. United States*, 106 S. Ct. 594 (1985).

9. 769 F.2d 52 (2d Cir. 1985).

10. 768 F.2d 525 (3d Cir. 1985) (*en banc*).

11. See *infra* notes 85-135 and accompanying text (analyzing *Brown*, *Two Grand Jury Subpoenae*, and *Morganstern*).

12. See *infra* notes 194-214 and accompanying text.

13. See *infra* notes 229-35 and accompanying text.

14. The privilege against self-incrimination does not bar the seizure of personal or business documents pursuant to a valid search warrant. *Andresen v. Maryland*, 427 U.S. 463, 477 (1976). Although the seizure of documents creates some fourth amendment problems, these are beyond the scope of this comment.

“collective entity”<sup>15</sup> exceptions to the fifth amendment. Part III examines *Fisher* and *Doe* and analyzes the “act of production” doctrine. Part IV analyzes *Morganstern*, *Two Grand Jury Subpoenae*, and *Brown*, and examines the differences among the three cases. Part V discusses whether the “act of production” doctrine, as the Supreme Court applied it in *Fisher* and *Doe*, extends to custodians of corporate records. Parts VI and VII extract a common theme from the three cases and develop a framework for dealing with the fifth amendment rights of corporate custodians. This Comment concludes that although corporations should not be able to shield their records, the rationale underlying the “act of production” doctrine makes that doctrine applicable to the custodians of corporate records.

## II. THE FIFTH AMENDMENT AND THE PRODUCTION OF DOCUMENTS

### A. *Boyd v. United States* and *Early Corporate Entity Cases*

*Boyd v. United States*<sup>16</sup> marked the first application of the fourth<sup>17</sup> and fifth<sup>18</sup> amendments to court orders or subpoenas<sup>19</sup> requiring production of documents and papers. *Boyd* involved a customs forfeiture proceeding in which the government sought to utilize an 1874 statutory provision to gain documentary evidence from the importer of property to be forfeited. The provision authorized the trial judge, on a motion of the government describing a particular document and indicating what it might prove, to issue a notice directing the importer to produce the document.<sup>20</sup> The trial court in

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15. The Supreme Court formulated the “collective entity” concept, an extension of the “corporate entity exception,” in *United States v. White*, 322 U.S. 694 (1944), and *Bellis v. United States*, 417 U.S. 85 (1974).

16. 116 U.S. 616 (1886).

17. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

18. The fifth amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. For an exhaustive history of the fifth amendment, see L. LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT* (1968).

19. “A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter. A subpoena duces tecum requires production of books, papers” and other documents. *BLACK’S LAW DICTIONARY* 1279 (5th ed. 1979). See also Fed. R. Civ. P. 45(a)-(b) (A subpoena may command the person to whom it is directed to give testimony or produce documents.).

20. 116 U.S. at 618-20.

*Boyd* directed the defendant to produce an invoice for twenty-nine cases of glass plates that the defendant allegedly had imported without payment of customs duties.<sup>21</sup> Pursuant to this directive, the defendant produced the invoice, and, as a result, the trial court entered a judgment of forfeiture.<sup>22</sup> On appeal the Supreme Court held that the compulsory production of the defendant's private papers violated the fourth<sup>23</sup> and fifth<sup>24</sup> amendments. The Court reasoned that there was an intimate relation between the two amendments and stated that courts should liberally construe constitutional provisions that ensure the security of persons and property.<sup>25</sup> Although Justice Miller and Chief Justice Waite did not believe that the fourth amendment applied to the case before the Court,<sup>26</sup> every member of the Court agreed that compulsory production of private<sup>27</sup> papers violated the fifth amendment.

Twenty years later, in *Hale v. Henkel*,<sup>28</sup> a corporate officer, to whom the government had granted immunity from prosecution, refused to testify or comply with a subpoena duces tecum. The Court dismissed the officer's fifth amendment claim because the grant of

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21. *Id.* at 619.

22. *Id.* at 618.

23. Justice Bradley, writing for the Court, stated that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited" was "the equivalent of a search and seizure . . . within the meaning of the Fourth Amendment." *Id.* at 634-35. One commentator has noted that "much of *Boyd's* Fourth Amendment analysis has been relegated to the judicial graveyard, and it is at least arguable that its Fifth Amendment analysis is headed in the same direction." W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 8.12 (1985).

24. 116 U.S. at 634-35. Some commentators believe that the death-knell has been sounded for *Boyd's* "private papers" doctrine. See, e.g., Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979) (Burger Court has removed *Boyd's* right of privacy "gloss" from the fifth amendment); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977) (Supreme Court has supplanted *Boyd's* absolute fourth and fifth amendment safeguards for certain papers based on the private nature of their contents with a more relativistic reading of the protections provided by these amendments). But see *infra* note 84 (Most lower courts have held that the fifth amendment still protects in some way the contents of "private papers.").

25. 116 U.S. at 634.

26. "Nothing in the nature of a search is here hinted at. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers." *Id.* at 640 (Miller, J., concurring).

27. The Supreme Court used the term "private" even though the invoice in question was "from the Union Plate Glass Company." *Id.* at 619. The Court followed English common law, which protected "private" writings but "did not recognize a dichotomy between personal and business documents in defining 'private.'" Note, *Business Records and the Fifth Amendment Right against Self-Incrimination*, 38 OHIO ST. L. J. 351, 352 (1977).

28. 201 U.S. 43 (1906).

immunity included the act of producing corporate records.<sup>29</sup> The Court also held that the officer could not claim the privilege against self-incrimination *on behalf of the corporation* in order to refuse production of documents, because the corporation did not have any fifth amendment rights; the Court viewed this privilege as purely personal.<sup>30</sup>

The Supreme Court extended *Hale* in *Wilson v. United States*;<sup>31</sup> the Court held that an officer of a corporation could not claim *his* privilege against self-incrimination in order to refuse production of corporate records sought pursuant to a subpoena duces tecum directed to the corporation.<sup>32</sup> Because the records belonged to the

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29. *Id.* at 73.

30. The Court stated:

[W]e are of the opinion that there is a clear distinction in this particular [sic] 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. His power to contract is unlimited. He owes no such 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 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. . . . 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 its franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of corporate books and papers for that purpose.

*Id.* at 74-75. The first formulation of the "corporate entity" exception seemed to be based on the government's need to regulate corporations which it had chartered. *Id.*

31. 221 U.S. 361 (1911).

32. In explaining its decision, the Court stated:

The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The 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. No personal privilege to which they are entitled requires such a conclusion . . . the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books, without regard to the conduct of the custodian.

*Id.* at 384-85. In a companion case, *Drier v. United States*, the Court held that corporate documents had to be produced even though the subpoena in question was directed at the secretary of the corporation. 221 U.S. 394 (1911).

corporation, "there [was] no ground upon which it [could] be said that [the officer]" could withhold the records, even if he had prepared them himself.<sup>33</sup> The Court reasoned that if the records belonged to the corporation the officer could not withhold them from the government; the Court made short shrift of the fact that the officer had been indicted by the grand jury that sought the corporate records.<sup>34</sup> In his dissent, Justice McKenna argued that the fifth amendment privilege was "a personal liberty" and that "a distinction based on the ownership of the books demanded as evidence [was] immaterial."<sup>35</sup>

In *Grant v. United States*,<sup>36</sup> the Court held that an attorney could not invoke the privilege against self-incrimination to justify his refusal to obey a subpoena directing him to produce the records of a "one-man" corporation that had ceased to do business. The Court reasoned that the documents in Grant's possession were independent documents and that it would not regard them as privileged even if Grant had received them for purposes of consultation.<sup>37</sup> In dicta, the Court stated that the sole stockholder could not withhold the records on the ground that they would tend to incriminate him.<sup>38</sup>

After *Grant*, it was clear that neither corporations nor their custodians could refuse to produce corporate records. Although the early "corporate entity" cases paid lip service to *Boyd*, it was apparent that they had begun to foreshadow *Boyd's* decline.

### B. *The Emergence of the "Collective Entity" Exception*

In *United States v. White*,<sup>39</sup> the Supreme Court of the United States extended *Hale* to unincorporated organizations and formulated

33. 221 U.S. at 378.

34. *Id.* at 379.

35. *Id.* at 388 (McKenna, J., dissenting). Justice McKenna may have been right in finding the ownership of the records immaterial. In *Wheeler v. United States*, the Court held that *Wilson* was controlling even though the corporation whose records were sought had been dissolved. 226 U.S. 478 (1913).

36. 227 U.S. 74 (1913).

37. *Id.* at 79.

38. The Court explained:

The books and papers called for by the subpoena were corporate records and documents. Whether or not the title to them had passed to Burlingame when the Ensworth Company ceased to do business, their essential character was not changed. They remained subject to inspection and examination when required by competent authority, and they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him.

*Id.* at 79-80. For later cases holding that the sole stockholder in a "one-man" corporation cannot refuse to produce records, see *Reamer v. Beall*, 506 F.2d 1345 (4th Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *Fineberg v. United States*, 393 F.2d 417 (9th Cir. 1965).

39. 322 U.S. 694 (1944).

the "collective entity" doctrine. In *White*, a federal district court issued a subpoena to an unincorporated labor union. The subpoena required the union to produce copies of "its constitution and by-laws and specifically enumerated union records showing its collections of work-permit fees" before a grand jury investigating "alleged irregularities in the construction" of a naval depot.<sup>40</sup> The union officer that had the records in his possession refused to produce them, and, as a result, the district court held him in contempt. The Court of Appeals for the Third Circuit reversed. The court held that the union officer could refuse to produce the records if they tended to incriminate him because the records of the union belonged to all of its members.<sup>41</sup>

The Supreme Court reversed the judgment of the court of appeals and held that the officer could not refuse to produce the records even if they incriminated him.<sup>42</sup> Justice Murphy, writing for a unanimous court,<sup>43</sup> 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.<sup>44</sup>

Justice Murphy also stated that the union's lack of incorporation did 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."<sup>45</sup> Whether or not an organization could invoke the privilege against self-incrimination depended on:

[w]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its

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40. *Id.* at 695.

41. 137 F.2d 24 (3d Cir. 1943), *rev'd*, 322 U.S. 694 (1944).

42. 322 U.S. at 704.

43. Justices Roberts, Frankfurter, and Jackson concurred in the result, but did not write opinions. *Id.* at 705.

44. *Id.* at 699 (citations omitted).

45. *Id.* at 700-01.



constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.<sup>46</sup>

Using this test, Justice Murphy found that a labor union, as well as its officers, could not invoke the personal privilege against self-incrimination.<sup>47</sup>

Thirty years later, the Supreme Court expanded *White in Bellis v. United States*.<sup>48</sup> The Court held that a member of a dissolved three-man law partnership who had been subpoenaed to produce partnership records could not invoke the privilege against self-incrimination to refuse to produce the records.<sup>49</sup> Justice Marshall, after stating that the case required the Court to explore the "outer limits" of *White*,<sup>50</sup> concluded that the *White* test did not render the "collective entity" exception inapplicable simply because an organization embodied a combination of personal and group interests; the presence of an organizational structure serving the group interest was sufficient to make the exception apply. Justice Marshall stated that the formulation in *White* could not be "reduced to a simple proposition based solely upon the size of the organization. It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be."<sup>51</sup>

Expanding on a concept formulated in *Couch v. United States*,<sup>52</sup> Justice Marshall also explained that expectation of privacy was a rationale for the corporate entity exception.<sup>53</sup> In *Couch*, the Court held that a taxpayer could not assert the fifth amendment privilege against self-incrimination to withhold from the Internal Revenue Service books and records that she had turned over to her accountant.<sup>54</sup>

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46. *Id.* at 701.

47. *Id.* at 704.

48. 417 U.S. 85 (1974).

49. *Id.* at 100-01. The defendant attorney argued that he could refuse to produce the records because the Court in *Boyd* had allowed a partnership to claim the privilege against self-incrimination when asked to produce a business invoice. *Id.* at 94-95. Justice Marshall responded that the Court had decided *Boyd* at an "early stage in the development of . . . Fifth Amendment jurisprudence" when an invoice was treated as a private paper and that "it was only after *Boyd* had held that the Fifth Amendment privilege applied to the compelled production of documents that the question of the extension of this principle to the records of artificial entities arose." *Id.* at 95 n.2. *Boyd*, therefore, did not decide "the issue presented" in *Bellis*. *Id.*

50. *Id.* at 94.

51. *Id.* at 100. Justice Marshall added, however, that "it might be a different case if it involved a small family partnership." *Id.* at 101. See *infra* note 165 and accompanying text.

52. 409 U.S. 322 (1973).

53. 417 U.S. at 91-92.

54. The Court stated:

We do indeed believe that actual possession of documents bears the most

The Court found that there was no legitimate expectation of privacy in this area.<sup>55</sup> Neither could the taxpayer claim governmental compulsion when the government was forcing only the accountant to produce the records.<sup>56</sup>

The cases leading up to and including *Bellis* made it clear that neither collective entities nor their custodians, acting in a representative capacity, could assert a fifth amendment privilege in order to avoid production of entity documents. This well-settled rule, however, may have been due to the fact that before *Fisher v. United States*<sup>57</sup> the Court did not distinguish between the contents of documents and the act of producing those documents when determining whether a party could assert the privilege against self-incrimination. Before *Fisher*, the Court never contemplated an "act of production" privilege. By stating that the act of producing documents could be testimonial,<sup>58</sup> the *Fisher* Court altered the focus of fifth amendment jurisprudence and created a new analytical problem for lower federal courts.

### III. FISHER, DOE, AND THE "ACT OF PRODUCTION" DOCTRINE

#### A. Fisher v. United States

In *Fisher v. United States*,<sup>59</sup> taxpayers under investigation for possible civil or criminal liability under the federal income tax laws obtained certain documents prepared by their accountants and then transferred the documents to their attorneys, who were assisting the taxpayers in the investigation.<sup>60</sup> The Internal Revenue Service served

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significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of a possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

*Couch*, 409 U.S. at 333.

In *California Bankers Ass'n v. Shultz*, the Court upheld the constitutionality of the Bank Secrecy Act of 1970, which required banks to maintain records of their customers' identities, make microfilm copies of checks and similar instruments, and keep records of certain other items. 416 U.S. 21 (1974). The Court rejected the arguments of certain plaintiffs that the record keeping requirements imposed on the banks violated their fifth amendment rights, pointing out that compelled production of incriminating evidence by a third party did not constitute a fifth amendment violation. *Id.* at 55.

55. 409 U.S. at 335.

56. *Id.* at 336.

57. 425 U.S. 391 (1976).

58. *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 149 (6th Cir. 1985) (Jones, J., dissenting), *cert. denied*, *Morganstern v. United States*, 106 S. Ct. 594 (1985).

59. 425 U.S. 391 (1976).

60. *Id.* at 394-95.

summonses on the attorneys that directed them to produce the documents, but the attorneys refused to comply, claiming that enforcement of the summonses would "involve compulsory self-incrimination of the taxpayers, would involve a seizure of the papers without necessary compliance with the Fourth Amendment, and would violate the taxpayers' right to communicate in confidence" with them.<sup>61</sup>

The Court, in an opinion by Justice White, held that enforcement of the summonses against the taxpayers' attorneys would not violate the taxpayers' fifth amendment rights.<sup>62</sup> Justice White wrote that although the court:

had often stated that one of the several purposes served by the constitutional privilege against self-incrimination is that of protecting personal privacy, . . . [it had] 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.<sup>63</sup>

The Court distanced itself from previous opinions, such as *Bellis*, which had stated that the fifth amendment had privacy underpinnings.<sup>64</sup> Justice White made it clear that the majority in *Fisher* did not agree with the broad statements of privacy in those cases: "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."<sup>65</sup>

Although the Court seemed to eliminate any protection of privacy from the fifth amendment, Justice White stated that the fifth

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61. *Id.* at 395.

62. *Id.* at 414. Justice White reasoned that enforcement of the summons against the attorneys did not "compel" the taxpayers to do anything and certainly did not compel them to be witnesses against themselves. *Id.* at 397. The case did not present a situation where constructive possession was so clear as to leave the personal compulsion against the taxpayer substantially intact. See *Couch v. United States*, 409 U.S. 322, 333 (1973).

Enforcement of the summons did not violate the attorney-client privilege, because the records in question were "pre-existing" documents and could have been sought from the attorney as long as they could have been obtained from the taxpayer. *Fisher*, 425 U.S. at 403-05. The dispositive question, therefore, was whether the Court could require the taxpayer himself to produce the documents. *Id.* at 405. Because the defendant accountants prepared the documents, the documents did not contain the taxpayer's testimonial declarations. The taxpayer, therefore, could not refuse to produce the documents. *Id.* at 409-10.

63. *Id.* at 399.

64. See *Bellis v. United States*, 417 U.S. 85 (1974); *Couch v. United States*, 409 U.S. 322 (1973); *Telan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Davis v. United States*, 328 U.S. 582 (1946).

65. 425 U.S. at 401.

amendment could protect against the *act of producing* evidence if it were testimonial:

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.<sup>66</sup>

Justice White concluded that, in the case before the Court, testimonial aspects of production were not present because the existence and location of the documents in question were a foregone conclusion.<sup>67</sup>

Because the Court announced a new analytical framework without providing much guidance,<sup>68</sup> lower courts had difficulty applying the new "act of production" doctrine to different factual settings.<sup>69</sup> The Court provided some much needed guidance in *United States v. Doe*.

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66. *Id.* at 410. One commentator has noted: "That production of evidence may itself be testimonial is at best an elusive idea." Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 686 (1982). Justice Marshall, who concurred in *Fisher*, seemed to agree, calling the Court's focus on the testimonial aspects of production "technical" and "somewhat esoteric." 425 U.S. at 431 (Marshall, J., concurring). See also Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 702 (1968) (The argument that compulsory production involves an implicit testimonial authentication "reeks of the oil lamp."). For an examination of different approaches to implicit authentication of documents, see Note, *supra* at 686-90.

67. 425 U.S. at 411.

68. See Heidt, *The Fifth Amendment Privilege and Documents-Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439 (1984).

69. See, e.g., *In re Grand Jury Empanelled March 9, 1983*, 722 F.2d 294 (6th Cir. 1983) (*Fisher* did not extend protection to production of a collective entity's records); *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983) (taxpayer could not refuse to produce his accountant's workpapers); *In re First National Bank*, 701 F.2d 115 (10th Cir. 1983) (anti-tax groups' fifth amendment rights not violated by subpoena directed at bank, but government had to show a compelling need to obtain the documents if enforcement of subpoena would likely chill associational rights); *In re Grand Jury Subpoena*, 646 F.2d 963 (5th Cir. 1981) (fifth amendment protection applicable to sole proprietor's business records is same as protection applicable to an individual's records); *United States v. Greenleaf*, 546 F.2d 123 (5th Cir. 1977) (custodian's personal privilege should not bar production of an organization's financial records); *In re Grand Jury Subpoena Duces Tecum (Passports)*, 544 F. Supp. 721 (S.D. Fla. 1982) (requiring witness to produce passport for presentation to grand jury did not involve testimonial communication but witness was entitled to an order mandating that his act of production not be used as evidence against him); *United States v. Challman*, 520 F. Supp. 64 (S.D. Ind. 1981) (production of gospel music cassettes pursuant to I.R.S. summons did not involve testimonial self-incrimination); *In re Bernstein*, 425 F. Supp. 37 (S.D. Fla. 1977) (defendant's fifth amendment right would be violated if forced to produce tape recordings of conversations with others which he himself made and which were in his possession).

### B. United States v. Doe

In *United States v. Doe*,<sup>70</sup> the Supreme Court of the United States applied *Fisher's* "act of production" doctrine to a sole proprietorship and reaffirmed that the fifth amendment did not protect the contents of business documents.<sup>71</sup> In *Doe*, a grand jury investigating corruption of county and municipal contracts served five subpoenas<sup>72</sup> on the owner of several sole proprietorships. The sole proprietor filed a motion to quash the subpoenas in federal district court, and the District Court for the District of New Jersey granted the motion.<sup>73</sup> The Court of Appeals for the Third Circuit affirmed and held that the grand jury could not subpoena the sole proprietor's business records.<sup>74</sup> The court of appeals reasoned that production of the documents would result in an "impermissible incriminating 'testimonial communication.'"<sup>75</sup> The Supreme Court, in an opinion by Justice Powell, affirmed in part and reversed in part. The Court disagreed with the court of appeals' conclusion that the contents of a sole proprietor's business records were privileged because the fifth amendment provided protection only from compelled self-incrimination:

Respondent does not contend that he prepared the documents

70. 465 U.S. 605 (1984).

71. *Id.* at 610-12.

72. The third subpoena sought production of:

- (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) cancelled 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 addresses of all partners, associates, and employees; (26) W-2 forms of each partner, associate, and employees; (27) workpapers; (28) copies of tax returns.

*Id.* at 607 n.1.

73. The district court found that enforcement of the subpoenas "would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights." Matter of 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*, *United States v. Doe*, 465 U.S. 605 (1984).

74. The court held that *Fisher* had not made a complete break with *Boyd* and that therefore "an individual's business papers, as well as his personal records, [could not] be subpoenaed by a grand jury." Matter of Grand Jury Empanelled March 19, 1980, 680 F.2d at 334 (citing *I.C.C. v. Gould*, 629 F.2d 847 (3d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981)).

75. *Id.* The Court, in *Bellis*, stated that "the privilege [against self-incrimination] applies to the business records of the sole proprietor . . . ." *Bellis*, 417 U.S. at 87-88.

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.<sup>76</sup>

The Court, however, declined to disturb the finding of both the district court and the court of appeals that the sole proprietor's act of producing the records would be both testimonial and self-incriminating.<sup>77</sup> Relying on this finding, the Court held that the grand jury could not compel the sole proprietor to produce the documents without a statutory grant of use immunity<sup>78</sup> pursuant to 18 U.S.C. §§ 6002 and 6003.<sup>79</sup> The government had urged the Court to adopt a doctrine

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76. *Doe*, 465 U.S. at 611-12. Justice Powell also stated that "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." *Id.* at 612 n.10. This statement, "hidden" in a footnote, may signal the end of fifth amendment protection for the contents of private papers such as diaries or letters. Because most, if not all, "private papers" are voluntarily composed, no compulsion would be involved and the contents of the papers would not be privileged. *But see infra* note 84 (Most lower courts have held the fifth amendment protects the contents of private papers in some manner.).

77. 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 the 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 614 (citations omitted).

78. *Id.* at 617.

79. 18 U.S.C. § 6002 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 presiding 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 not 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.

18 U.S.C. § 6002 (1982).

18 U.S.C. § 6003 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

of “constructive use immunity,”<sup>80</sup> but the Court refused to “extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.”<sup>81</sup>

Justice O'Connor concurred, writing to make explicit what she believed was implicit in the Court's opinion: “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.”<sup>82</sup> Justice Marshall, joined by Justice Brennan, concurred in part and dissented in part. Justice Marshall believed that the Court erred by reversing the court of appeals' conclusion that the contents of the sole proprietor's documents were privileged because the court of appeals' judgment did not rest on the disposition of that issue.<sup>83</sup> Justice Marshall also argued that, contrary to Justice O'Connor's con-

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 the 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.

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

80. Under “constructive” use immunity, “the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures [had] not been followed.” *Doe*, 465 U.S. at 616.

81. Of course, courts generally suppress compelled, incriminating testimony that results from a violation of a witness' Fifth Amendment rights. The difference between that situation and the Government's theory of constructive use immunity is that in the latter it is the grant of judicially enforceable use immunity that compels the witness to testify. In the former situation, exclusion of the witness' testimony is used to deter the Government from future violations of witnesses' Fifth Amendment rights.

*Id.* at 616 n.16 (citations omitted).

82. *Id.* at 618 (O'Connor, J., concurring). Justice O'Connor believes that *Fisher* “sounded the death-knell for *Boyd*.” *Id.* This conclusion seems to be correct even though *Doe* did not specifically deal with the “private papers” issue. *See supra* note 76. *But see infra* note 84 and accompanying text (Most lower courts have held that the fifth amendment protects in some way the contents of private papers.).

83. *Doe*, 465 U.S. at 618 (Marshall, J., concurring in part and dissenting in part). Justice Stevens, concurring in part and dissenting in part, agreed with Justice Marshall. Both the court of appeals and the Supreme Court of the United States had reached the same conclusion—the subpoena had to be quashed. Because the court of appeals appropriately resolved the “act of production” issue, Justices Marshall and Stevens believed that its judgment should have been affirmed. *Id.* at 619-23 (Stevens, J., concurring in part and dissenting in part).

tion, the *Doe* Court did not consider "whether the Fifth Amendment provides protection for the contents of 'private papers of any kind.'" <sup>84</sup>

Justice Powell's majority opinion in *Doe* addressed only the narrow issue before the Court. As a result, it is not clear if the Court intended the "act of production" doctrine to extend to custodians of corporate records. Recently, the Second, Third, and Sixth Circuit Courts of Appeals have addressed the issue left open in *Doe*.

#### IV. THREE APPROACHES

##### A. Brown

In *In re Grand Jury Matter (Brown)*,<sup>85</sup> a grand jury served a subpoena duces tecum<sup>86</sup> on the sole owner of a professional corporation.<sup>87</sup> The owner resisted the enforcement of the subpoena by

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84. *Id.* at 619 (Marshall, J., concurring in part and dissenting in part). See *supra* notes 76 and 82. Although *Doe* may have signaled the end of fifth amendment protection for "private papers," the Supreme Court of the United States "has been unwilling to concede that there may not be certain types of papers which should be accorded special protection." Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 462 (1981).

Most lower courts, in both pre-*Doe* and post-*Doe* cases, have held or stated in dictum that the fifth amendment still protects in some way the contents of "private" or personal papers. See, e.g., *Butcher v. Bailey*, 753 F.2d 465 (6th Cir. 1985) (fifth amendment privilege did not apply to contents of personal records that related to property of bankrupt's estate, because the information relating to the property was not so intimately personal as to evoke serious concern over privacy interests); *United States v. Schlansky*, 709 F.2d 1079 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984) (contents of documents less private than personal diaries are not protected by the fifth amendment); *In re Grand Jury Subpoenas Duces Tecum*, 657 F.2d 5 (2d Cir. 1981) (fifth amendment protects individuals from government compelled production of personal documents); *United States v. Mackey*, 647 F.2d 898 (9th Cir. 1981) (personal notations on corporate documents not enough to shroud the documents with fifth amendment protections reserved for purely personal papers); *United States v. Davis*, 636 F.2d 1028 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981) (Fifth Circuit has rejected interpretations of *Fisher* and *Andresen* that would either limit the *Boyd* principle to non-business records or abolish it altogether); *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979) (compelling production of an individual's books and papers to be used against him in a legal proceeding violates the fourth and fifth amendments); *In re Grand Jury Subpoenas* S. Feb. 27, 1984, 599 F. Supp. 1006 (E.D. Wash. 1984) (with reference to contents, if documents are authored by the person named in the subpoena, are nonbusiness in nature, and contain recorded thoughts so personal that their disclosure would infringe on whatever residual privacy rights remain protected by the fifth amendment, then those documents are privileged). *Contra In re Kave*, 760 F.2d 343 (1st Cir. 1985) (*Fisher* and *Doe* limited *Boyd's* "private papers" doctrine by holding that the compelled production of such documents is prohibited only if there were testimonial aspects in the act of production itself); *United States v. Goerhring*, 742 F.2d 1323 (11th Cir. 1984) (*Doe* overruled *Boyd* and held that books and records sought by subpoena or summons were no longer to be given fifth amendment protection).

85. 768 F.2d 525 (3d Cir. 1985) (*en banc*).

86. See *supra* note 19 (defining a subpoena).

87. The subpoena required the sole owner, James Brown, to appear before a federal grand jury and bring with him "all workpapers, reports, records, correspondence and copies of tax



asserting that his authenticating testimony with regard to the records sought would constitute compelled self-incrimination. The District Court for the Eastern District of Pennsylvania held that "because the records [sought] belonged to a corporation, [the owner] had no privilege against self-incrimination, either with respect to the contents of the records, or with respect to their authentication before the grand jury"<sup>88</sup> and held the owner in civil contempt for refusing its order enforcing the subpoena.<sup>89</sup> The Court of Appeals for the Third Circuit reversed. The court held that the trial court could hold a witness in contempt for refusing to authenticate records only if it found that there was no likelihood of self-incrimination or if the government granted use immunity to the witness.<sup>90</sup>

Judge Gibbons, writing for the majority,<sup>91</sup> stated that the issue was "whether [the sole owner could] be compelled by a subpoena to give testimony before the grand jury, verbally or by a non-verbal communicative act, authenticating those records."<sup>92</sup> Judge Gibbons expanded on *Fisher's* notion of the communicative aspects of the act of production by equating nonverbal communicative acts with testimony.<sup>93</sup> Equating production to testimony, however, did not completely resolve the issue before the court. Judge Gibbons had to address *United States v. Austin-Bagley Corp.*,<sup>94</sup> in which the Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, held that the trial court could compel the secretary-treasurer of a corporation to give oral testimony as to the authenticity of corporate records even though the testimony would result in self-incrimination.<sup>95</sup> Judge Gibbons reasoned that the Third Circuit had never adopted the *Austin-Bagley* exception to the fifth amendment and that the exception was inconsistent with the Supreme Court's recent treat-

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returns" in his possession or under his control "relating to accounting services performed by [him] or under [his] supervision" on behalf of parties listed in the subpoena. *Brown*, 768 F.2d at 531.

88. *Id.* at 525.

89. The district court did not find that possession of the records was not of evidentiary significance, nor that production of the records would not be used for evidentiary purposes. *Id.* at 526.

90. *Id.*

91. The court heard the case *en banc*. Of the eleven judges who heard the case, five joined Judge Gibbons' majority opinion, two judges concurred, and three judges dissented.

92. *Brown*, 768 F.2d at 526.

93. *Id.* at 527.

94. 31 F.2d 229 (2d Cir.), *cert. denied*, 279 U.S. 863 (1929).

95. *Id.* at 233-34. Although Judge Hand recognized that there was a "possible, if tenuous distinction" between producing documents and giving testimony to authenticate them, he reasoned that production encompassed authentication and that, "since the production can be forced, it [can] be made effective by compelling the producer to declare that the documents are genuine." *Id.* at 234.

ment of the fifth amendment privilege.<sup>96</sup>

Although he acknowledged that *Fisher* ended fifth amendment protection for the contents of business documents, Judge Gibbons stated that *Fisher* recognized "that testimonial communication of any kind was protected if it might tend to incriminate."<sup>97</sup> In support of this proposition, Judge Gibbons relied on *Curcio v. United States*,<sup>98</sup> in which the Supreme Court held that the secretary-treasurer of a union could refuse to answer questions concerning the whereabouts of missing union books and records that had been subpoenaed, but not produced, by invoking the fifth amendment privilege against self-incrimination.<sup>99</sup> Although *Curcio* was distinguishable from *Austin-Bagley*,<sup>100</sup> Judge Gibbons emphasized that the Supreme Court in *Fisher* focused on aspects of production that the *Austin-Bagley* court thought irrelevant.<sup>101</sup>

After discussing *Curcio*, Judge Gibbons dismissed the government's argument that *Doe* was limited to sole proprietorships. Judge Gibbons explained that *Fisher* and *Doe* "make the significant factor, for the privilege of self-incrimination, neither the nature of the entity which owns the documents, nor the contents of the documents." Rather, the significant factor is the "communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled."<sup>102</sup> The majority opinion also pointed out that the federal rules of evidence allowed authentication by presentation of sufficient evidence and added that when a witness is required for authentication, most businesses had agents who could testify without fear of self-incrimination.<sup>103</sup> Furthermore, the government also could grant use immunity to the authenticating witness.<sup>104</sup> Because the district court did not give the owner an opportunity to establish that production

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96. *Brown*, 768 F.2d at 526.

97. *Id.* at 527.

98. 354 U.S. 118 (1957).

99. The *Curcio* court distinguished *Austin-Bagley*, reasoning that requiring a custodian to identify or authenticate records produced only made explicit what was implicit in the production itself. *Id.* at 125.

100. At the time of *Curcio*, the Supreme Court did not distinguish between the contents of documents and the act of producing the documents. If the production of corporate documents were not privileged, then testimony authenticating the documents might not add to what already had been revealed when the documents were produced.

101. *Brown*, 768 F.2d at 528.

102. *Id.*

103. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a).

104. The government had not requested the trial court to direct the corporation to appoint an agent. *Brown*, 768 F.2d at 529 n.4.

and authentication would tend to incriminate him, the majority reversed the order holding the owner in contempt.

In a concurring opinion, Judge Becker stated that he agreed with Judge Garth's dissent that *Fisher* and *Doe* did not change the corporate entity exception. Judge Becker, however, argued that the case involved "testimonial incrimination" beyond that inherent in the act of production because of the wording of the grand jury subpoena.<sup>105</sup> Judge Becker read the subpoena to be an interrogatory that asked the owner whether he had prepared the documents listed in the subpoena. According to Judge Becker, the owner's compliance with the subpoena would potentially result in more incriminating testimony than necessarily resulted from production of corporate records.<sup>106</sup> Judge Becker believed, however, that if the government desired, it could obtain the documents by eliminating the interrogatory character of the subpoena.<sup>107</sup>

Judge Garth dissented and argued that the majority erred in treating the case as one involving compelled testimony rather than compelled production of corporate documents.<sup>108</sup> Judge Garth noted that the Supreme Court had yet to answer whether the fifth amendment privilege applied when a subpoena directed a professional one-man corporation to produce records and the production of those records could incriminate him individually.<sup>109</sup> Judge Garth believed that the subpoena never asked the owner in the case at hand to testify for purposes of authentication or identification and that the district court held him in contempt because he "failed and refused to comply with the order of the Court to provide the subpoenaed documents."<sup>110</sup> Lastly, Judge Garth explained that *Doe*, in focusing on the testimonial aspects of the act of production, did not change the corporate entity exception.<sup>111</sup>

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105. Judge Becker focused on the words "accounting services performed by [him] or under [his] supervision." *Id.* at 531 (Becker, J., concurring).

106. *Id.*

107. *Id.* at 531-32.

108. *Id.* at 532 (Garth, J., dissenting).

109. Although the issue of the one-man corporation was addressed in *Grant v. United States*, 227 U.S. 74 (1913), at that time the Supreme Court did not focus on the testimonial aspects of the act of production. *See supra* p. 798.

110. 768 F.2d at 534 (Garth, J., dissenting).

111. "[T]he [collective entity] doctrine survives, *not* because production by the custodian has no testimonial ramification, but because the custodian has waived, to a limited extent, his fifth amendment right upon assuming the duties of his office." *Id.* at 538 (Garth, J., dissenting).

## B. In re Two Grand Jury Subpoenae Duces Tecum

In *In re Two Grand Jury Subpoenae Duces Tecum*,<sup>112</sup> two subpoenas were served at the offices of a corporation that a federal grand jury was investigating. Both subpoenas called for testimony and the production of the corporation's business records. One subpoena was addressed to the corporation's "custodian of records."<sup>113</sup> The custodian moved to quash the subpoenas, but the district court refused to do so after limiting the subpoenas to corporate business records. The district court directed that someone who was not a target of the grand jury investigation produce the records and stated that any employee of the corporation who worked in the main office (where the records were kept) could produce the records.<sup>114</sup> The custodian appealed the district judge's order, and the Court of Appeals for the Second Circuit, in an opinion by Judge Pratt, affirmed the order.<sup>115</sup>

Judge Pratt explained that a corporate representative normally could not claim a fifth amendment privilege against producing corporate records, regardless of whether the corporation was large or small<sup>116</sup> because no self-incrimination problem exists when a corporation is asked to produce records. Although some individual must act on behalf of the corporation, the employee producing the records "would not be attesting to his personal possession of them but to their existence and possession by the corporation."<sup>117</sup> If the custodian of records would be incriminated, then the corporation could appoint an agent to produce the records.<sup>118</sup> Judge Pratt stated that because the

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112. 769 F.2d 52 (2d Cir. 1985).

113. *Id.* at 54. The custodian was the corporation's majority shareholder and sole operating officer as well as a target of the grand jury's investigation. *Id.*

114. *Id.*

115. The government had moved to dismiss the appeal on the ground that the custodian could not appeal the order denying the motion to quash without first resisting enforcement and enduring the penalty of a citation for contempt. *See In re Katz*, 623 F.2d 122 (2d Cir. 1980). The custodian argued that his appeal fell under the exception created by *Perlman v. United States*, 247 U.S. 7 (1918), "which allows an immediate appeal from the denial of a motion to quash the subpoena without first . . . being found in contempt, 'when the subpoena is directed to a third party and the one seeking to quash the subpoenas claims that its enforcement will violate one or more of his constitutional rights.'" *Two Grand Jury Subpoenae*, 769 F.2d at 54 (citations omitted). The court denied the government's motion, stating that the flaws in the custodian's argument became apparent only after consideration of his fifth amendment claims. *Id.* at 55.

116. 769 F.2d at 56.

117. *Id.* at 57.

118. *Compare* *United States v. Barth*, 745 F.2d 184 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1356 (1985)(corporation has duty to appoint agent) *with* *United States v. Hankins*, 565 F.2d 1344 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979)(improper for court to direct president of corporation to produce witness who would not claim fifth amendment privilege against self-incrimination).

district judge specifically excluded any grand jury target from having to produce the records and provided that the corporation could select an employee to produce the records, any danger of self-incrimination was removed.<sup>119</sup>

In the second part of his opinion, Judge Pratt explained that *Doe* did not change existing law regarding corporate records. He argued that *Doe's* holding was predicated on the fact that the documents at issue were documents of a sole proprietorship, and not corporate records, and that *Doe* failed to discuss the "long-standing rules set down by the Supreme Court that have limited, emphatically, the Fifth Amendment privilege in the corporate setting."<sup>120</sup> Lastly, Judge Pratt stated that *Doe* did not limit or overrule *Bellis*<sup>121</sup> and concluded that the bright line of *Bellis* was still valid.<sup>122</sup>

### C. Morganstern

The question presented in *In re Grand Jury Proceedings (Morganstern)*<sup>123</sup> was whether a subpoena duces tecum requiring the production of partnership and corporate records should be quashed on the ground that production of the documents would violate the defendants' fifth amendment privilege against compulsory self-incrimination. Citing *Doe*, the defendants sought to quash the subpoena served on their attorney.<sup>124</sup> The district court denied the motion to quash, and the Court of Appeals for the Sixth Circuit reversed, concluding that the defendants could not be required to produce the requested records absent a grant of use immunity.<sup>125</sup> A majority of the judges in active service voted to rehear the case en banc, thereby vacating the panel decision.<sup>126</sup> On rehearing, the Sixth Circuit affirmed the judgment of the district court.

Judge Lively, writing for the majority,<sup>127</sup> stated that *Bellis'* "collective entity" rule established that no artificial organization could utilize the personal privilege against self-incrimination. Therefore, an

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119. 769 F.2d at 57.

120. *Id.* at 58.

121. 417 U.S. 85 (1974). For a discussion of *Bellis*, see *supra* notes 48-56 and accompanying text.

122. *Two Grand Jury Subpoenae*, 769 F.2d at 59. The "bright line" of *Bellis* restricts a collective entity's use of the fifth amendment privilege against self-incrimination.

123. 771 F.2d 143 (6th Cir.) (*en banc*), *cert. denied*, *Morganstern v. United States*, 106 S. Ct. 594 (1985).

124. See *In re Grand Jury Proceedings (Morganstern)*, 747 F.2d 1098 (6th Cir. 1984), *vacated*, 771 F.2d 143 (6th Cir. 1985).

125. See *supra* note 79 (quoting the statutes that provide for use immunity).

126. 6th Cir. R. 14.

127. Eight judges joined the majority opinion, and two judges dissented.

individual acting in a representative capacity likewise could not assert his personal privilege against self-incrimination to withhold the records.<sup>128</sup> Judge Lively explained that *Fisher*, while changing the focus of inquiry from contents of documents to the act of production, did not retreat from the collective entity rule announced in *Bellis*.<sup>129</sup> He pointed out that on two previous occasions<sup>130</sup> the Supreme Court had applied *Fisher* to fifth amendment challenges of summons or subpoenas without discarding the collective entity exception on either occasion.

*Doe*, according to the majority in *Morganstern*, did not hint that it announced a departure from the collective entity rule. Indeed, Justice Powell's opinion for the Court in *Doe* had addressed a narrow issue and cited *Bellis* with approval.<sup>131</sup> After stating that a custodian of corporate records could not assert the fifth amendment privilege against self-incrimination, Judge Lively said:

It is well settled in this circuit that if the government later attempts to implicate the custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress. 'Such proof would seek to add testimonial value to the otherwise testimony-free act of production.'<sup>132</sup>

In dissent, Judge Jones, joined by Judge Martin, argued that *Doe* established "the principle that, without reference to the content or origin of documents sought by a subpoena, the compelled act of producing documents may be testimonial and self-incriminating, and therefore privileged under the Fifth Amendment."<sup>133</sup> Judge Jones pointed out that *Bellis* and the other corporate entity exception cases were not concerned with the act of production, and therefore *Doe* and *Bellis* supplemented rather than conflicted with one another.<sup>134</sup> More importantly, Judge Jones said:

The majority distorts the rationale of *Doe* by promulgating a rule that the act of producing corporate documents is always free of testimonial implications . . . [We] reject the majority's conclusion that the testimonial aspects of an act of producing corporate documents arises only at trial when the government seeks to introduce

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128. 771 F.2d at 148.

129. *Id.* at 147.

130. *See* In re Grand Jury Empaneled Mar. 8, 1983, 722 F.2d 294 (6th Cir. 1983), *cert. dismissed sub nom.* Butcher v. United States, 465 U.S. 1085 (1984); United States v. Schlansky, 709 F.2d 1079 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984).

131. 771 F.2d at 147.

132. *Id.* at 148. This holding appears to be in conflict with *Doe*'s refusal to adopt a doctrine of constructive use immunity. *See supra* notes 80-81 and *infra* note 195.

133. 771 F.2d at 148 (Jones, J., dissenting).

134. *Id.* at 149.

incriminating evidence concerning the act of production.<sup>135</sup>

#### D. *From Clear Precedent to a State of Confusion*

*Brown*, *Two Grand Jury Subpoenae*, and *Morganstern* demonstrate the confusion concerning the proper scope of the act of production doctrine. The three cases differ both in their approach and resolution of this issue. The courts in *Two Grand Jury Subpoenae* and *Morganstern* required custodians of corporate records to produce corporate records,<sup>136</sup> while the court in *Brown* permitted the custodian to demonstrate on remand that the act of production would be incriminating.<sup>137</sup>

Although the courts in *Two Grand Jury Subpoenae* and *Morganstern* refused to apply the act of production doctrine to corporate custodians, they disagreed in their reasons for not doing so. The Second Circuit in *Two Grand Jury Subpoenae* indicated that a custodian's act would not be incriminating,<sup>138</sup> while the Sixth Circuit in *Morganstern* held that the act of production was not testimonial.<sup>139</sup> Furthermore, the courts differed in their solutions to the problems created when the government seeks to use a custodian's act of production as evidence against him. These solutions included the appointment of an agent to produce the documents in *Two Grand Jury Subpoenae*,<sup>140</sup> the grant of statutory use immunity in *Brown*,<sup>141</sup> and the suppression of evidence at trial in *Morganstern*.<sup>142</sup> The differing rationales and results of the three cases demonstrate that much ambiguity exists concerning the overlap between the entity exception and the act of production doctrine.

Until recently, there was no confusion concerning the application of the fifth amendment to subpoenaed corporate documents; neither a collective entity nor its custodians could assert the privilege against self-incrimination.<sup>143</sup> This precedent had been continuous and unambiguous since the Supreme Court's decisions in *Hale v. Henkel* and *Wilson v. United States* in the early 1900's.<sup>144</sup>

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135. *Id.*

136. For an analysis of *Two Grand Jury Subpoenae* and *Morganstern*, see *supra* notes 112-32 and accompanying text.

137. See *supra* p. 809.

138. See *supra* notes 116-18 and accompanying text.

139. See *supra* notes 127-32 and accompanying text.

140. See *supra* notes 117-19 and accompanying text.

141. See *supra* p. 809.

142. See *supra* note 132 and accompanying text.

143. See *supra* notes 48-58 and accompanying text.

144. For a discussion of the development of the entity exception, see *supra* notes 16-58 and accompanying text. The act of production doctrine enunciated in *Fisher v. United States*, 425

The confusion that *Doe* and its progeny caused may generate practical and analytical problems as well. Presumably, much of the evidence that the government uses to prosecute collective entities comes from documents belonging to these entities. Until the Supreme Court establishes whether custodians of entity records can assert the fifth amendment privilege, lower courts, prosecutors, and grand juries will act with uncertainty when trying to obtain entity documents through subpoena or summons. More importantly, those who possess entity documents will be unsure of their rights.

## V. HOW *FISHER* AND *DOE* AFFECTED THE ENTITY EXCEPTION

The existing confusion in the lower courts illustrated by the decisions in *Brown*, *Two Grand Jury Subpoenae*, and *Morganstern* arose out of *Doe's* application of the "act of production" doctrine to business records.<sup>145</sup> *Doe's* application of the act of production doctrine to the business records of a sole proprietor may have changed, in several respects, the previously clear scope of the entity exception. First, the act of production doctrine may apply to custodians of corporate records, because courts may interpret the doctrine as a new protection for all persons, regardless of their professional capacity,<sup>146</sup> or because courts may view the custodian's act of production as testimony, which has always been privileged.<sup>147</sup> Second, the reasoning of *Doe* and *Fisher* may indicate that the collective entity exception has become a rule without rationale.<sup>148</sup> The remainder of this section will

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U.S. 391 (1976) and applied in *United States v. Doe*, 465 U.S. 605 (1984) made the scope of the entity exception less clear.

145. Although *Doe* was the basis for the present controversy among the three circuits, some lower courts do not view *Doe* as affecting the entity exception. In *United States v. G. & G. Advertising Co.*, the court indicated that *Doe* is relevant only when the target is a sole proprietor. 592 F. Supp. 1278 (E.D. Miss. 1984). In *In re Grand Jury Subpoena Served Feb. 27, 1984*, the court rejected the idea that a court may apply the "act of production" doctrine when partnership records are subpoenaed. 599 F. Supp. 1006 (E.D. Wash. 1984). The court declined to follow the cases in which the Second Circuit applied the act of production doctrine to corporate records. See *infra* notes 202-05. The court stated that "when coupled with the Supreme Court's holding in *Bellis*, . . . the weight of authority leads this court to conclude that Petitioner may not assert the 'act of production' doctrine in regard to any . . . partnership records in his possession." 599 F. Supp. at 1013. In *In re Heuwetter*, the court stated that the custodian had failed to show how his case differed from cases holding that representatives must produce subpoenaed documents. 584 F. Supp. 119, 124 (S.D.N.Y. 1984). The court reasoned that a custodian is not able to pass the doctrine's requirement of testimonial incrimination. *Id.* at 126. See *infra* notes 175-77 and accompanying text. The court also said that the custodian's act of production "[would] add little or nothing to the sum total of the Government's information." 584 F. Supp. at 124.

146. For further discussion of this issue, see *infra* notes 149-53 and accompanying text.

147. For further discussion of this issue, see *infra* notes 154-59 and accompanying text.

148. For further discussion of this issue, see *infra* notes 161-93 and accompanying text.



analyze the reasoning inherent in these views.

### A. *The Application of Doe*

One interpretation of *Doe* that lends support to the view that the act of production doctrine affected the collective entity exception is that *Doe* formulated a new type of fifth amendment protection. Because the *Doe* Court did not expressly limit the act of protection doctrine to sole proprietors, the protection may apply to all persons, including custodians of corporate records, who can show that the act of producing documents will be testimonial and incriminating. This new protection is distinct from the "contents-based" privilege that was available only to sole proprietors before *Doe*.<sup>149</sup>

This interpretation of *Doe* assumes that the "collective entity" exception was not a general rule that absolutely denied fifth amendment protection to custodians of collective entity documents. Instead, proponents of this view argue that the entity exception only prevented a custodian from claiming a fifth amendment privilege in the contents of the collective entity documents.<sup>150</sup> The entity exception, therefore, would not bar a custodian's assertion of a privilege in the act of production. According to this view, the sole relevant factor in applying *Doe* is whether the act of production is testimonial and incriminating.

Many of the cases that applied the collective entity exception employed general language that indicates that the entity exception also prevents a custodian from claiming an act of production privilege.<sup>151</sup> One should not, however, construe this general language to apply to the act of production doctrine. Because the courts employing this general language had not contemplated an act of production doctrine at the time of their decisions,<sup>152</sup> their language could not

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149. See *Morganstern*, 771 F.2d at 148 (Jones, J., dissenting) (arguing that *Doe* supplements the *Bellis* rule). *Doe*, however, made it clear that the contents of a sole proprietor's business records are not privileged. See *supra* p. 804-05.

150. *Id.* *Bellis* and its predecessors draw a distinction between personal documents and collective documents when evaluating a claim that a document's contents are not privileged. The broad language of *Bellis* was not written to foreclose an act of production privilege for corporate documents. *Id.*

151. In *Bellis v. United States*, the Court stated, in dicta, that "no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." 417 U.S. 85, 100 (1974). The Court, in *White*, also used language that would seem to foreclose any act of production privilege for custodians: "[T]he official records and documents of the organization that are held by [the custodians] in a representative rather than 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." 322 U.S. 694, 699 (1944).

152. The Court decided *White* and *Bellis* before it announced the act of production doctrine in *Fisher*.

have been meant to foreclose an act of production privilege.<sup>153</sup>

### B. *Prior Privilege in Testimony*

The entity exception, while forcing custodians to produce records, has at the same time allowed custodians to assert the fifth amendment privilege against self-incrimination when asked to testify.<sup>154</sup> Because *Fisher* and *Doe* redefined testimonial communication to include certain acts of production, one may now interpret the custodian's privilege not to incriminate himself to include a privilege to forbear from testimonial acts of production. Dicta in *Curcio* approving *United States v. Austin-Bagley Corp.*<sup>155</sup> indicated that courts may compel authentication testimony from custodians who turn over records.<sup>156</sup> Because an act of production is testimonial when it authenticates documents,<sup>157</sup> this dicta in *Curcio* would appear to indicate that courts may compel such production.<sup>158</sup> Such a conclusion, however, would ignore the meaning of the act of production doctrine. *Fisher* and *Doe* indicate that an act of production is testimonial and incriminating when it authenticates documents.<sup>159</sup> The distinction in *Austin-Bagley*, between testimony that authenticates and other testimony, is therefore no longer valid, because courts now consider testimonial acts that authenticate documents privileged.<sup>160</sup>

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153. *Morganstern*, 771 F.2d at 149 (Jones, J., dissenting).

154. See *Bellis*, 417 U.S. at 89-90 ("privilege . . . should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.'") (emphasis added); *Curcio v. United States*, 354 U.S. 118, 124 (1957) ("[A custodian] cannot lawfully be compelled in the absence of a grant of adequate immunity from prosecution to condemn himself by his own oral testimony.") See also *Wilson v. United States*, 221 U.S. 361 (1911) (distinguished the production aspect of a subpoena from the ad testificandum clause of the subpoena, implying that testimony is privileged).

155. 31 F.2d 229 (2d Cir. 1929).

156. 354 U.S. at 125; See also *Brown*, 768 F.2d at 527.

157. *Fisher v. United States*, 425 U.S. 391 (1976).

158. See also *In re Grand Jury Proceedings*, 523 F. Supp. 107, 108 (E.D. Penn. 1981) (the personal privilege in *Curcio* "does not include the identification of corporate documents already produced. Requiring a corporate agent . . . to identify documents already produced merely makes explicit what is implicit in the production itself."); Heidt, *supra* note 68, at 486.

Although the *Curcio* Court recognized the *Austin-Bagley* distinction, dicta in *Bussell v. United States* indicates that such a distinction between testimony auxiliary to production authenticating the documents and other testimony may not be important. 396 U.S. 1229 (1969). Citing *Curcio*, the Court wrote that "all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." *Id.* at 1230 (quoting *Shapiro v. United States*, 335 U.S. 1, 27 (1948)).

Other courts have reiterated the distinction and required corporate custodians to either produce the documents or state under oath that they are not in their possession or under their control. *United States v. Rylander*, 460 U.S. 752, 761, *reh'g denied*, 462 U.S. 1112 (1983); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979).

159. See *supra* notes 66, 77 and accompanying text.

160. 768 F.2d at 527.

The above discussion sets forth two competing interpretations of *Doe*. One position argues that courts may not infer an end to the long-standing corporate entity doctrine from the Supreme Court's silence in *Doe*. The other view argues that the *Doe* Court applied the act of production doctrine without any express limitation, and therefore, this new doctrine encompasses the privilege against self-incrimination which custodians of corporate records already hold. Although the prior discussion indicates that the latter position is more reasonable, the arguments center on determining the Court's intended scope for the act of production doctrine. Because any attempt to determine the Court's intent is speculative, a more useful analysis may be to examine whether any valid rationale remains valid for the corporate entity exception.

### C. *The Entity Exception: A Search for Rationales*

Prior to *Fisher*, the Supreme Court, in *Bellis*, provided two rationales for the corporate entity exception.<sup>161</sup> First, the *Bellis* Court explained that the privilege against self-incrimination "should be limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."<sup>162</sup> The *Bellis* Court, however, did not view the act of production as including either testimony or personal records, both of which were privileged. *Fisher's* redefinition of testimonial communication to include certain acts of production seems to transform a custodian's act of production into a privileged act,<sup>163</sup> thereby undermining the rationale in *Bellis* that a custodian's fifth amendment claim was not an assertion of a personal privilege.

The second rationale that the *Bellis* Court enunciated for the entity exception was that corporate custodians lack an expectation of privacy in entity documents. The Court stated that "the Fifth Amendment 'respects a private inner sanctum of individual feeling and thought.'"<sup>164</sup> A corporation or its representatives, therefore, could not assert the privilege when corporate documents were subpoenaed, because no expectation of privacy existed with respect to the financial records of an organized collective entity.<sup>165</sup>

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161. 417 U.S. 85 (1974).

162. *Id.* at 89-90 (quoting *United States v. White*, 322 U.S. 694, 701 (1944)).

163. *See supra* notes 154-59 and accompanying text.

164. 417 U.S. at 91.

165. *Id.* at 92. The Court explained that no expectation of privacy exists as to corporate documents, because access to the documents is generally guaranteed to others in the organization. *Id.* Given this rationale, it would seem to follow that a one-man corporation has an expectation of privacy in corporate documents. Nevertheless, the court indicated that "no

The *Fisher* Court made this analysis irrelevant by explaining that the fifth amendment does not protect against the disclosure of private business information.<sup>166</sup> The distinction between collective entities and sole proprietors with respect to subpoenaed business documents was based on an expectation of privacy rationale. *Fisher* made this distinction unimportant and undermined the expectation of privacy rationale by holding that the fifth amendment is not a general protector of privacy.<sup>167</sup>

The original rationale that the Supreme Court provided for the corporate entity exception was the notion of the state's "visitorial powers."<sup>168</sup> This concept provides that a state may subpoena corporate records because (1) a corporation is a mere creature of the state and (2) the state needs to regulate corporations.<sup>169</sup> The *Bellis* Court indicated, however, that an expectation of privacy rationale was "the modern-day relevance of the visitorial powers doctrine relied upon by the court in *Wilson* and other cases dealing with corporate records."<sup>170</sup>

The visitorial powers rationale may have relevance apart from any expectation of privacy notions. In *White v. United States*,<sup>171</sup> the Court demonstrated the value of a visitorial powers rationale:

The greater portion of evidence or wrongdoing by an organization or its representatives is usually to be found in the official records and documents of the organization. Were 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.<sup>172</sup>

The Court in *White* thus contended that because governmental bodies and prosecutors need these documents to regulate these organizations,

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privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Id.* at 100.

*But cf.* Comment, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L. J. 351, 371 (1977) (indicating that the Supreme Court had rarely accepted the expectation of privacy notion of fifth amendment analysis). Compare *Bellis* (stating that entities do not have an expectation of privacy in their documents for fifth amendment purposes) with *Andresen v. Maryland*, 427 U.S. 463 (1976) (implying that businesses have an expectation of privacy in business records when the fourth amendment is involved).

166. 425 U.S. at 401; see Heidt, *supra* note 68.

167. 425 U.S. at 401. One should note, however, that the fifth amendment may still protect privacy in cases dealing with private papers. See *supra* note 84.

168. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906); *Hair Indus. Ltd. v. United States*, 340 F.2d 510 (2d Cir. 1965), *cert. denied*, 381 U.S. 950 (1965).

169. *Hale*, 201 U.S. at 74.

170. 417 U.S. at 92.

171. 322 U.S. 694 (1944).

172. *Id.* at 700. For a related comment, see Heidt, *supra* note 68, at 449-50.

courts should not allow custodians of collective entity documents to refuse production of the entity's documents.<sup>173</sup>

Even if courts extend the act of production doctrine to custodians, several theories concerning the application of the act of production doctrine are so restrictive as to imply a rationale for the continued viability of the corporate entity exception. The inference arising from several cases<sup>174</sup> is that a corporate custodian cannot, or can only rarely, meet the criteria for invoking the doctrine. *Fisher*, in announcing the act of production doctrine, explicitly upheld the corporate entity exception in dicta. The majority asserted that even though the production of entity documents "tacitly admits their existence and their location in the hands of their possessor," the act is not sufficiently testimonial for purposes of the privilege against self-incrimination.<sup>175</sup> The Court failed to explain this assertion except to say that "the existence and possession or control of the subpoenaed documents [were] no more in issue than" in cases dealing with handwriting exemplars.<sup>176</sup> Justice Marshall, concurring in *Fisher*, expanded on this belief: "Since the existence of corporate record books is seldom in doubt, the verification of their existence may fairly be termed not testimonial at all."<sup>177</sup> These notions of the applicability of the act of production doctrine to corporations support the view expressed in *Morganstern* and in *Two Grand Jury Subpoenae* that the custodian's act of production is rarely, if ever, a testimonial, incriminating act.<sup>178</sup>

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173. This pragmatic regulatory goal is questionable. The regulation of collective entities is not more important than the prosecution of other crimes.

174. *Fisher v. United States*, 425 U.S. 391 (1976); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.), cert. denied, *Morganstern v. United States*, 105 S. Ct. 594 (1985); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985).

175. 425 U.S. at 411-12. *But see* 425 U.S. at 429-30 (Brennan, J., concurring) (criticizing the idea of "sufficiently testimonial").

176. 425 U.S. at 411-12. *But cf.* Heidt, *supra* note 68 at 473-76. Heidt argues that the courts have unevenly applied the act of production doctrine and that acts such as handwriting exemplars and the custodian's act of production constitute admissions just as much as other acts of production do. Heidt suggests that because of the difficulty in administering the act of production doctrine, the only time the act should be sufficiently testimonial is when the language of the subpoena discloses on its face that implied admissions will establish an element of a crime. *Id.* at 481-85.

177. 425 U.S. at 432 (Marshall, J., concurring); *cf.* *United States v. Fishman*, 726 F.2d 125, 127 (4th Cir. 1983) (applying the same rationale to compel production of patient medical records of a doctor who was a sole practitioner, the court said that self-evident truths need not be proven by the act of production).

178. *Two Grand Jury Subpoenae* indicated that the act of production was not incriminating. 769 F.2d at 57. This question differs from the emphasis in *Fisher* and *Morganstern* on whether the act was testimonial. *Morganstern*, 771 F.2d at 148. In what may have provided the basis for this confusion, the *Fisher* Court defined a testimonial act of production as one which adds to

The Court in *Fisher* inadequately articulated the reasons why an entity custodian's act of production is less testimonial than that of a sole proprietor. Justice Marshall's statement that "the existence of corporate record books is seldom in doubt" did not adequately explain why there should be a distinction between a sole proprietor and a custodian of entity records. Although federal securities statutes and other laws require corporations to keep some financial records,<sup>179</sup> there is no reason why a court should presume the existence of other documents, such as other financial records unique to that corporation or particular receipts or contracts. Furthermore, Justice Marshall failed to mention that an act of production may be testimonial by authenticating and verifying the custodian's possession of the documents. Also, one may argue that because neither the majority in *Fisher* nor Justice Marshall's concurrence stated that the custodian's act of production is nontestimonial as a matter of law,<sup>180</sup> the Court may have recognized that it was too early in the development of the act of production doctrine to foreclose the possibility that a custodian's act of production could be testimonial.

In 1983, the Court of Appeals for the Second Circuit addressed the issue whether a custodian's act of production is testimonial if it verifies the custodian's possession of the documents in question. In *In re Grand Jury Subpoena Duces Tecum Dated June 13, 1983 and June 22, 1983*,<sup>181</sup> the court found the act of production to be testimonial

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the sum total of the government's information. 425 U.S. at 411. This definition relates to both the incriminating and testimonial aspects of an act.

179. *E.g.*, Securities Exchange Act of 1934 §§ 13(a), 13(c), 15(d), 15 U.S.C. §§ 78m(a), 78m(c), 78o(d) (1982) (requiring registered corporations to file certain financial statements). In *Shapiro v. United States*, the Supreme Court of the United States held that a person asked to produce records could not invoke the fifth amendment privilege against self-incrimination if the records were required to be kept by law. 335 U.S. 1 (1948). In order for the "required records" exception of *Shapiro* to apply:

the purpose of the [government's] inquiry must be essentially regulatory; second, information is to be obtained by requiring the presentation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.

*Grosso v. United States*, 390 U.S. 62, 67-68 (1968). Recently, in a case involving odometer statements of car dealerships operating as sole proprietorships, the Court of Appeals for the Sixth Circuit held that *Doe's* "act of production" doctrine could not be invoked because the odometer statements were "required records" within the meaning of *Shapiro* and *Grosso*. *In re Grand Jury Subpoena Duces Tecum Served Upon Randall Underhill*, No. 85-5127 (6th Cir. Jan. 13, 1986) (available Feb. 1, 1986 on LEXIS, GenFed library, USApp file).

180. The majority opinion said that the production was not *sufficiently* testimonial. 425 U.S. at 411. Justice Marshall believed that the existence of corporate records was *seldom* in doubt. 425 U.S. at 432 (Marshall, J., concurring). *See also infra* note 230 and accompanying text.

181. 722 F.2d 981 (2d Cir. 1983).

where a former officer possessed the corporation's records. Because he was no longer a corporate officer, his production would prove that he, and not the corporation, possessed the records. The court implied, however, that a custodian's production of documents normally would only attest to the corporation's possession of the documents.<sup>182</sup> Nevertheless, the case demonstrates another situation where a corporate "custodian" meets the "testimonial and incriminating" standard for invoking the act of production doctrine.<sup>183</sup> Therefore, the view that the custodian's act of production is not generally testimonial does not foreclose the application of the act of production doctrine to corporate custodians and does not create a per se corporate entity exception.

The court in *Brown* used a different test in applying the act of production doctrine. The court noted that under *Fisher* the test for determining whether the act of production doctrine applies is whether the act verifies the existence, possession, or control of the papers. Nevertheless, rather than applying this test,<sup>184</sup> the *Brown* court appeared to apply a test derived from *Schmerber v. California*.<sup>185</sup> This test involves a determination of the communicative or noncommunicative nature of the disclosures: whether the disclosure reveals a person's thought processes.<sup>186</sup> This test is concerned with whether the contents of the papers reveal a person's state of mind.<sup>187</sup> The *Brown* court therefore remanded to the district court solely for a determination of whether the act of production is incriminating.<sup>188</sup> Because the *Brown* court believed that under *Fisher* an act of production was communicative, it did not find a need to determine whether the "act of

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182. *Id.* The court, although holding that the production by a former corporate officer would be testimonial, stated the reason why a corporate representative usually is obligated to produce records:

[T]here would rarely be any dispute over possession when the person subpoenaed is required to respond in his representative capacity. In producing records . . . he would not be attesting to his personal possession of them but to their existence and possession by the corporation which is not entitled to claim a fifth amendment privilege with respect to them.

*Id.* at 986.

183. See also *In re Katz*, 623 F.2d 122, 126 (2d Cir. 1980) (act of production was incriminating and testimonial because the government, which sought to obtain articles of incorporation, was not aware of the existence of or the target's relationship to the corporation).

184. According to Justices Marshall and White, this test allows limited application to the corporation. See *supra* notes 75-78 and accompanying text.

185. 384 U.S. 757 (1966) (compelled production of blood samples did not violate the fifth amendment privilege against self-incrimination).

186. 768 F.2d at 526.

187. See Note, *supra* note 66, at 686 (indicating that this approach may be based on the desire to protect privacy, an approach which *Fisher* disapproved).

188. 768 F.2d at 529.

production" was communicative.<sup>189</sup> This interpretation of the act of production doctrine implicitly contradicts the view that a corporate custodian's act of production is not testimonial.

Judge Becker, in a concurring opinion in *Brown*, addressed the issue of whether authentication of corporate records involves testimonial communication. He found that production in the case before the court would be testimonial, because the subpoena requested documents "relating to accounting services performed by [the defendant] or under [his] supervision."<sup>190</sup> Judge Becker believed that the subpoena constituted an interrogatory that asked the defendant whether he had prepared the documents.<sup>191</sup> In this situation, according to Judge Becker, the custodian of records, in complying with the subpoena, would testify to the existence of these records and their authenticity. This testimonial communication would occur even if Justice Marshall's observation, that the existence of the records is seldom in doubt, was true.

Thus, Justice Marshall's attempt to create an entity exception to the act of production doctrine appears to be without merit, because *Fisher* made the privacy rationale for treating corporations differently from sole proprietors no longer valid.<sup>192</sup> The sole remaining rationale for the entity exception seems to be that corporations should not be able to shield their documents when courts and governmental bodies need them for regulatory purposes.<sup>193</sup> The purpose of the next sections of this comment is to attempt to accommodate this government need for regulation with the application of the act of production doctrine to entity custodians.

## VI. THREE RECENT CASES: A FOUNDATION FOR A RULE

### A. *A Common Theme*

The three recent cases from the Second, Third, and Sixth Circuits<sup>194</sup> provide a foundation for formulating a rule on how courts should apply the act of production doctrine to the custodians of collective entities. Despite their differences, the three cases share a com-

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189. The court said, "[i]n *Fisher* the Court specifically referred to the communicative nature of production." 768 F.2d at 527. The court then indicated that the critical determination in *Fisher* and *Doe* was whether the act of production would be incriminating. *Id.* at 528.

190. *Id.* at 531 (Becker, J., concurring).

191. *Id.*

192. See *supra* notes 161-70 and accompanying text.

193. Even if *Doe* undermined the rationales for the collective entity exception, a corporation still has no fifth amendment privilege in its documents. *Doe* explicitly held that the contents of business documents are not privileged. 465 U.S. at 612.

194. See *supra* notes 85-135 and accompanying text.



mon theme: (1) a custodian of corporate records need not incriminate himself with the testimonial acts of production; and (2) the act of production doctrine must not prevent a grand jury or governmental body from ordering corporate records to be produced. The differences in the cases arose out of the manner in which each court furthered the goals it articulated.

The courts articulated the second concern, that a corporation or its agents must not be permitted to shield corporate records, in various ways. In *Morganstern*, the Sixth Circuit held that the custodian had to produce the corporate records.<sup>195</sup> In *Two Grand Jury Subpoenae*, the Second Circuit noted that the corporation had a duty to produce records and explained that, when the act of production would incriminate the custodian of records, an appointed agent could produce the records without breaching the corporation's duty.<sup>196</sup> In *Brown*, the Third Circuit intimated that the government could request the court to direct the corporation to appoint an agent to produce and authenticate the documents; the court wrote that "[t]he government did not in this case request the court to direct that the corporation appoint such an agent."<sup>197</sup> The *Brown* court also stated that the government could insure that the custodian produced and authenticated the documents by granting him statutory use immunity. Thus, each court provided a means whereby the government could insure that the documents are produced without forcing the custodian of the documents to testify against himself.

The three courts based the concern over government access to corporate documents on the view that the corporate entity exception is valid at least as applied to the entity. The court in *Brown* stated that neither corporations nor other collective entities may assert a privilege against self-incrimination.<sup>198</sup> The courts in *Two Grand Jury Subpoenae* and in *Morganstern* denied the fifth amendment privilege to corporate representatives because:

recognition of the individual's claim of privilege with respect to the

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195. 771 F.2d at 144.

196. 769 F.2d at 57. A relevant factor in a court's decision as to whether documents must be produced is the party to whom the subpoena is addressed. The court, in *Two Grand Jury Subpoenae*, considered that the subpoenas were addressed to "custodian" and "Custodian of Records" when it determined that the corporation had a duty to produce the documents. *Id.* at 59. The court distinguished *In re Katz*, 623 F.2d 122 (2d Cir. 1980) and *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981 (2d Cir. 1983). Both of these cases had applied the act of production doctrine to the corporation (thereby shielding the records) by emphasizing that the the subpoenas were not directed to the corporation. *See also* note 214.

197. *Brown*, 768 F.2d at 529 n.4.

198. *Id.* at 528.

financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.<sup>199</sup>

The first aspect of the common theme running throughout these cases is the belief that an individual employee should not incriminate himself through his testimonial acts of production. This belief may not be apparent in *Morganstern* and *Two Grand Jury Subpoenae* because each court ordered the employee to produce the documents in question.<sup>200</sup> Although the two courts expressly limited *Doe's* holding to sole proprietors, each court, in some way, expressed a concern that individuals may incriminate themselves by the act of producing documents. In *Two Grand Jury Subpoenae*, the court implied that the employee may assert a right not to produce corporate documents when the act of producing the records is testimonial and incriminating.<sup>201</sup> Although stating that these situations, if any, would be rare, the court did not disapprove of the application of the act of production doctrine in two cases involving corporations: *In re Katz*<sup>202</sup> and *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*.<sup>203</sup> The court in *Katz* applied the act of production doctrine where (1) the subpoenaed articles of incorporation indicated the person's connections with the corporation, and (2) the government did not know the identity of the corporation.<sup>204</sup> The doctrine also was applied in *In re Grand Jury Subpoenas*, where a subpoena was directed to a former corporate officer. Because he was a former officer, his production of corporate documents would verify his possession, rather than the corporation's possession, of the documents.<sup>205</sup>

The statement in *Two Grand Jury Subpoenae* that *Doe* applied solely to sole proprietors,<sup>206</sup> seems to indicate that a corporate custodian may not assert a fifth amendment privilege by invoking the act of production doctrine. Instead, these statements indicate the court's concern that an entity should not invoke the fifth amendment in order

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199. *Two Grand Jury Subpoenae*, 769 F.2d at 56; *Morganstern*, 771 F.2d at 145 (quoting *Bellis*, 417 U.S. 85, 90-91 (1974)).

200. *Morganstern*, 771 F.2d 143 (6th Cir.) (*en banc*), *cert. denied*, 106 S. Ct. 594 (1985); *Two Grand Jury Subpoena*, 769 F.2d 52 (2d Cir. 1985).

201. 769 F.2d at 57.

202. 623 F.2d 122 (2d Cir. 1980).

203. 722 F.2d 981. The court in *Two Grand Jury Subpoenae* noted the application of the act of production doctrine in this case and in *Katz*. 769 F.2d at 59.

204. *Katz*, 623 F.2d at 126.

205. 722 F.2d at 986-87. The court held that the district court erred in deciding that the *Fisher* act of production doctrine did not apply to corporate records. *Id.* at 986.

206. 769 F.2d at 58.

to shield records. The court in *Two Grand Jury Subpoenae* stated that *Doe* did not change present law which "gives the custodian . . . no fifth amendment privilege to stop the corporation from producing documents."<sup>207</sup> Therefore, *Two Grand Jury Subpoenae* does not necessarily hold that a corporate custodian may not claim a fifth amendment privilege; he may claim a privilege if he meets the act of production criteria as long as the documents are not shielded.

The concern that a custodian's act of production not be used against him is voiced in the other two cases, *Morganstern* and *Brown*. Even though the court in *Morganstern* held that a corporate representative had to comply with a subpoena duces tecum,<sup>208</sup> it mentioned, in dicta, that if the act of production would be used against the custodian, "evidence of that fact is subject to a motion to suppress."<sup>209</sup> The same problem was the major concern in *Brown*, where the court allowed the custodian to avoid production if the act of production would be incriminating.<sup>210</sup> All three circuits, therefore, provide a means to prevent the act of production from incriminating the person producing collective entity documents.

### B. *An Application of Doe to the Corporate Setting*

Although *Morganstern* and *Two Grand Jury Subpoenae* explicitly held that *Doe* does not apply to corporations,<sup>211</sup> the common theme running through these cases may provide a basis for applying the act of production doctrine to collective entities.<sup>212</sup> The *Doe* Court was not only concerned that the producer of business documents not incriminate himself by the testimonial aspects of production, but the Court also believed that corporations should not be able to shield their records from investigative governmental bodies. *Doe* held that the contents of business records are not privileged.<sup>213</sup> If no privilege exists in the documents themselves, then a grand jury or a govern-

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207. *Id.* at 56 (emphasis added).

Unlike a sole proprietor's assertion of the fifth amendment in *Doe*, the application of the act of production doctrine to a corporate custodian would not prevent production of the papers where the subpoena was addressed to "custodian" or to "corporation." See *supra* note 196 and accompanying text. Because the corporation is an entity separate from the person producing the records, the court may direct the corporation to find a party, who would not be incriminated by the production, to produce the corporate documents.

208. 771 F.2d at 144. The court's holding was predicated on the idea that the act of production would not be testimonial, because the custodian acts only in a representative capacity. *Id.* at 148.

209. *Id.*

210. 768 F.2d 525 (3d Cir. 1985).

211. 771 F.2d at 147; 769 F.2d at 58.

212. See *supra* notes 197-211 and accompanying text.

213. See *infra* note 76 and accompanying text.

mental body may subpoena them. Any act of production privilege claimed by an individual producer should not be translated into a privilege as to the contents of the documents requested to be produced.<sup>214</sup> Thus, if interpreted in this manner, *Brown*, *Two Grand Jury Subpoenae*, and *Morganstern* can be seen as applications of *Doe* to collective entities.

### C. Common Theme as a Foundation for a Rule

The goals implicit in the theme of the three cases provide a basis for allowing individuals in collective entities to claim a fifth amendment privilege when producing corporate documents. The first goal, allowing an individual to avoid incriminating himself by his personal, testimonial act is a fundamental fifth amendment right.<sup>215</sup> To hold that a person waives his right against self-incrimination because of his employment would pay too much homage to a "corporate entity exception" no longer based on principle.<sup>216</sup>

The second goal, denying a corporation the right to shield its documents, also is reasonable, as long as courts are able to achieve this goal without encroaching on individual rights. The remaining rationale for the entity exception is that it enables the government to regulate corporations and other collective entities.<sup>217</sup> If courts fashion means to acquire the documents without requiring the custodian's incriminating act of production, then they can still further this regulatory goal. Courts may apply the act of production doctrine without sacrificing the rationale for the corporate entity exception, because the contents of entity documents are not privileged.

The courts in *Brown*, *Two Grand Jury Subpoenae*, and *Morganstern* have not fully articulated the means (agent appointment, use immunity, and suppression) by which they attempt to acquire documents without the custodian's production. For example, the Third Circuit in *Brown*, which provided for the appointment of an agent when a custodian successfully asserts his privilege against self-incrimination, has left some questions unanswered. If the corporation is

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214. When a sole proprietor successfully invokes the act of production doctrine, the government is not able to acquire the documents unless it grants the proprietor use immunity. *Doe*, 465 U.S. at 617. This may result in the shielding of the proprietor's documents. In contrast, a court may enforce a subpoena directed toward a corporation after a party invokes the doctrine by ordering the corporation to produce the documents through an agent. The status of the corporation, as an entity distinct from the party invoking the privilege against self-incrimination, allows the government access to the documents.

215. *Id.* at 612-13.

216. *But see supra* notes 161-93 and accompanying text.

217. *See supra* notes 151-56 and accompanying text.

ordered to appoint an agent to produce the documents, may it avoid the order if the original custodian is the sole party who knows the existence or the location of the records or if the records are physically in the custodian's possession? These problems are accentuated in investigations of one-person corporations. In dicta, the Second Circuit, in *Two Grand Jury Subpoenae*, indicated that a "one-person corporation"<sup>218</sup> may be required to hire a party to produce and then testify about the subpoenaed records.<sup>219</sup> This suggestion, however, fails to solve situations where only the custodian is able to find the documents or testify about them. If the court orders the custodian to assist the special agent, the custodian is indirectly acting in a testimonial, incriminating manner, because the agent's testimony about the documents will be based on the information that he communicated to the agent. In *Brown*, the Third Circuit did not indicate that a corporation must hire a new employee, nor did it explain how a one-man corporation could comply with a subpoena.<sup>220</sup> Thus, it is possible that the Third Circuit may allow a one-man corporation to shield its records, because the party invoking the privilege is the only party able to comply with the subpoena.

The Sixth Circuit's suggestion in *Morganstern*, that testimonial aspects of production be suppressed after the court orders production,<sup>221</sup> seems questionable in light of *Doe*. The Supreme Court in *Doe* ruled on a court's ability to order an act of production when the act may be testimonial and incriminating and declined to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the immunity statute requires.<sup>222</sup>

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218. The target in *Two Grand Jury Subpoenae* was a majority stockholder. The court referred to him as a one-man corporation because he was the sole operating officer and director of the corporation. 769 F.2d at 54.

219. *Id.* at 57.

220. The court stated that "most business entities will have agents who can provide testimony without self-incrimination." 768 F.2d at 529. Presumably, the court would not grant the government's request for an order requiring a one-man corporation to appoint an agent because no other party would be able to produce the documents. On the other hand, the court indicated that the government had not requested an agent, implying that if it had, the one-man corporation would have been required to appoint an agent.

221. See *supra* note 80 and accompanying text.

222. *Doe*, 465 U.S. at 616. The Court explained that courts suppress compelled, incriminating testimony that results from a violation of a witnesses' fifth amendment rights but distinguished this situation from constructive use immunity, where a court compels a witness to testify. Courts that have suppressed testimony have not compelled it. The purpose of suppression is to deter the government from committing future violations of witnesses' fifth amendment rights, but this goal is not met through constructive use immunity. *Id.* at 616 n.16. In other words, courts may suppress testimonial communication but should not compel such testimony without the statutory grant of authority. See also *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1057 (1st Cir. 1980) (stating that judicial creation of an

The Court explained that Congress expressly left this decision exclusively to the Justice Department.<sup>223</sup> By allowing a trial court to suppress testimonial acts of production *which have been compelled*, the *Morganstern* court seemed to circumvent the mandate of *Doe*.

Statutory use immunity is appropriate for the application of the act of production doctrine in the corporate context. The rationale for the entity exception is preventing corporations or other entities from shielding their documents.<sup>224</sup> The common theme of the cases from the three circuits is that courts must not compel individuals to incriminate themselves but must prevent corporations from shielding documents.<sup>225</sup> The immunity statutes<sup>226</sup> are suitable vehicles for courts to further these competing goals. In *Kastigar v. United States*,<sup>227</sup> the Supreme Court of the United States held that immunity granted under 18 U.S.C. § 6002 need only be coextensive with the scope of the party's privilege. Because the government need only immunize that portion of the requested evidence for which a valid claim of immunity has been raised,<sup>228</sup> the statute allows prosecutors to obtain the documents while allowing the person producing them to assert the privilege against self-incrimination.

## VII. THE FRAMEWORK FOR A RULE

Given the rationale for the entity exception and the common theme of the three cases, it is possible to develop a framework in which the act of production doctrine could apply in the corporate context. Courts could examine the application of the doctrine by using the following steps. The first question a court should ask is whether the act of production is testimonial. Because the act of production is sometimes testimonial,<sup>229</sup> one cannot argue that a corporate custodian's act of production is non-testimonial as a matter of law. The Supreme Court in *Fisher* explained that this question does not lend itself to categorical answers but, instead, depends on the facts and circumstances of particular cases.<sup>230</sup> Courts, however, should

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exclusionary rule in this context would amount to a judicial grant of immunity without statutory authorization).

223. 465 U.S. at 616.

224. See *supra* notes 171-73, 193 and accompanying text (discussing the pragmatic, regulatory rationale for the entity exception).

225. See *supra* notes 193-210 and accompanying text (specifying the ways in which the cases agree).

226. See *supra* note 79 for the text of the statute.

227. 406 U.S. 441, 450 (1972); *Martinez*, 626 F.2d at 1058.

228. *Martinez*, 626 F.2d at 1058.

229. See *supra* notes 179-83, 188-91 and accompanying text.

230. 425 U.S. at 410.

note that the custodian's act of production may not be sufficiently testimonial if the existence of the documents is a foregone conclusion and if the act verifies only the entity's possession of the documents.<sup>231</sup>

If the act is testimonial, the next step involves an attempt to prevent corporations from shielding their documents. When a subpoena is directed to a corporation, and the act of production would be testimonial and incriminating for an individual custodian, the court may direct the corporation to comply with the subpoena by appointing an agent to produce the documents.<sup>232</sup> Because the corporation may not be able to comply with the court's order,<sup>233</sup> the court should give it an opportunity to show why it cannot do so. If the corporation makes this showing, prosecutors must then resort to statutory use immunity in order to gain access to the documents. Courts should not order a custodian to produce documents if the custodian meets the requirements of the act of production doctrine, unless the prosecutor makes a request for statutory use immunity.<sup>234</sup> If testimonial aspects of production are admitted into evidence without court compulsion, the courts should be permitted to suppress this evidence.<sup>235</sup>

### VIII. CONCLUSION

*Doe's* rationale limited the collective entity exception but did not change the rule that a corporation has no fifth amendment privilege with regard to the contents of its documents. The act of production doctrine should apply to the individual custodians of corporate records, because there is no reason for creating a per se denial of this doctrine to the custodian. The act of production doctrine relates more to the custodian's long-held privilege as to testimony than to the contents-based collective entity exception. A denial of the privilege to a custodian simply because he acts in a "representative capacity" for the corporation or entity would impinge upon fundamental constitutional rights and would be based on meaningless legal jargon and distorted legal reasoning. The collective entity exception, insofar as it relates to custodians of records, has reached the end of a useful life.

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231. See *supra* notes 177-79, 182 and accompanying text.

232. This method of acquiring the documents highlights a major difference between a corporate custodian and a sole proprietor. When a sole proprietor invokes the act of production doctrine, there is no separate entity which may be ordered to comply with the subpoena.

233. See *supra* notes 218-20 (specifying problems that arise when the person asserting the privilege is the only party who is able to produce the documents).

234. See *supra* notes 221-23 and accompanying text (explaining that courts have no jurisdiction to grant constructive use immunity).

235. See *supra* notes 222 (Suppression of evidence derived from violations of fifth amendment is permitted.).

Now that the contents of business records are no longer protected by the fifth amendment, the entity exception should be replaced with an interpretation of *Doe* that denies a corporation the opportunity to shield its documents while at the same time allowing the custodian to claim a fifth amendment privilege when production would be testimonial and incriminating.

The common theme of the three post-*Doe* cases analyzed in this comment provides a framework by which a custodian's "act of production" privilege can be formulated.<sup>236</sup> A custodian should have the right to avoid self-incriminating and testimonial acts of production, especially if the documents sought can be obtained by other means. If the government's quest for information is not impeded, the custodian's fifth amendment rights should not be sacrificed.

The Supreme Court of the United States, however, has indicated in dicta that acts of production would rarely be incriminating and testimonial.<sup>237</sup> Although this may be true, the Court should not hesitate to allow custodians of corporate records to claim a fifth amendment privilege when the act of producing the documents *would* be testimonial. By doing so, the Court would heed Justice Bradley's admonition in *Boyd* that illegitimate and unconstitutional practices "can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."<sup>238</sup> By allowing corporate custodians to invoke the act of production doctrine, the Supreme Court can keep alight *Boyd*'s flickering flame.

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236. See *supra* notes 195-210 and accompanying text (explaining the common theme of *Brown*, *Two Grand Jury Subpoenae*, and *Morganstern*).

237. See *supra* notes 175-77 and accompanying text (expanding on the notion that a custodian's act of production is not sufficiently testimonial).

238. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

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