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Fifth Amendment--The Act of Production Privilege: The Supreme Court's Portrait of a Dualistic Record Custodian

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FIFTH AMENDMENT—THE ACT OF PRODUCTION PRIVILEGE: THE SUPREME COURT'S PORTRAIT OF A DUALISTIC RECORD CUSTODIAN

Braswell v. United States, 108 S. Ct. 2284 (1988).

I. INTRODUCTION

In *Braswell v. United States*,[1] the United States Supreme Court rejected the fifth amendment[2] claim of a one-man corporation's[3] record custodian,[4] who resisted a subpoena to produce documents on the ground that his act of producing the documents would tend to incriminate himself.[5] The Court ruled instead that the common law collective entity doctrine[6] precluded petitioner Braswell's claimed act of production privilege.[7]

In two decisions prior to *Braswell*, however, the Supreme Court "embarked upon a new course of Fifth Amendment analysis" and enunciated a compelled testimony standard.[8] In *Fisher v. United*

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1 108 S. Ct. 2284 (1988).

2 The fifth amendment provides in pertinent part: "nor shall [any person] be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. *See* Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-98 (1968) and S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 385-88 (2d ed. 1984), for an examination of the traditional justifications for fifth amendment protection.

3 *See* In re Grand Jury Proceedings, 814 F.2d 190, 192 (5th Cir. 1987), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988). For a description of the extent of Braswell's control over the corporations, see *infra* notes 26-30 and accompanying text.

4 A "corporate record custodian" is any person who has custody or charge of corporate papers, records, or documents. *See* BLACK'S LAW DICTIONARY 347 (5th ed. 1979).

5 *Braswell*, 108 S. Ct. at 2295.

6 The collective entity doctrine states that the fifth amendment privilege is strictly personal and may not be invoked on behalf of a collective entity or its representatives in their official capacity. Hale v. Henkel, 201 U.S. 43, 69-70 (1906).

The Court has defined a collective entity as "an organization which is recognized as an independent entity apart from its individual members." *See* Bellis v. United States, 417 U.S. 85, 92 (1974).

7 *Braswell*, 108 S. Ct. at 2292. For a description of the act of production privilege, see *infra* notes 55-56 and accompanying text.

8 *Braswell*, 108 S. Ct. at 2290-91.

States,[9] the Court defined the new standard, stating that "the [fifth amendment] privilege protects a person only against being incriminated by his own compelled testimonial communications."[10] The Court thus identified three factors to be determinative of fifth amendment protection under the Court's new analysis: compulsion, testimonial communication, and personal incrimination.[11] The Court subsequently applied the compelled testimony standard in *United States v. Doe*.[12] There the Court held that a sole proprietor's act of producing documents pursuant to a subpoena was privileged under the fifth amendment when it would effect compelled testimonial self-incrimination.[13]

Nevertheless, the *Braswell* majority avoided applying the Court's new standard to the record custodian of a one-man corporation.[14] The majority instead relied upon the collective entity doctrine to reject Braswell's fifth amendment claim and affirm his citation for contempt.[15]

This Note examines the *Braswell* decision and concludes that the majority erred in applying the formalistic collective entity doctrine instead of the compelled testimony standard which is both easier for courts to apply and more equitable in its treatment of individual claimants. The majority opinion also erred in its reliance on and analysis of the white-collar crime rationale, in adopting constructive use immunity in disregard of recent Court precedent, and in refusing to accord constitutional protection to testimonial acts.

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

10 *Id.* at 409. In *Fisher*, the Court held that a taxpayer's act of producing his accountant's workpapers was not sufficiently testimonial, and therefore not privileged. *Id.* at 411. The Court was persuaded by the fact that the workpapers belonged to and were prepared by the accountant. Thus, the Court stated that the taxpayer's production was a " 'question . . . not of testimony but of surrender.' " *Id.* (quoting In re Harris, 221 U.S. 274, 279 (1911)).

11 *Id.* at 410.

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

13 *Id.* at 613, 617. The Court stated in United States v. Doe that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." *Id.* at 612.

In Doe v. United States, 108 S. Ct. 2341 (1988), the Court applied the compelled testimony standard to a petitioner's attempt to resist compliance with a consent directive which compelled him to authorize foreign banks to disclose his account records. The Court rejected the claimed fifth amendment privilege, holding that the consent directive was not sufficiently testimonial. *Id.* at 2352.

14 *Braswell*, 108 S. Ct. at 2291, 2295.

15 *Id.* at 2292, 2295.

II. FACTUAL SUMMARY OF *BRASWELL*

Randy Braswell operated a sole proprietorship[16] from 1965 until 1980.[17] His business consisted primarily of buying and selling equipment, land, timber, and oil and gas interests.[18] In 1980, Braswell incorporated his business under the name Worldwide Machinery Sales, Inc.[19] He formed a second corporation in 1981 named Worldwide Purchasing, Inc.[20]

Braswell incorporated both businesses in the state of Mississippi.[21] In accordance with Mississippi law,[22] each corporation had three directors — Braswell, his wife, and his mother.[23] Braswell named his wife and mother as secretary-treasurer and vice-president, respectively, of both corporations.[24] Neither individual, however, had authority over the business affairs of the corporations.[25]

Braswell was the president and sole shareholder of both corporations.[26] He conducted all of his business and personal affairs through the corporations.[27] He personally guaranteed the corporations' loans,[28] and claimed to have " 'absolute, total, [and] complete' control over the corporations."[29] Moreover, Braswell claimed that he was so synonymous with the corporations that he acquired the nickname "Worldwide."[30]

The government subsequently commenced a tax fraud investigation of Braswell's personal income tax returns for the years 1982 through 1985.[31] In August 1986, a federal grand jury issued a sub-

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16 A "sole proprietorship" is a business owned and controlled exclusively by one person. BLACK'S LAW DICTIONARY 1098 (5th ed. 1979).

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

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 MISS. CODE ANN. § 79-3-69 (1972) (repealed 1987).

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

24 *Id.*

25 *Id.*

26 In re Grand Jury Proceedings, 814 F.2d 190, 191 (5th Cir. 1987), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988).

27 *Id.* The personal expenses of Braswell and his wife were paid out of the corporate checking accounts. *Id.* at 192. All of his personal assets, including his house, were owned in the names of the corporations. *Id.* The personal credit cards used by Braswell and his wife were also in the names of the corporations. *Id.*

28 *Id.* This fact is significant in proving that Braswell did not incorporate his businesses to escape personal liability. *See infra* note 211 and accompanying text.

29 In re Grand Jury Proceedings, 814 F.2d at 192.

30 Brief for Petitioner at 6, Braswell v. United States, 108 S. Ct. 2284 (1988)(No. 87-3).

31 *Id.* at 40. The scope of the investigation also included the corporations' returns. *Id.*

poena personally to " 'Randy Braswell, President Worldwide Machinery, Inc. [and] Worldwide Purchasing, Inc.' "[32] The subpoena did not require Braswell to testify, but ordered him to produce certain documents of the two corporations.[33]

Braswell moved to quash the subpoena on the ground that his act of producing the documents would violate his fifth amendment right against self-incrimination.[34] The district court denied the motion and ordered Braswell to produce the documents.[35] The court held that the collective entity doctrine[36] precluded Braswell from asserting a fifth amendment privilege for the production of corporate documents.[37] Braswell subsequently appeared before the grand jury but refused to produce the documents.[38] The district court held Braswell in contempt of court and suspended his commitment, pending an appeal.[39]

The United States Court of Appeals for the Fifth Circuit affirmed the district court's denial of Braswell's motion to quash the subpoena.[40] The court cited *Bellis v. United States*[41] as support for the proposition that a corporate record custodian may not refuse a

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[32] *Braswell*, 108 S. Ct. at 2286 (citation omitted).

[33] *Id.* The subpoena ordered Braswell to produce the following documents:

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

Id. at 2286 n.1.

[34] In re Grand Jury Proceedings, 814 F.2d at 192.

[35] *Id.*

[36] *See supra* note 6.

[37] *Braswell*, 108 S. Ct. at 2286. The district court noted that "Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost could be conceived." In re Grand Jury Proceedings, 814 F.2d at 192. Nevertheless, the district court rejected Braswell's argument that "the collective entity doctrine does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego." *Braswell*, 108 S. Ct. at 2286.

[38] In re Grand Jury Proceedings, 814 F.2d at 192.

[39] *Id.*

[40] *Id.* at 193.

[41] 417 U.S. 85 (1974). The Court held in *Bellis* that a partner in a three-person law firm could not refuse a subpoena to produce partnership documents on the ground that the documents' contents might tend to incriminate him. *Id.* at 101. While the Court employed the collective entity doctrine to reject the claimed privilege as to the documents' contents, the Court endorsed the compelled testimony standard in principle if not in name: "[T]he privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony.' " *Id.* at 89-90 (quoting United States v. White, 322 U.S. 694, 701 (1944)).

subpoena to produce documents on fifth amendment grounds, regardless of the corporation's size.[42] Thus, the court ruled that "Braswell's contention that his 'one-man' corporations are not collective entities must fail."[43]

The Courts of Appeals had split on the issue of whether a corporate record custodian may assert a fifth amendment privilege as to the act of production to resist a subpoena for documents.[44] The United States Supreme Court granted Braswell's petition for writ of certiorari[45] to resolve this split in the circuits.[46]

III. THE MAJORITY OPINION

In *Braswell v. United States*,[47] the United States Supreme Court affirmed the Fifth Circuit Court of Appeals' denial of Braswell's motion to quash a subpoena to produce documents.[48] The Court held that the custodian of corporate records may not resist a subpoena to produce documents on the ground that the act of production will personally incriminate him in violation of the fifth amendment.[49]

Chief Justice Rehnquist, writing for the majority,[50] began the opinion by reaffirming two tenets historically promulgated in the Court's fifth amendment analysis: the contents of business documents are not privileged under the fifth amendment;[51] and artificial

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42 In re Grand Jury Proceedings, 814 F.2d at 192.

43 *Id.*

44 The Second, Third, Fourth, Eleventh and District of Columbia Circuits have allowed an act of production privilege for the custodian of collective entity documents. *See* In re Sealed Case, 832 F.2d 1268, 1279 (D.C. Cir. 1987); In re Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569, 573 (11th Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240 (4th Cir.), *cert. denied*, 479 U.S. 985 (1986); United States v. Sancetta, 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury Matter (Brown), 768 F.2d 525, 526 (3d Cir. 1985)(en banc).

The First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, however, have denied the act of production privilege to collective entity custodians. *See* In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), *cert. dismissed*, 479 U.S. 1048 (1987); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143, 148 (6th Cir.)(en banc), *cert. denied sub nom.* Morganstern v. United States, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985); United States v. Malis, 737 F.2d 1511, 1512 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 945 (10th Cir.), *cert. denied*, 469 U.S. 819 (1984); In re Grand Jury Proceedings United States, 626 F.2d 1051, 1053 (1st Cir. 1980).

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

46 Braswell v. United States, 108 S. Ct. 2284, 2287 (1988).

47 108 S. Ct. 2284 (1988).

48 *Braswell*, 108 S. Ct. at 2287.

49 *Id.*

50 The Chief Justice was joined by Justices White, Blackmun, Stevens, and O'Connor. *Id.* at 2286.

51 *Id.* at 2287 (citing United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976)).

entities may not assert a fifth amendment privilege.[52] The Court noted that Braswell challenged neither of these principles, but rather, asserted that "his *act of producing* the documents [had] independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits government compulsion of that act."[53] The majority indicated that this argument was premised on the Court's decisions in *Fisher v. United States* and *United States v. Doe*.[54]

Chief Justice Rehnquist proceeded to summarize the *Fisher* and *Doe* opinions. The Chief Justice stated that the issue in *Fisher* was whether an attorney may assert a fifth amendment privilege to resist a subpoena to produce client tax records prepared by the client's accountant.[55] According to the majority, the Court in *Fisher* stated that the fifth amendment prohibits compelled testimonial self-incrimination, and recognized that:

> "[t]he 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[56]. . . . The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment."[57]

According to Chief Justice Rehnquist, *Fisher* concluded that the act of production in that case would not effect testimonial self-incrimination.[58]

Chief Justice Rehnquist acknowledged that *Doe* held that a sole proprietor possessed a fifth amendment privilege prohibiting compelled production of business records.[59] The Chief Justice hypothe-

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[52] *Id.* (citing Bellis v. United States, 417 U.S. 85 (1974)).

[53] *Id.* (emphasis added).

[54] *Braswell*, 108 S. Ct. at 2287 (citing *Fisher*, 425 U.S. at 391, and *Doe*, 465 U.S. at 605).

[55] *Id.* As Chief Justice Rehnquist noted, *Fisher* determined the availability of a fifth amendment privilege to the attorney by determining whether the taxpayer-client was protected under the fifth amendment. *Id.*

[56] Courts following the act of production doctrine generally imply three testimonial statements manifested in the production of documents: 1) an admission that the documents exist; 2) that they are in the possession of the custodian; and 3) that the custodian believes them to be authentic. *See Fisher*, 425 U.S. at 410; *Doe*, 465 U.S. at 613 n.11.

[57] *Braswell*, 108 S. Ct. at 2287 (quoting *Fisher*, 425 U.S. at 410).

[58] *Id.* at 2287-88 (citing *Fisher*, 425 U.S. at 411). *Fisher* ruled that the existence and location of the accountant's workpapers was a foregone conclusion, and thus the act of production had no testimonial value. *Fisher*, 425 U.S. at 411. Furthermore, the Court noted that the workpapers were prepared by and belonged to the accountant. *Id.* Thus the Court found little testimonial significance in the *taxpayer's* act of production. *Id.*

[59] *Braswell*, 108 S. Ct. at 2288. The Court in *Doe* did not examine the testimonial aspects of the proprietor's act of production. *Doe*, 465 U.S. at 614. Rather, as the majority indicated, the Court deferred to the district and appellate courts, "which had found

sized that, had Braswell operated his business as a sole proprietorship, he would have been entitled under *Doe* to an opportunity to prove the testimonial and incriminating nature of his act of production.[60] The majority asserted, however, that courts have long distinguished between corporations and individuals for purposes of fifth amendment analysis.[61] The Chief Justice stated that the Court determines the fifth amendment rights of the former according to the collective entity doctrine.[62]

Before applying the collective entity doctrine to the facts of *Braswell*, Chief Justice Rehnquist traced the Court's development of the doctrine. According to the majority, the Court first enunciated the collective entity rule in *Hale v. Henkel*.[63] The majority observed that *Hale* rejected a corporate officer's attempt to resist a subpoena to produce documents by asserting a fifth amendment privilege on behalf of the corporation.[64] Chief Justice Rehnquist noted that *Hale* distinguished between the fifth amendment protection of individuals and corporations,[65] and premised the distinction on the fact that corporations are " 'creature[s] of the State,' with powers limited by the State."[66] Thus, the majority observed, the state's right to demand the records is merely an exercise of its power of visitation[67] over the corporation.[68]

Chief Justice Rehnquist described *Hale* as limiting the Court's earlier decision in *Boyd v. United States*.[69] According to the majority, *Boyd* held that partnership records are the " 'private books and papers' " of the partners, and therefore are protected under the fifth amendment.[70] Chief Justice Rehnquist stated that *Hale* limited *Boyd*

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that enforcing the subpoenas at issue would provide the Government [with] valuable information." *Braswell*, 108 S. Ct. at 2288. Namely, the proprietor's act of production would tacitly admit the documents' existence, their possession by the proprietor, and their authenticity. *Id.* (citing *Doe*, 465 U.S. 613 n.11). *See supra* note 56.

60 *Braswell*, 108 S. Ct. at 2288.

61 *Id. See* Hale v. Henkel, 201 U.S. 43, 74 (1906) ("[W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.").

62 *Braswell*, 108 S. Ct. at 2288. *See supra* note 6.

63 *Braswell*, 108 S. Ct. at 2288 (citing Hale v. Henkel, 201 U.S. 43 (1906)).

64 *Id.*

65 *See supra* note 61.

66 *Braswell*, 108 S. Ct. at 2288 (quoting *Hale*, 201 U.S. at 74)(citation omitted).

67 A state's power of visitation over a corporation includes the power of inspection, superintendence, direction, and regulation. BLACK'S LAW DICTIONARY 1410 (5th ed. 1979).

68 *Braswell*, 108 S. Ct. at 2288 (citing *Hale*, 201 U.S. at 75).

69 *Id.* (citing Boyd v. United States, 116 U.S. 616 (1886)).

70 *Id.* (quoting *Boyd*, 116 U.S. at 634-635)(emphasis omitted).

by declaring that corporate documents are not private papers, and thus are not privileged under the fifth amendment.[71]

The majority next examined *Wilson v. United States*,[72] in which the issue was whether a corporate officer could resist a subpoena to produce corporate documents by asserting a personal privilege against self-incrimination.[73] Chief Justice Rehnquist stated that the Court rejected Wilson's claimed privilege, holding instead that the subpoenaed documents belonged to the corporation and were not the private papers of the officer.[74] *Wilson* added, according to the majority, that the state's visitatorial power over corporations would be thwarted if an officer could assert a personal privilege over corporate documents.[75]

The majority noted that the next significant application of the collective entity doctrine occurred in *United States v. White*.[76] According to the majority, *White* held that a labor union was a collective entity, and thus precluded a union supervisor from withholding union documents pursuant to a subpoena.[77] Chief Justice Rehnquist quoted the test enunciated in *White* for determining when an organization qualifies as a collective entity:

> "The test . . . is whether 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 constituents, but rather to embody their common or group interests

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71 *Id.*

72 221 U.S. 361 (1911).

73 *Braswell*, 108 S. Ct. at 2288. Chief Justice Rehnquist distinguished the issue presented in *Wilson* from that presented in *Hale*. *Id.* He noted that while the petitioner in *Hale* asserted a fifth amendment privilege on behalf of the corporation, the officer in *Wilson* claimed a fifth amendment privilege on his own behalf. *Id.*

74 *Id.* at 2289. The majority noted that the Court also applied the *Wilson* holding in Dreier v. United States, 221 U.S. 394 (1911), and denied a fifth amendment privilege where the government addressed the subpoena personally to the custodian. *Braswell*, 108 S. Ct. at 2289. The Chief Justice noted that the government addressed the subpoena in *Wilson* to the corporation, but that the *Dreier* Court found this distinction to be irrelevant because the documents in both cases belonged to the corporations. *Id.* (citing *Dreier*, 221 U.S. at 400).

75 *Braswell*, 108 S. Ct. at 2289.

76 *Id.* (citing United States v. White, 322 U.S. 694 (1944)).

77 *Id.* According to Chief Justice Rehnquist, the Court in *White* reasoned that "the Fifth Amendment privilege applies only to natural individuals and protects only private papers," whereas record custodians of a collective entity act as agents and hold documents in a representative capacity. *Id.* Note, however, that the Court has since rejected this privacy rationale as a basis for fifth amendment analysis. *See infra* note 205 and accompanying text. The Chief Justice observed that, by applying the collective entity doctrine to an unincorporated labor union, *White* abandoned the dontrine's premise of maintaining the state's visitatorial power over corporations. *Id.* at 2290. *See supra* note 67.

only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."[78]

Finally, Chief Justice Rehnquist reviewed the Court's most recent expansion of the collective entity doctrine. In *Bellis v. United States*,[79] the Chief Justice stated, the Court held that a partner in a three-person law firm could not assert a fifth amendment privilege to resist a subpoena to produce partnership documents.[80] According to Chief Justice Rehnquist, the *Bellis* Court stated that *White*'s collective entity test was not useful in a wide range of cases and could not be reduced to a determination based solely on the organization's size.[81] The Chief Justice quoted *Bellis*, stating that " '[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be.' "[82]

The majority summarized the doctrine of these cases, from *Hale* to *Bellis*, as holding that a corporate custodian may not resist a subpoena for corporate records on fifth amendment grounds, regardless of whether the subpoena is addressed to the corporation or to the custodian.[83]

The majority turned next to Braswell's argument that the collective entity doctrine was limited by the Court's analysis in *Fisher* and *Doe*.[84] The majority restated Braswell's argument as follows:

> In response to *Boyd v. United States*, with its privacy rationale shielding personal books and records, the Court developed the collective entity rule, which declares simply that corporate records are not private and therefore are not protected by the Fifth Amendment. The collective entity decisions were concerned with the contents of the documents subpoenaed, however, and not with the act of production. In *Fisher* and *Doe*, the Court moved away from the privacy based collective entity rule, replacing it with a compelled testimony standard under which the contents of business documents are never privileged but the act of producing the documents may be. Under this new regime, the act of production privilege is available without regard to the entity whose records are being sought.[85]

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78 *Braswell*, 108 S. Ct. at 2289-90 (quoting *White*, 322 U.S. at 701).

79 417 U.S. 85 (1974).

80 *Braswell*, 108 S. Ct. at 2290. According to the majority, the Court ruled that the partner held the documents in a representative capacity, and thus could not claim a personal privilege with respect to them. *Id.* (citing *Bellis*, 417 U.S. at 101).

81 *Id.* (citing *Bellis*, 417 U.S. at 100).

82 *Id.* (quoting *Bellis*, 417 U.S. at 100). It should be noted, however, that the Court in *Bellis* tempered the broad language of this statement by professing that "[t]his might be a different case if it involved a *small family* partnership." *Bellis*, 417 U.S. at 101 (emphasis added). Thus, *Bellis* appeared to leave open the question of the definitiveness of its holding as applied to a small family business, such as Braswell's.

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

84 *Id.*

85 *Id.* (citing In re Grand Jury Matter (Brown), 768 F.2d 525, 528 (3d Cir. 1985) (en

Chief Justice Rehnquist proclaimed, however, that while *Fisher* and *Doe* evidenced a new fifth amendment analysis by the Court, the analysis in those cases did not overrule the collective entity doctrine.[86] The Chief Justice noted particularly that the "agency rationale undergirding the collective entity decisions . . . survives."[87] The majority reasoned: a collective entity may act only through its agent;[88] such an agent holds corporate documents in a representative capacity rather than a personal capacity;[89] the custodian's act of production is therefore not a personal act but an act of the corporation;[90] and permitting the custodian to assert a fifth amendment privilege "would be tantamount to a claim of privilege by the corporation — which of course possesses no such privilege."[91]

Chief Justice Rehnquist also observed that the Court rejected the custodians' fifth amendment claims in *Dreier* and *Bellis* even though both cases involved compelled testimonial production.[92] While the Chief Justice admitted that the *Dreier* and *Bellis* Courts did not examine the testimonial aspect of the act of production, he speculated that such an inquiry would not have affected the Court's decisions.[93]

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banc)) (citation omitted). According to Chief Justice Rehnquist, *In re* (Brown) recognized that " '[*Fisher* and *Doe*] make the significant factor . . . neither the nature of [the] entity which owns the documents, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled.' " *Id.* (quoting *In re* (Brown), 768 F.2d at 528).

86 *Id.* at 2291.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* Chief Justice Rehnquist supported this argument with the proposition from *Wilson* that " 'the custodian has no privilege to refuse production although [the documents'] contents tend to incriminate him. In assuming their custody he has accepted the incident obligation to permit inspection.' " *Id.* (quoting Wilson v. United States, 221 U.S. 361, 382 (1911)). *Wilson*, however, premised its rejection of a claimed fifth amendment privilege on the incriminating nature of the documents' *contents*, which was not at issue in *Braswell*. *Wilson*, 221 U.S. at 385; *Braswell*, 108 S. Ct. at 2298 (Kennedy, J., dissenting). Rather, Braswell claimed a privilege only for his *act of producing* the documents. *Id.* at 2287.

Chief Justice Rehnquist also drew support from *White*, which stated that " '[i]n their official capacity . . . [the custodians] have no privilege against self-incrimination. And the official records . . . that are held by them in a representative capacity . . . cannot be the subject of the personal privilege.' " *Id.* at 2291 (quoting United States v. White, 322 U.S. 694, 699 (1944)).

92 *Id.* The majority noted that the government addressed the subpoena to the custodian in each case, and that the act of production would have tacitly admitted the records' existence and possession by the custodian. *Id.* (citing *Fisher*, 425 U.S. at 411-12).

93 *Id.* The Chief Justice was correct to the extent that the *Dreier* and *Bellis* Courts applied the collective entity doctrine, which does not predetermine fifth amendment protection on the existence of compelled testimonial incrimination. For a description of

Moreover, the majority rejected the notion that *Fisher* and *Doe* supported petitioner Braswell's claim. Chief Justice Rehnquist dismissed *Doe* as inapplicable to the issue before the Court, and limited the Court's holding in that case to the production of documents by a sole proprietor.[94] The Chief Justice also claimed that the *Fisher* opinion "indicate[d] that the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating."[95] *Fisher* recognized, according to the majority, that the Court has consistently denied a record custodian's attempt to refuse a subpoena to produce documents, even though such production has authenticated the documents,[96] and admitted their existence and possession by the custodian.[97]

Chief Justice Rehnquist found support for the majority's position in Justice Brennan's concurrence in *Fisher*.[98] Justice Brennan espoused the notion, according to the majority, that a custodian waives the right to exercise a personal privilege while acting as the representative of a collective entity.[99] Chief Justice Rehnquist con-

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the elements of the collective entity doctrine, see *infra* notes 147-50 and accompanying text. The existence of compelled testimonial incrimination, however, is dispositive of fifth amendment protection under the compelled testimony standard more recently espoused by the Court. *See infra* note 206 and accompanying text.

94 *Braswell*, 108 S. Ct. at 2292 n.5. Chief Justice Rehnquist reasoned that the Court refrained from discussing the collective entity doctrine in *Doe* because a sole proprietor holds documents in a personal rather than representative capacity. *Id.*

95 *Id.* at 2292. This interpretation is troubling for two reasons. First, *Fisher* did not involve a *corporate* custodian. Rather, the case involved the fifth amendment claim of an *individual taxpayer*. Fisher v. United States, 425 U.S. 391, 402 (1976). Because Chief Justice Rehnquist strictly limited the Court's grant of fifth amendment protection in *Doe* to the production of documents by a sole proprietor, *see supra* note 94 and accompanying text, it is inconsistent to stretch *Fisher*'s rejection of an individual taxpayer's privilege to include all corporate custodians.

Secondly, *Fisher* rejected the taxpayer's claimed privilege for the sole reason that, under the facts of that case, the taxpayer's act of production was not sufficiently testimonial. *Fisher*, 425 U.S. at 414. On the contrary, the Court found that the existence and location of the papers was a "foregone conclusion." *Id.* at 411. The court thus "h[e]ld that compliance with a summons directing the taxpayer to produce the accountant's documents . . . would involve no incriminating testimony within the protection of the Fifth Amendment." *Fisher*, 425 U.S. at 414. Chief Justice Rehnquist's statement was therefore misleading, for an incriminating and compelled production of documents is not accorded fifth amendment protection under *Fisher* only when it is insufficiently testimonial.

96 *Braswell*, 108 S. Ct. at 2292 (citing *Fisher*, 425 U.S. at 413 n.14).

97 *Id.* (citing *Fisher*, 425 U.S. at 411-12). *See supra* note 56. Chief Justice Rehnquist also noted that the *Fisher* Court cited the collective entity decisions in support of its holding. *Braswell*, 108 S. Ct. at 2292.

98 *Braswell*, 108 S. Ct. at 2292.

99 *Id.* The majority recognized, however, that Justice Brennan disagreed with the *Fisher* majority's conclusion that the act of production was not sufficiently testimonial.

cluded that, whether you adopt the *Fisher* majority opinion that the act of production is not sufficiently testimonial, or believe that a collective entity custodian waives his fifth amendment right, "the lesson of *Fisher* is clear: a custodian may not resist a subpoena for corporate records on Fifth Amendment grounds."[100]

The majority also rejected Braswell's reliance on *Curcio v. United States*[101] and indicated that that case supported the government's position.[102] Chief Justice Rehnquist restated Braswell's analysis of *Curcio* as follows: *Curcio* held that the government may not compel the representative of a collective entity to give testimony about the entity's records, even though the contents of the records are not privileged;[103] since *Fisher* held that the act of production may be testimonial, the government could not compel Braswell's production of documents under *Curcio* if it would tend to incriminate him.[104]

Chief Justice Rehnquist rejected this line of reasoning and stated instead that *Curcio* distinguished between "oral testimony and other forms of incrimination."[105] The majority observed that, while *Curcio* recognized the testimonial effect implicit in producing documents,[106] the Court concluded that the government might have suc-

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Id. (quoting *Fisher*, 425 U.S. at 429 (Brennan, J., concurring) (" 'Nothing in the language of [the collective entity] cases, either expressly or impliedly, indicates that the act of production with respect to the records of business entities is insufficiently testimonial for purposes of the Fifth Amendment.' ")).

100 *Id.* This is a very broad reading of *Fisher*. *See supra* note 95. The Court in *Fisher* rejected the taxpayer's fifth amendment claim strictly because it found that the taxpayer's act of production was insufficiently testimonial, and therefore failed the compelled testimony standard. *Fisher*, 425 U.S. at 414. Thus, a more accurate recitation of the *Fisher* "lesson" is that a custodian may not resist a subpoena for collective entity reords on fifth amendment grounds *where the act of producing the documents is insufficiently testimonial.*

101 354 U.S. 118 (1957)(holding that the fifth amendment protects a union record custodian from testifying on the whereabouts of union documents).

102 *Braswell*, 108 S. Ct. at 2293. The majority noted that in *Curcio* the government served two subpoenas on an officer of a local union — one requiring the officer to produce union records and the other requiring him to testify. *Braswell*, 108 S. Ct. at 2293. The *Curcio* Court allowed the officer's fifth amendment claim, according to the majority, and rejected "the Government's argument 'that the representative duty which required the production of union records in the *White* case requires the giving of oral testimony by the custodian.' " *Id.* (quoting *Curcio*, 354 U.S. at 123).

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

104 *Id.*

105 *Id.* Chief Justice Rehnquist quoted *Curcio*, stating that " '[a] custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial [sic] powers. But he cannot lawfully be compelled . . . to condemn himself by his own *oral testimony*.' " *Id.* (quoting *Curcio*, 354 U.S. at 123-24)(emphasis added by *Braswell* Court). *But see infra* notes 252-55 and accompanying text.

106 According to the majority, the *Curcio* Court realized that:

"The custodian's act of producing books or records in response to a subpoena *duces*

cessfully compelled the production under the subpoena duces tecum.[107]

The majority warned that granting a fifth amendment privilege to the holders of collective entity records would seriously jeopardize the government's ability to regulate white-collar crime.[108] Chief Justice Rehnquist stated that such protection would inhibit government prosecution of individuals and organizations alike.[109]

The majority also rejected Braswell's two solutions to this perceived problem of impeding the regulation of white-collar crime: 1) address the subpoena to the corporation and allow it to select an agent for producing the documents, or 2) grant statutory immunity[110] for the custodian's act of production.[111] Chief Justice Rehn-

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tecum is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself."

Id. (quoting *Curcio*, 354 U.S. at 125).

107 *Id.* (citing *Curcio*, 354 U.S. at 127 n.7). A subpoena duces tecum requires the production of documents, while a subpoena ad testificandum orders the subpoenaed party to testify. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

108 *Braswell*, 108 S. Ct. at 2294. The majority quoted *White* for the argument that:

"The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that 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."

Id. (quoting United States v. White, 322 U.S. 694, 700 (1944)).

109 *Id.* The majority claimed that granting fifth amendment protection to a custodian holding collective entity documents would impede the prosecution of artificial entities, since they are able to produce documents only through their agents. *Id.* (citing Bellis v. United States, 417 U.S. 85, 90 (1974)).

110 A court may grant a request for statutory immunity under 18 U.S.C. §§ 6002, 6003 (1982). Section 6002 states:

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 no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1982).

Section 6003 states:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or

quist labelled the first solution a "chimera,"[112] if the custodian was the only person with knowledge of the documents' location but could still refuse to assist the appointed replacement on the ground that such assistance would be incriminating.[113] The majority stated that sending an alternate custodian on an unassisted search for documents might well result in the documents never reaching the courthouse.[114]

Chief Justice Rehnquist similarly disposed of the second proposed solution of granting statutory immunity as to the act of production.[115] The Chief Justice noted that the prosecution may not use testimony elicited under a grant of statutory immunity, either directly or derivatively against the testifying party.[116] The majority asserted that this limitation places a heavy burden on the state to prove that evidence was obtained from independent sources, and accordingly "may result in the preclusion of crucial evidence that was obtained legitimately."[117]

Finally, Chief Justice Rehnquist relented as to the government's evidentiary use of a custodian's act of production.[118] The Chief Justice stated that "[b]ecause the custodian acts as a representative, the act is deemed one of the corporation and not the individual. Therefore, the Government concedes, as it must, that it may make no evidentiary use of the 'individual act' against the individual."[119]

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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).

111 *Braswell*, 108 S. Ct. at 2294.

112 Chimera is derived from the Greek word "chimaira," meaning "she-goat." It refers to an impossible or foolish fancy. WEBSTER'S COLLEGIATE DICTIONARY 233 (9th ed. 1983).

113 *Braswell*, 108 S. Ct. at 2294.

114 *Id.*

115 *Id.* at 2294-95.

116 *Id.* (citing 18 U.S.C. § 6002; Kastigar v. United States, 406 U.S. 441 (1972)). *See supra* note 110.

117 *Braswell*, 108 S. Ct. at 2295 (citing *Kastigar*, 406 U.S. at 460-62 (holding that derivative use of compelled testimony is coextensive with the fifth amendment privilege, and grant of immunity "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony")).

118 *Id.*

119 *Id.* Chief Justice Rehnquist claimed, however, that this limitation does not amount

Continuing, however, the Chief Justice stated that "[t]he Government has the right . . . to use the corporation's act of production against the custodian."[120]

Chief Justice Rehnquist distinguished these two uses as follows: on the one hand, the government may not establish that it served the subpoena upon the custodian or that the custodian produced the documents;[121] on the other hand, the government may admit into evidence the fact that the corporation produced the subpoenaed documents, knowing that the jury will "reasonably infer that [the custodian] had possession of the documents or knowledge of their contents."[122] The Chief Justice acknowledged that the jury is particularly likely to make such an inference when, as in *Braswell*, the custodian holds an influential position within the organization.[123]

In accordance with the aforementioned analysis, the majority affirmed the Fifth Circuit Court of Appeals' ruling that Braswell could not resist the subpoena to produce the corporations' records on the ground that the act of production might personally incriminate him in violation of the fifth amendment.[124]

IV. The Dissenting Opinion

Justice Kennedy authored the dissenting opinion, in which three justices joined.[125] The dissent asserted that the collective entity doctrine was irrelevant to the issue of an act of production privilege.[126] Justice Kennedy renounced the majority's limitation of *Curcio* to oral testimony, and stated that the case's true hallmark is the denial of compelled disclosure of one's thoughts or knowledge.[127] The dissent rebuked Chief Justice Rehnquist's heavy reliance on agency principles and pointed out that the agency rationale was undermined by the Court's own attempt to mitigate the severity of its holding.[128] Finally, Justice Kennedy rejected the notion that considerations of government's prosecutorial convenience should

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to constructive use immunity which the Court prohibited in United States v. Doe. *Id.* n.11 (citing United States v. Doe, 465 U.S. 605, 616-17 (1984)). *But see infra* notes 182-83, 247-51, and accompanying text.

120 *Braswell*, 108 S. Ct. at 2295.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 2296 (Kennedy, J., dissenting). Justices Brennan, Marshall, and Scalia joined in Justice Kennedy's opinion.

126 *Id.* at 2297-98 (Kennedy, J., dissenting).

127 *Id.* at 2299 (Kennedy, J., dissenting).

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

have any place in fifth amendment analysis.[129]

Justice Kennedy stated that the extensive common law development of fifth amendment analysis concerning artificial entities has solidified two basic principles of the self-incrimination clause: "first, that it is an explicit right of a natural person, protecting the realm of human thought and expression; second, that it is confined to governmental compulsion."[130] The dissent asserted that the majority impaired these principles by holding that the government may compel incriminating testimony from an individual who is the target of a criminal investigation.[131] The Court reasoned, according to the dissent, that an employee of an artificial entity has no fifth amendment privilege simply because the entity itself has none.[132]

Justice Kennedy stated that there is "no historical or logical relation between the so-called collective entity rule and [Braswell's claimed act of production] privilege."[133] To support this statement, the dissent traced the common law elements of the fifth amendment privilege. Justice Kennedy reiterated that the Court prohibited the compelled production of private documents in *Boyd*.[134] The dissent also noted, however, that *Boyd* "generated nearly a century of doctrinal ambiguity as [the Court] explored its rationale and sought to define its protection for the contents of business records under the Fifth Amendment."[135] Justice Kennedy stated that the Court in *Doe* rejected *Boyd*'s privacy rationale.[136] According to the dissent, *Doe* held that the contents of business documents are not privileged unless the subpoenaed party proves that the documents were created under government compulsion.[137]

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129 *Id.* at 2301 (Kennedy, J., dissenting).

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

131 *Id.* (Kennedy, J., dissenting). The dissent declared that the majority "denie[d] an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself." *Id.* (Kennedy, J., dissenting).

132 *Id.* (Kennedy, J., dissenting).

133 *Id.* (Kennedy, J., dissenting). Justice Kennedy prefaced this statement by noting that the majority and the dissent agreed that: 1) artificial entities have no privilege; 2) individuals may not claim a privilege on behalf of an artificial entity; 3) the contents of business documents are not protected under the fifth amendment; and 4) both sides admitted that compelling Braswell to produce the subpoenaed documents would personally incriminate him. *Id.* (Kennedy, J., dissenting).

134 *Id.* at 2296-97 (Kennedy, J., dissenting)(citing Boyd v. United States, 116 U.S. 616, 622 (1886)). *See supra* note 70 and accompanying text.

135 *Braswell*, 108 S. Ct. at 2297 (Kennedy, J., dissenting). The dissent also quoted Fisher v. United States for the proposition that " '[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time.' " *Id.* (Kennedy, J., dissenting)(quoting *Fisher*, 425 U.S. 391, 407 (1976)).

136 *Id.* (Kennedy, J., dissenting)(citing United States v. Doe, 465 U.S. 605 (1984)).

137 *Id.* (Kennedy, J., dissenting)(citing *Doe*, 465 U.S. at 610 n.8).

The dissent observed, however, that a subpoena compels the production of documents and not their creation.[138] Justice Kennedy asserted that the Court acknowledged this distinction in *Fisher*.[139] According to Justice Kennedy, *Fisher* held that an individual's act of producing documents may constitute compelled testimony.[140] Furthermore, the dissent noted, the Court in *Doe* refused to grant a fifth amendment privilege based on the contents of a proprietor's documents, but held nonetheless that the production of the documents was privileged.[141] Justice Kennedy underscored this fact, stating that the *Doe* "holding did not depend on who owned the papers, how they were created, or what they said; instead, [the Court's decision] rested on the fact that 'the act of producing the documents would involve testimonial self-incrimination.' "[142] From the Court's decision in *Doe*, Justice Kennedy reasoned that the government's own assumption — that Braswell's act of producing the documents would result in testimonial self-incrimination[143] — was sufficient to grant Braswell's claimed privilege.[144]

Justice Kennedy identified the issue in *Braswell* as "whether an individual may be compelled, simply by virtue of his status as a corporate custodian, to perform a testimonial act which will incriminate him personally."[145] Justice Kennedy recognized that the majority relied on the collective entity doctrine to answer that question affirmatively. The dissent asserted, however, that the collective entity doctrine was irrelevant to Braswell's claim.[146] The dissent defined the scope of the collective entity doctrine as three-pronged: first, a corporation may not assert a fifth amendment privilege to resist a

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138 *Id.* (Kennedy, J., dissenting). This fact supports the notion that the contents of business documents are not protected under the fifth amendment but the act of producing documents may be privileged. *See Doe*, 465 U.S. at 612.

139 *Braswell*, 108 S. Ct. at 2297 (Kennedy, J., dissenting).

140 *Id.* (Kennedy, J., dissenting). Justice Kennedy asserted that the act of production communicates the authenticity of the documents, and their possession or control by the custodian. *Id.* (Kennedy, J., dissenting). Justice Kennedy posited that "[t]hose assertions can convey information about that individual's knowledge and state of mind as effectively as spoken statements, and the Fifth Amendment protects individuals from having such assertions compelled by their own acts." *Id.* (Kennedy, J., dissenting).

141 *Id.* (Kennedy, J., dissenting)(citing *Doe*, 465 U.S. at 612-14).

142 *Id.* (Kennedy, J., dissenting)(quoting *Doe*, 465 U.S. at 613).

143 Justice Kennedy highlighted the fact that the government "submit[ted] the case to us on the assumption that the act of producing the subpoenaed documents [would] effect [the] personal incrimination of Randy Braswell ." *Id.* at 2296 (Kennedy, J., dissenting). *See id.* at 2297 (Kennedy, J., dissenting) (citing Transcript of Oral Argument at 26, 36, Braswell v. United States, 108 S. Ct. 2284 (1988) (No. 87-3)).

144 *Id.* at 2297 (Kennedy, J., dissenting).

145 *Id.* (Kennedy, J., dissenting).

146 *Id.* (Kennedy, J., dissenting).

subpoena to produce documents;[147] second, this principle applies to unincorporated organizations, such as labor unions[148] and partnerships;[149] and third, an organization's record custodian may not resist a subpoena to produce documents by asserting a privilege as to the documents' contents.[150]

Justice Kennedy stated, however, that none of the Supreme Court's decisions applying the collective entity doctrine dealt with the issue of a custodian's self-incrimination through the compelled act of production.[151] The dissent noted particularly that *Wilson* premised its rejection of a claimed fifth amendment privilege on the incriminating nature of the documents' contents.[152] Moreover, according to Justice Kennedy, *Wilson* reflected the Court's concern with maintaining the state's visitatorial powers over corporations, a concern which is predicated on the content of business records.[153]

Justice Kennedy distinguished the act of production privilege from a privilege as to the content of documents as follows: "While a custodian has no necessary relation to the contents of documents within his control, the act of production is inescapably his own. Production is the precise act compelled by the subpoena, and obedience, in some cases, will require the custodian's own testimonial assertions."[154] The dissent asserted that this principle was the foundation of the privilege granted in *Doe*.[155] Justice Kennedy also asserted that, while *Doe* involved the production of a proprietorship's records as opposed to a corporation's, "the potential for self-incrimination inheres in the act demanded of the individual, and as a consequence the nature of the entity is irrelevant to determining whether there is ground for the privilege."[156]

According to the dissent, the focus of the Court's fifth amendment analysis shifted in *Fisher* and *Doe* away from an agency rationale toward the principle of compulsion.[157] Thus, Justice Kennedy noted that *Fisher* rejected the claim that voluntarily prepared busi-

147 *Id.* at 2297-98 (Kennedy, J., dissenting)(citing Hale v. Henkel, 201 U.S. 43 (1906)).
148 *Id.* at 2298 (Kennedy, J., dissenting)(citing United States v. White, 322 U.S. 694 (1944)).
149 *Id.* (Kennedy, J., dissenting)(citing Bellis v. United States, 417 U.S. 85 (1974)).
150 *Id.* (Kennedy, J., dissenting)(citing Wilson v. United States, 221 U.S. 361, 363 (1911)).
151 *Id.* (Kennedy, J., dissenting).
152 *Id.* (Kennedy, J., dissenting).
153 *Id.* (Kennedy, J., dissenting).
154 *Id.* (Kennedy, J., dissenting).
155 *Id.* (Kennedy, J., dissenting).
156 *Id.* (Kennedy, J., dissenting).
157 *Id.* (Kennedy, J., dissenting).

ness documents were protected under the fifth amendment.[158] Notwithstanding this shift, Justice Kennedy reaffirmed the validity of the principles underlying the collective entity doctrine.[159] He commented, however, that a collective entity custodian is now prohibited from asserting a fifth amendment privilege as to the contents of entity documents, not because of the status of the entity, but because business documents generally are not created by compulsion.[160]

The dissent analogized the testimonial act of production ordered of Braswell to the testimonial act compelled in *Curcio*.[161] Justice Kennedy stated that the government in *Curcio* subpoenaed a labor union custodian to give oral testimony on the whereabouts of certain union documents.[162] Justice Kennedy observed that, at the time of *Curcio*, the Court had previously determined that a union was a collective entity for fifth amendment purposes.[163] Nevertheless, the dissent noted, the Court rejected the government's argument that the custodian was acting in a representative capacity, and held instead that compelling him to testify on the location of documents would " 'require[] him to disclose the contents of his own mind. . . . That is contrary to the spirit and letter of the Fifth Amendment.' "[164]

The dissent rebuffed Chief Justice Rehnquist's limitation of the *Curcio* holding to compelled oral testimony.[165] Justice Kennedy

158 *Id.* (Kennedy, J., dissenting).

159 *Id.* (Kennedy, J., dissenting). Thus, Justice Kennedy would argue that a corporation or other collective entity is still precluded from asserting a fifth amendment privilege on its own behalf and that a custodian is still precluded from asserting a privilege with respect to the contents of collective entity documents. *See supra* notes 147-50 and accompanying text.

160 *Braswell*, 108 S. Ct. at 2298-99 (Kennedy, J., dissenting). Justice Kennedy emphasized that the issue before the Court was "not the existence of the collective entity rule, but whether it contains any principle which overrides the personal Fifth Amendment privilege of someone compelled to give incriminating testimony." *Id.* at 2299 (Kennedy, J., dissenting).

161 *Id.* at 2299 (Kennedy, J., dissenting)(citing Curcio v. United States, 354 U.S. 118 (1957)). Justice Kennedy stated that the Court should analyze Braswell's act of production in relation to other compelled acts which the Court has examined. *Id.* (Kennedy, J., dissenting).

162 *Id.* (Kennedy, J., dissenting).

163 *Id.* (Kennedy, J., dissenting). The Court established this principle in United States v. White, 322 U.S. at 694. *See supra* note 77 and accompanying text.

164 *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting)(quoting *Curcio*, 354 U.S. at 128).

165 *Id.* (Kennedy, J., dissenting). Justice Kennedy criticized the majority, stating that it "is able to distinguish *Curcio* only by giving much apparent weight to the words 'out of his own mouth,' reading *Curcio* to stand for the proposition that the Constitution treats oral testimony different than it does other forms of assertion." *Id.* (Kennedy, J., dissenting). *See supra* note 105 and accompanying text.

wrote, "[t]here is no basis in the text or history of the Fifth Amendment for such a distinction. The self-incrimination clause speaks of compelled 'testimony,' and has always been understood to apply to testimony in all its forms."[166] Justice Kennedy instead proferred that the true distinction promulgated in *Curcio* is between "a subpoena which compels a person to 'disclose the contents of his own mind,' through words or actions, and one which does not."[167]

The dissent also criticized Chief Justice Rehnquist's pervasive reliance on agency principles to support the Court's holding.[168] The dissent stated that "[t]he majority gives the corporate agent fiction a weight it simply cannot bear."[169] Justice Kennedy noted that the majority concluded from simple agency principles that a custodian's compliance with a subpoena is exclusively the act of the organization.[170] Justice Kennedy asserted, however, that this conclusion contradicted *Curcio*, in which the Court held that a union officer's "testimony . . . may not be divorced from the person who speaks it."[171]

In an attempt to cut through the majority's abstruse agency rationale, Justice Kennedy challenged that "[t]he heart of the matter, as everyone knows, is that the Government does not see Braswell as a mere agent at all; and the majority's theory is difficult to square with what will often be the Government's actual practice."[172] Thus, the dissent noted that the government addressed the subpoena specifically to Braswell and not to the corporations;[173] the subpoena ordered Braswell to personally produce the stated documents;[174] and the government defended this policy by admitting that it

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166 *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting)(citing Doe v. United States (*Doe II*), 108 S. Ct. 2341, 2347 n.8 (1988)).

167 *Id.* (Kennedy, J., dissenting)(quoting *Curcio*, 354 U.S. at 128). Justice Kennedy also noted that:

> A custodian who is incriminated simply by the contents of the documents he has physically transmitted has not been compelled to disclose his memory or perception or cognition. A custodian who is incriminated by the personal knowledge he communicates in locating and selecting the document demanded in a Government subpoena has been compelled to testify in the most elemental, constitutional sense.

Id. (Kennedy, J., dissenting).

168 *Id.* at 2300 (Kennedy, J., dissenting). Justice Kennedy referred to the majority's agency rationale as a "metaphysical progression, which, I respectfully submit, is flawed." *Id.* at 2299-2300 (Kennedy, J., dissenting).

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

170 *Id.* (Kennedy, J., dissenting).

171 *Id.* (Kennedy, J., dissenting). The dissent asserted that the production of documents required Braswell to disclose personal knowledge which could not be attributed to the corporations merely by calling Braswell an agent. *Id.* (Kennedy, J., dissenting).

172 *Id.* (Kennedy, J., dissenting).

173 *Id.* (Kennedy, J., dissenting). *See supra* note 32 and accompanying text.

174 *Id.* (Kennedy, J., dissenting).

wanted to force the specific target of the investigation to comply with the subpoena.[175] Justice Kennedy contended that "[t]his is not the language of agency. By issuing a subpoena which the Government insists is 'directed to petitioner personally,' it has forfeited any claim that it is simply making a demand on a corporation that, in turn, will have to find a physical agent to perform its duty."[176] The dissent also argued that the agency relationship is particularly illusory when the government admits, as it did in *Braswell*, that the custodian's act of production is implicitly testimonial.[177]

Justice Kennedy charged that the majority undermined its own agency rationale by holding that the government may compel the custodian's act of production, but may not admit into evidence the fact that he performed the act.[178] Justice Kennedy questioned the Court's authority for ruling that such evidence is inadmissible.[179] The dissent pointed out that the fifth amendment is the sole authority for declaring relevant evidence inadmissible when a defendant reveals the information through his or her own actions.[180] Yet if the fifth amendment prohibits the admission of act of production evidence, Justice Kennedy stated that "it is because the Fifth Amendment protects the person without regard to his status as a corporate employee; and once this be admitted, the necessary [agency rationale] for the majority's case has collapsed."[181]

The dissent also criticized the majority for contradicting the Court's holding in *Doe*, in which it ruled that a court may grant immunity only after a formal request pursuant to 18 U.S.C. §§ 6002 and 6003.[182] In contrast to *Doe*, the dissent stated, the majority opinion results in "new judicially created evidentiary rules, conferring upon individuals . . . [constructive] immunity to avoid results

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175 *Id.* (Kennedy, J., dissenting)(citing Transcript of Oral Argument at 43, Braswell v. United States, 108 S. Ct. 2284 (1988)(No. 87-3)).

176 *Id.* (Kennedy, J., dissenting)(citation omitted).

177 *Id.* at 2299 (Kennedy, J., dissenting). Justice Kennedy stated that to hold otherwise " 'is to confuse metaphor with reality.' " *Id.* (Kennedy, J., dissenting)(quoting Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 33 (1986)(Rehnquist, J., dissenting)).

178 *Id.* at 2300 (Kennedy, J., dissenting). Justice Kennedy labelled this retreat "a peculiar attempt to mitigate the force of [the Court's] own holding." *Id.* (Kennedy, J., dissenting).

179 *Id.* (Kennedy, J., dissenting).

180 *Id.* (Kennedy, J., dissenting).

181 *Id.* (Kennedy, J., dissenting).

182 *Id.* at 2300-01 (Kennedy, J., dissenting). Justice Kennedy noted that *Doe* "rejected the argument that compelled production necessarily carried with it a grant of constructive immunity." *Id.* at 2300 (Kennedy, J., dissenting).

the Court finds constitutionally intolerable."[183]

Finally, the dissent disagreed with the majority's concern over the government's ability to regulate white-collar crime, asserting that "the Fifth Amendment does not authorize exceptions premised on such rationales."[184] Justice Kennedy noted that the majority exaggerated the dangers of recognizing an act of production privilege.[185] Justice Kennedy reminded the majority that the Court would grant a privilege only on a case-by-case basis when the custodian could prove as a factual issue that his act of production would be both testimonial and self-incriminating.[186] The dissent recalled that *Fisher* denied a fifth amendment privilege where " 'the existence and location of the papers [were] a foregone conclusion,' " and accordingly, the act of production was not sufficiently testimonial.[187]

Justice Kennedy also noted that the government would need to request statutory immunity only for the custodian and only with respect to the act of production.[188] He stated that this would allow the government to: receive the documents necessary for prosecution;[189] use the contents of the documents as evidence against anyone, including the custodian;[190] and utilize the testimony implicit in the custodian's act of production against everyone but the custodian himself.[191]

According to Justice Kennedy, the majority implied that a custodian waives his fifth amendment right by accepting employment as the agent of a collective entity.[192] Justice Kennedy noted, however, that most people are not able to choose their employer, let alone their employers' business structure.[193] Furthermore, the dissent pointed out, there is no basis for holding that acceptance of employ-

183 *Id.* at 2301 (Kennedy, J., dissenting). *But see supra* notes 118-19 and accompanying text.

184 *Id.* (Kennedy, J., dissenting). *See supra* notes 108-09 and accompanying text.

185 *Id.* (Kennedy, J., dissenting).

186 *Id.* (Kennedy, J., dissenting)(citing Doe v. United States (*Doe II*), 108 S. Ct. 2341 (1988)).

187 *Id.* (Kennedy, J., dissenting)(quoting Fisher v. United States, 425 U.S. 391, 411 (1976)). Note also that *Doe II* similarly rejected a claimed fifth amendment privilege where the Court found that a petitioner's compliance with a consent directive was not sufficiently testimonial. *Doe II*, 108 S. Ct. at 2352.

188 *Id.* (Kennedy, J., dissenting).

189 *Id.* (Kennedy, J., dissenting).

190 *Id.* (Kennedy, J., dissenting).

191 *Id.* (Kennedy, J., dissenting).

192 *Id.* (Kennedy, J., dissenting).

193 *Id.* (Kennedy, J., dissenting). Justice Kennedy admitted that, in this regard, Braswell's case was not very sympathetic, for he voluntarily chose to incorporate his businesses. *Id.* (Kennedy, J., dissenting).

ment constitutes a waiver of constitutional rights.[194]

The dissent concluded by charging that the majority's denial of the act of production privilege, and its blindness to the government's obvious desire to personally incriminate Braswell, was "factually unsound, unnecessary for legitimate regulation, and a violation of the Self-Incrimination Clause of the Fifth Amendment of the Constitution."[195]

V. ANALYSIS

In *Braswell v. United States*,[196] the United States Supreme Court attempted to breathe life into a collective entity doctrine that the Court laid to rest in *Fisher v. United States*[197] and *United States v. Doe*.[198] The Court's decision was iniquitous, for it stripped Randy Braswell, the target of a federal investigation, of his constitutional right against self-incrimination.[199] The decision was misguided in its dogged adherence to agency principles, thereby creating a dualistic record custodian.[200] Thus, while the government conducted a grand jury investigation of Braswell as an individual, the majority steadfastly refused to accord him that same status, opting instead to label Braswell as the agent of a collective entity. Finally, the Court's decision was untimely, for it reaffirmed the collective entity doctrine which the lower courts, and the Court itself, had struggled to apply and begun to drift away from in favor of a more uniform and easily applied compelled testimony standard.[201]

A. THE MAJORITY'S MISAPPLIED AGENCY RATIONALE

The *Braswell* majority relied extensively on agency principles to distinguish Braswell from the two corporations[202] and to reject Braswell's claimed act of production privilege.[203] The Court historically distinguished between the individual and the entity as a concomitant to the Court's privacy rationale.[204] The Court in *Fisher* and

194 *Id.* (Kennedy, J., dissenting).
195 *Id.* at 2301-02 (Kennedy, J., dissenting).
196 108 S. Ct. 2284 (1988).
197 425 U.S. 391 (1976).
198 465 U.S. 605 (1984).
199 *See infra* note 212 and accompanying text.
200 *See infra* note 213 and accompanying text.
201 *See infra* notes 205-06, 228-33, and accompanying text.
202 Braswell operated two corporations, Worldwide Purchasing, Inc. and Worldwide Machinery Sales, Inc. *Braswell*, 108 S. Ct. at 2286. *See supra* notes 16-30 and accompanying text.
203 *See supra* note 169 and accompanying text. *But see supra* note 61 and accompanying text.
204 After Boyd v. United States held that the compulsory production of "private pa-

Doe, however, explicitly rejected the privacy rationale as a basis for fifth amendment analysis.[205] Instead, the Court stated that the fifth amendment "protects a person only against being *incriminated* by his own *compelled testimonial* communications."[206] While the agency distinction between the individual and the entity was a necessary offshoot of a privacy standard, it has no logical connection to the inquiry of whether there is compelled testimonial incrimination.[207] Thus, the *Braswell* majority erred in relying on agency principles as the thread holding together the Court's "metaphysical progression."[208]

The agency distinction was particularly tenuous under the facts of *Braswell*. Braswell produced substantial evidence at trial showing that the corporations had no identity apart from his own.[209] Bras-

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pers" was unconstitutional, the Court necessarily distinguished individuals from entities as a means of determining the privacy of the documents subpoenaed. *See* Boyd v. United States, 116 U.S. 616, 634 (1886). *See also*, Bellis v. United States, 417 U.S. 85, 87 (1974); Davis v. United States, 328 U.S. 582, 587-88 (1946); United States v. White, 322 U.S. 694, 699 (1944); Wheeler v. United States, 226 U.S. 478, 489 (1913); Wilson v. United States, 221 U.S. 361, 377-78 (1911); Dreier v. United States, 221 U.S. 394, 400 (1911).

205 The Court declared in *Fisher* that "[w]e adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure] of private information.'" *Fisher*, 425 U.S. at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)). The *Fisher* Court also criticized the *Boyd* decision, stating that "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." *Id.* at 409. *See also* United States v. Doe, 465 U.S. 605, 610 n.8 (1984); Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 471-75 (1981) ("[I]t is no more self-incriminating to record evidence of a crime in a diary than in a business record. And a search for such a diary involves no more compulsion than does a search for business records.").

206 *Fisher*, 425 U.S. at 409 (emphasis added)(citing Schmerber v. California, 384 U.S. 757, 761 (1966); United States v. Wade, 388 U.S. 218, 221 (1967); Gilbert v. California, 388 U.S. 263, 266 (1967)). The Court thus identified three factors to be dispositive of fifth amendment protection under the compelled testimony standard: compulsion, testimonial communication, and personal incrimination. *Id.* at 410. *See also* Doe v. United States (*Doe II*), 108 S. Ct. 2341, 2345-46, 2347 n.8 (1988); United States v. Doe, 465 U.S. at 613; Couch v. United States, 409 U.S. 322, 328 (1973); Curcio v. United States, 354 U.S. 118, 128 (1957).

207 The distinction between an individual and an entity made sense under a privacy standard as a means of determining the availability of a fifth amendment privilege. *See supra* note 204 and accompanying text. Documents belonging to the individual were considered private and therefore were protected; those belonging to an artificial entity were deemed not private and thus were not protected. There is no relationship, however, between the distinction of the individual from the entity, and the Court's three criteria for determining a fifth amendment privilege — compulsion, testimony, and incrimination. *See* Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 647 (1986) [hereinafter *Organizational Papers*] (suggesting that courts should not distinguish between personal and organizational *records* for fifth amendment purposes).

208 *Braswell*, 108 S. Ct. at 2299-300 (Kennedy, J., dissenting).

209 Braswell introduced into evidence twelve facts that supported his claim:

well also introduced evidence that he incorporated his sole proprietorships merely for the sake of appearance[210] and not to reap the traditional benefit of limited personal liability for corporate debts.[211] Furthermore, Braswell claimed a fifth amendment privilege in response to a federal investigation of him personally on pos-

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(1) Randy Braswell owns, and has always owned 100% of the stock of the active corporation.

(2) The corporation has only one employee other than Randy Braswell, this being the secretary, who is Braswell's sister-in-law.

(3) Braswell's authority over the corporation is "absolute, total, [and] complete."

(4) Braswell has no personal checking account, only the corporate one.

(5) Braswell's personal expenses, and those of his wife, are paid out of the corporate checking account.

(6) Randy Braswell is the only individual who has the authority to act on behalf of the corporation, and is the only person who has ever acted on behalf of the corporation.

(7) Braswell has total control over the contents of the records of the business.

(8) These records reflect all of Braswell's financial transactions, personal as well as business.

(9) The credit cards used by Braswell and his wife for personal expenditures are in the name of the corporation.

(10) No bank loans to the corporation were ever made by Ray Price, Jr., Braswell's primary banker, without Braswell's personal guarantee.

(11) Other individuals doing business with Worldwide Purchasing, Inc., view themselves as actually doing business with Randy Braswell.

(12) Braswell even acquired the nackname "Worldwide," an indication that others in the business community viewed him as being synonymous with the corporation.

Brief for Petitioner at 5-6, Braswell v. United States, 108 S. Ct. 2284 (1988)(No. 87-3).

Moreover, the district court recognized that Braswell and his businesses were actually one and the same, stating that "the question before [the court] was whether 'the holding of United States v. Doe [should] be applied to [Braswell's] records even though they're corporate in form because *as a practical matter they are sole proprietorship form, sole proprietorship records, and . . . should not be produced under any circumstances.*' " *Id.* at 6 (quoting Trial Transcript at 77)(emphasis added). The district court nonetheless relied on the broad rule enunciated in Bellis v. United States, 417 U.S. 85 (1974), to reject Braswell's claimed privilege. Brief for Petitioner at 6. *But see supra* note 82 for another view of *Bellis*.

210 The attorney who incorporated Braswell's businesses testified that:

> Randy had gotten to the point where it had been a hinderance [sic] to do business as an individual, as a matter of form. . . . It hurt you as far as business was concerned to go in and say I'm Randy Braswell from Magnolia, Mississippi. We felt it was [an] advantage to us strictly as a matter of form to incorporate.

Brief for Petitioner at 4.

211 This claim was supported by the fact that Braswell had personally guaranteed the corporations' debts, and thus was not attempting to limit his liability for potential business failure. In re Grand Jury Proceedings, 814 F.2d 190, 192 (5th Cir. 1987), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988). *See also supra* note 209. The incorporating attorney also testified that there were no income tax, pension or profit sharing reasons for Braswell's incorporating his businesses. Brief for Petitioner at 4.

It should be noted, however, that aside from the limited personal liability for corporate debts, corporate officers and directors are shielded from personal liability for torts committed by the corporation. Barry v. Legler, 39 F.2d 297, 300 (8th Cir. 1930). Thus, Braswell would have benefited from the corporate form if either corporation was found liable for damages in a tort action.

sible charges of personal income tax fraud.[212] These facts illustrate that Braswell was not merely a representative agent of a larger independent entity, as the majority implied.

The majority's rejection of Braswell's personal fifth amendment privilege, premised heavily on a supposed distinction between Braswell and the corporate entities, resulted in a decision that contradicted the Court's very own analysis. Indeed, the Court's stubborn adherence to its agency rationale created a dualistic record custodian: while the government viewed Braswell as an individual, the Court effectively viewed Braswell as a corporate entity, and accordingly denied his claimed personal privilege; in doing so, however, the Court allowed the government to prosecute Braswell as an individual despite the Court's insistence that he was not an individual possessing a personal fifth amendment right.[213]

The majority's analysis also reaffirmed a distinction, which the Court itself has struggled to define, between employees of various business organizations.[214] Thus, while the Court has rejected claimed fifth amendment privileges with respect to corporate[215] and labor union documents,[216] the Court nonetheless has allowed a fifth amendment privilege for producing proprietorship records.[217] The Court's struggle to distinguish between employees of various business organizations has resulted in considerable confusion as is evidenced by Chief Justice Rehnquist's closing statement in *Braswell*. After rejecting the fifth amendment claim of Randy Braswell, the President, sole shareholder, and virtually sole employee of two corporations,[218] the Chief Justice stated:

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212 Brief for Petitioner at 40. *See Bellis*, 417 U.S. at 104 (Douglas, J., dissenting)(Justice Douglas argued for a fifth amendment privilege when the government investigated a partnership custodian personally, but did not investigate the partnership). *But see Bellis*. 417 U.S. at 97 n.8.

213 *Braswell*, 108 S. Ct. at 2291, 2295, 2300.

214 The Court's struggle to draw the line between permissible and impermissible business organizations for fifth amendment purposes was evidenced in Bellis v. United States, 417 U.S. at 85. In *Bellis*, the Court rejected a claimed fifth amendment privilege as to the records of a three-member partnership, but stated that "[t]his might be a different case if it involved a small family partnership." *Id.* at 101.

215 Wilson v. United States, 221 U.S. 361, 386 (1911).

216 United States v. White, 322 U.S. 694, 704 (1944).

217 United States v. Doe, 465 U.S. 605, 617 (1984).

218 Braswell was the sole shareholder of the corporations. *Braswell*, 108 S. Ct. at 2286. He was one of two corporate employees, the other being a sister-in-law who performed secretarial work. Brief for Petitioner at 5, Braswell v. United States, 108 S. Ct. 2284 (1988)(No. 87-3). He was also the President and controlling officer of both corporations, because neither of the other two officers — his wife and his mother — had authority over the operation of the corporations. *Braswell*, 108 S. Ct. at 2286. *See also supra* notes 21-26 and accompanying text.

> We leave open the question [of] whether the [collective entity doctrine] supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.[219]

This statement underscores two points of questionable precedential value. First, the Court was willing to determine the availability of a custodian's fifth amendment privilege based on whether the custodian had a secretary, or had appointed two figurehead co-officers.[220] Secondly, while the majority resisted applying the compelled testimony standard, the Chief Justice's statement endorsed the use of the standard, in principle if not in name, for a claimed act of production privilege.[221]

B. THE COMPELLED TESTIMONY STANDARD: A PREFERABLE FIFTH AMENDMENT ANALYSIS

The compelled testimony standard is preferable to the collective entity doctrine as a standard for fifth amendment analysis. The compelled testimony standard ignores the agency rationale that results in a dualistic record custodian;[222] it is easier for the courts to apply;[223] and it permits uniform treatment of individuals regardless of their employers' business structure.[224] Contrary to what Chief Justice Rehnquist implied, adopting the compelled testimony standard would not set back fifth amendment analysis eighty years.[225] In fact, the compelled testimony standard embraces the same principles as the collective entity doctrine, but does so with less confusion

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219 *Braswell*, 108 S. Ct. at 2295 n.11.

220 *See supra* note 218. While the Court rejected Braswell's claimed privilege as the controlling officer and virtual sole employee, the Court's statement implied that the decision might be different if Braswell were the *sole* officer and employee of the corporations. This is not the proper place, however, to draw a line for determining the availability of a constitutional right. The preferable place, as advocated by the compelled testimony standard, is between a subpoena which compels testimonial incrimination and one which does not. *See Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).

221 Chief Justice Rehnquist's statement implied that the availability of a fifth amendment privilege depends upon whether the compelled production of documents communicates incriminating information to the jury. The Court thus premised the right to a fifth amendment privilege on the existence of the three factors — compelled incriminating testimony — that comprise the compelled testimony standard. It is interesting to note that the Court implicitly endorsed the standard that it refused to apply to Braswell.

222 *See infra* note 227 and accompanying text.

223 *See infra* notes 228-29 and accompanying text.

224 *See infra* notes 230-33 and accompanying text.

225 According to the Chief Justice, Braswell argued that *Fisher* and *Doe* overruled the collective entity doctrine, which the Court has advocated since *Hale v. Henkel* in 1906. *Braswell*, 108 S. Ct. at 2290.

and without the troublesome distinctions evidenced in *Braswell*.[226]

Under the compelled testimony standard, a court determines the availability of a fifth amendment privilege simply by examining whether the government is attempting to compel incriminating testimony.[227] This analysis precludes the use of agency principles to distinguish between the individual and the entity. It thus avoids the dualistic custodian result, where one custodian is simultaneously prosecuted as an individual and held by the court to represent an artificial entity.

The compelled testimony standard also eliminates the need for courts to distinguish between permissible and impermissible business organizations for fifth amendment purposes.[228] This results in a fifth amendment analysis that is easier for the courts to apply, for the court uses only one standard regardless of the employment of the individual claiming the privilege.[229]

The compelled testimony standard thus also results in the uni-

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226 *See Braswell*, 108 S. Ct. at 2298 (Kennedy, J., dissenting) ("The collective entity rule established in *Hale v. Henkel*, and extended in *White* and *Bellis*, remains valid."). Thus, like the collective entity doctrine, the compelled testimony standard recognizes that an artificial entity may not claim a fifth amendment privilege, nor may an individual claim a privilege on behalf of the entity. The fifth amendment privilege is a personal privilege, available only to a natural individual upon his own request. *See* Couch v. United States, 409 U.S. 322, 328 (1973); United States v. White, 322 U.S. 694, 700-01 (1944); 8 J. WIGMORE, EVIDENCE § 2259b at 355 (McNaughton rev. ed. 1961)("The privilege covers only disclosure by the person claiming the privilege and not disclosure by any other person.").

The compelled testimony standard is also in accord with the collective entity doctrine in that a custodian may not claim a privilege as to the contents of business documents. The collective entity doctrine reaches this conclusion by distinguishing between the individual and the artificial entity, and by attempting to place the given business within a range of permissible or impermissible artificial entities. *Braswell*, 108 S. Ct. at 2287. *See supra* notes 213-14 and accompanying text. The compelled testimony standard reaches the same conclusion simply by noting that the contents of voluntarily prepared business documents fail the standard's compulsion test. Doe v. United States (*Doe II*), 108 S. Ct. 2341, 2345 (1988); United States v. Doe, 465 U.S. 605, 610, 612 & n.10 (1984).

227 *See Doe II*, 108 S. Ct. at 2347; Fisher v. United States, 425 U.S. 391, 409 (1976); Schmerber v. California, 384 U.S. 757, 761 (1966).

228 The only relevant criterion under the compelled testimony standard is whether the individual is compelled to give incriminating, testimonial communication. *Doe II*, 108 S. Ct. at 2347 n.8; *Doe*, 465 U.S. at 613; *Fisher*, 425 U.S. at 409; *Schmerber*, 384 U.S. at 761. *See supra* notes 206, 227 and accompanying text. Thus, distinctions between various types of business organizations are irrelevant. *See supra* notes 214-17 and accompanying text for examples of the confusion that such distinctions generate.

229 Thus, the court would determine the availability of a fifth amendment privilege by applying the three compelled testimony criteria, regardless of whether the individual worked for a corporation, operated a proprietorship, or was even unemployed. This simplifies the court's analysis and avoids the confusion of competing standards. *See infra* note 230 and accompanying text.

form treatment of corporate and noncorporate custodians.[230] While the collective entity doctrine has led the Court to distinguish between a corporation with one employee and one with two employees,[231] and between a small law firm partnership and a small family partnership,[232] the *Bellis* Court asserted that "the applicability of the fifth amendment privilege should not turn on an insubstantial difference in the form of the business enterprise."[233] Such distinctions are irrelevant in the application of the compelled testimony standard. The standard applies uniformly to all individuals, and thus is preferable to the doctrine that the majority applied in *Braswell*.

C. APPLYING THE COMPELLED TESTIMONY STANDARD TO *BRASWELL*: THE MAJORITY'S FAILURES

Applying the compelled testimony standard to the facts of *Braswell* reveals that the majority erred in rejecting Braswell's claimed act of production privilege.[234] First, the government's subpoena *compelled* Braswell to produce the stated documents.[235] Secondly, Braswell's production of documents would have been *testimonial*.[236]

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230 The inequitable treatment that results from the Court's use of competing standards is evidenced by the decisions rendered in *Braswell* and *Doe*. In *Braswell* the Court applied the collective entity doctrine to reject Randy Braswell's act of production privilege. *Braswell*, 108 S. Ct. at 2295. In *Doe*, the Court employed the compelled testimony standard and granted the same act of production privilege to a sole proprietor. *Doe*, 465 U.S. at 617.

231 *See supra* notes 218-20 and accompanying text.

232 *See supra* note 214.

233 Bellis v. United States, 417 U.S. 85, 101 (1974).

234 Braswell claimed neither that the contents of the documents were protected under the fifth amendment, nor that the corporations could assert a privilege with respect to the documents. *Braswell*, 108 S. Ct. 2287. Rather, Braswell claimed that his act of producing the documents pursuant to the government's subpoena had "independent testimonial significance" which would tend to incriminate him in violation of the fifth amendment. *Id.*

See Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1549-54 (1986) [hereinafter *Fifth Amendment Privilege*], for a detailed analysis of each of the three elements of the compelled testimony standard.

235 *Braswell*, 108 S. Ct. at 2286. As Justice Kennedy noted, the fifth amendment does not protect the content of business documents because the creation of such documents is usually not compelled. *Id.* at 2298-99 (Kennedy, J., dissenting). *See also Doe* 465 U.S. at 612 n.10 ("If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the *contents* of the documents are not privileged.")(emphasis added); Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 40-41 (1986) (distinguishing the self-incriminating nature of the act of production from the content of documents). Because Braswell claimed a privilege only as to the act of production, however, the fact that the subpoena compelled his production was sufficient.

236 The testimonial nature of an individual's act of production was recognized as early as 1904 by John Henry Wigmore. According to Professor Wigmore:

It follows that the production of documents or chattels by a person . . . in response

Braswell's act of production would have communicated that the documents existed, that they were in his possession, and that he believed them to be authentic.[237] Moreover, the broad scope of the subpoena[238] indicated that the government was " 'attempting to compensate for its lack of knowledge by requiring [the custodian] to become, in effect, the primary informant against himself.' "[239]

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to a supboena . . . may be refused under the protection of the [fifth amendment] privilege. . . . For though the documents or chattels thus sought be not oral in form, and though they be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still there is a testimonial disclosure implicit in their production.

8 J. WIGMORE, EVIDENCE § 2264 at 379-80 (McNaughton rev. ed. 1961)(emphasis omitted).

The Court later acknowledged the act of production doctrine in *Curcio* when it stated that "[t]he custodian's act of producing books or records in response to a subpoena duces tecum is itself a representation that the documents produced are those demanded by the subpoena." Curcio v. United States, 354 U.S. 118, 125 (1957)(emphasis omitted). *See also Fisher*, 425 U.S. at 410 ("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."); *Doe*, 465 U.S. at 612.

237 *See Fisher*, 425 U.S. at 410; *Doe*, 465 U.S. at 613 n.11. The Court noted in *Fisher* that the " 'implicit authentication' rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas." *Fisher*, 425 U.S. at 412 n.12 (citing Schmerber v. California, 384 U.S. 757, 763-64 (1966); Couch v. United States, 409 U.S. 322, 344, 346 (1973); United States v. Beattie, 522 F.2d 267, 270 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976) (Friendly, J.); 8 J. WIGMORE, EVIDENCE § 2264 at 380 (McNaughton rev. ed. 1961)("[T]here is a testimonial disclosure in their production. . . . that the acticles produced are the ones demanded."); C. MCCORMICK, EVIDENCE § 126 (3d. 1984); People v. Defore, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926)(Cardozo, J.)). *See also Braswell*, 108 S. Ct. at 2287 (citing *Fisher*, 425 U.S. at 410).

The government may counter a custodian's claim, that the production of documents is implicitly testimonial, by proving the existence, location, and authenticity of the documents through evidence wholly independent of the custodian's act of production. Thus the custodian's production would add nothing to the case against him. *See Fisher*, 425 U.S. at 411 (the "foregone conclusion" test); *Doe*, 465 U.S. at 614 n.13. *See also* Note, *Pleading the Fifth: Record Custodians and the Act of Production Doctrine*, 8 CARDOZO L. REV. 633, 640 (1987) ("[The] foregone conclusion test was the [*Fisher*] Court's way of insuring that not every act of production which could potentially be characterized as testimonial would be granted fifth amendment protection."); Note, *Fifth Amendment Privilege*, *supra* note 234, at 1553-54 ("[T]he 'foregone conclusion' test designates an admission as nonincriminating if there is so much other evidence to prove the fact admitted that the government is not likely to use that particular admission as its means of proof."). *But see* Heidt, *The Fifth Amendment Privilege and Documents — Cutting* Fisher's *Tangled Line*, 49 MO. L. REV. 439, 480-82 (1984)(arguing that the prosecution's and the court's inability to make judgments about the existence, location, and authenticity of documents before they are produced naturally works to the advantage of the claimant). Given the broad scope of the subpoenas issued to Braswell, however, and the degree of Braswell's control over both the corporations and their records, it is doubtful that the government could have proven the documents' existence, location, and authenticity without Braswell's act of production. *See supra* notes 26-30, 33, and accompanying text.

238 *See supra* note 33.

239 *Doe*, 465 U.S. at 613 n.12 (quoting In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 335 (3d Cir. 1982)).

Thirdly, the government conceded that compelling Braswell to produce the documents would personallly *incriminate* him.[240] Thus, the elements of the compelled standard were satisfied, and accordingly the Court should have granted Braswell's claimed act of production privilege.

As Justice Kennedy correctly argued, the majority's concern with regulating white-collar crime was both misplaced and overstated.[241] The concern was misplaced because the fifth amendment does not permit balancing the state's interest in prosecution against an individual's constitutional rights.[242] Furthermore, granting a fifth amendment privilege and requesting statutory immunity for the custodian's act of production would enable the government to obtain all documents necessary to conduct its investigation.[243] The government could use the contents of the documents to prosecute anyone, including the custodian.[244] The government could also use any testimony implicit in the custodian's act of production against anyone except the custodian.[245] Thus, granting a fifth amendment privilege would hinder the government's ability to regulate white-collar crime only when the act of production testimony is both critical to the government's case against the custodian, and unobtainable from sources independent of the custodian's act of production.[246]

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240 *Braswell*, 108 S. Ct. 2296, 2299, 2301 (Kennedy, J., dissenting).

241 *Id.* at 2301 (Kennedy, J., dissenting). *See generally White Collar Crime: Third Annual Survey of Law*, 22 AM. CRIM. L. REV. 279, 559-577 (1984)[hereinafter *White Collar Crime*](surveying the case law on fifth amendment protection for the compelled production of business documents).

242 One author has suggested that:

> [t]he fifth amendment is concerned with procedural values: it maintains the integrity of the law enforcement system by limiting the state's ability to demand a defendant's participation in the determination of his own guilt. It is not concerned with the substantive results of trials — that is, whether or not guilt is established. Hence, the fact that . . . the privilege might make prosecution more difficult should be of little, if any, relevance.

Organizational Papers, *supra* note 207, at 652 (footnote omitted).

243 *See supra* note 110 for the text of the statutes providing for immunity.

244 The Court has stated that "[t]o satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege." *Doe*, 465 U.S. at 617 n.17 (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964)(White, J., concurring)). Thus, when the court grants a fifth amendment privilege for the custodian's act of production, he need be immunized only for the testimony derived from his act of production. *Doe* explicitly rejected the notion that immunization for the act of production necessarily covers the documents' contents. *Doe*, 465 U.S. at 617 n.17.

245 *Doe*, 465 U.S. at 617 n.17. *See supra* note 244.

246 *See* Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture" or "A Rational Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 156-58 (1976)(arguing that compelled production, accompanied by statutory immunity, is neither " 'criminal coddling' nor a 'new torture,' " but is rather a

The solution Justice Kennedy advocated, granting a fifth amendment privilege with statutory immunity for the custodian's act of production, is preferable to the majority's result of denying a privilege but conferring constructive immunity.[247] The Court in *Doe* explicitly rejected the doctrine of court-conferred constructive use immunity.[248] The Court in *Doe* stated that the decision to seek immunity is the exclusive responsibility of the Justice Department, not the judiciary, and thus held that a court may grant immunity only pursuant to a formal statutory request by the government.[249] While the dissent characterized the majority's solution as "compelled production [that] necessarily carrie[s] with it a grant of constructive immunity,"[250] Chief Justice Rehnquist rejected that label and instead called the Court's grant of limited immunity "a necessary concomitant" to an agent's compelled production of documents.[251] The difference is semantic. The majority conferred constructive use immunity, in reality if not in name, and the use of such immunity was expressly prohibited in *Doe*.

Finally, the majority incorrectly distinguished between oral testimony and testimonial acts, holding that the latter are unprotected under *Curcio*.[252] This distinction was squarely contradicted the very

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" 'rational accommodation between the imperatives of the [fifth amendment] privilege and the legitimate demands of government to compel citizens to testify.' "). *See supra* note 237 regarding the "foregone conclusion" test. *See also Organizational Papers*, *supra* note 207, at 650-51 (arguing that fifth amendment protection would not unduly hinder the government's ability to prosecute white collar crime).

247 *See Braswell*, 108 S. Ct. at 2295, 2300-01 (Kennedy, J., dissenting). The majority rejected Braswell's claimed act of production privilege, but held instead that the government could make no evidentiary use of the act against Braswell. *Id.* at 2295. Chief Justice Rehnquist conceded, however, that the jury nonetheless would infer the incriminating act of production testimony against Braswell, especially given the nature and size of the corporations. *Id.* The veil of constitutional protection thus extended to Braswell was a "chimera." *See supra* note 112 and accompanying text. The Chief Justice justified this result by relying further on the agency rationale, stating that "[b]ecause the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the *corporations's* act of production." *Braswell*, 108 S. Ct. at 2295 (emphasis added). For a comprehensive discussion of criminal immunity, see *White Collar Crime*, *supra* note 241, at 631-46.

248 *Doe*, 465 U.S. at 616.

249 *Id.* at 616-17 ("We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.").

250 *Braswell*, 108 S. Ct. at 2300 (Kennedy, J., dissenting).

251 *Id.* at 2295 n.11.

252 *See supra* notes 101-07 and accompanying text. Braswell relied on *Curcio* as a cornerstone of his act of production claim. *Curcio* held that the government may not compel a union custodian to give testimony about the union's records, and recognized that the act of production is implicitly testimonial. Curcio v. United States, 354 U.S. 118, 123-25 (1957).

same day as *Braswell*[253] by an eight-to-one Court in *Doe II*:

> [T]he Fifth Amendment comes into play "only when the accused is compelled to make a *testimonial* communication that is incriminating.". . . Petitioner has articulated no cogent argument as to why the "testimonial" requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements.[254]

Thus, the fifth amendment protects both oral testimony and testimonial acts.[255] The *Braswell* majority accordingly should have granted a fifth amendment privilege for Braswell's testimonial act of production.

VI. CONCLUSION

In *Braswell v. United States*, the United States Supreme Court denied the fifth amendment right of a corporate custodian for his act of producing corporate records pursuant to a subpoena. In doing so, the Court reaffirmed the agency-based collective entity doctrine, despite the Court's recent trend toward a fifth amendment analysis that emphasizes protection against compelled, testimonial self-incrimination.

The compelled testimony standard, however, is a preferable standard of fifth amendment analysis. It is a simplified three-step analysis that eliminates the need to distinguish between an individual and an entity in cases in which the difference is not readily apparent. The compelled testimony standard eliminates the need for courts to draw often contradictory distinctions between permissible and impermissible business organizations for fifth amendment purposes. The compelled testimony standard even embraces the same principles as the collective entity doctrine, yet avoids the confusion of competing standards. Most importantly, the compelled testi-

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253 The Court rendered its decisions in *Braswell* and *Doe II*, in which Chief Justice Rehnquist joined the majority, on June 22, 1988. *Braswell*, 108 S. Ct. at 2284; Doe v. United States, 108 S. Ct. 2341 (1988)(*Doe II*).

254 *Doe II*, 108 S. Ct. at 2347 n.8 (quoting *Fisher*, 425 U.S. at 408)(emphasis added in *Fisher*).

255 *See Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting)("Physical acts will constitute testimony if they probe the state of mind, memory, perception, or cognition of the witness. The Court should not retreat from the plain implications of this rule and hold that such testimony may be compelled, even when self-incriminating, simply because it is not spoken."); Schmerber v. California, 384 U.S. 757, 761 n.5 (1966)("A nod or a headshake is as much a 'testimonial' or 'communicative' act . . . as are spoken words."). *See also* Mansfield, *The* Albertson *Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 122; Arenella, Schmerber *and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 40-42 (1982).

mony standard results in uniform constitutional protection for all individuals regardless of their employment.

The Court stated in *Murphy v. Waterfront Comm'n* that the fifth amendment privilege is rooted in:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often a "protection to the innocent."[256]

The compelled testimony standard is a truer champion of these interests. The *Braswell* Court erred in applying the formalistic collective entity doctrine instead of the compelled testimony standard.

Applying the compelled testimony standard to *Braswell* reveals that the Court erred in rejecting Braswell's claimed act of production privilege. The government compelled Braswell to produce documents; Braswell's production of the documents would have communicated testimonial information, especially given the broad scope of the subpoena; and, as the government conceded, Braswell's production would have effected self-incrimination.

Furthermore, the majority's concern with regulating white-collar crime was misstated in degree, and misplaced in an examination of an individual's constitutional rights. The majority conferred constructive immunity in disregard of the Court's own rule mandating immunity only through formal statutory procedures. Moreover, the majority's elimination of fifth amendment protection for testimonial acts was both constitutionally unsound and contradicted almost immediately by the Court. Thus, the Court maligned the purpose of the fifth amendment, and its protection against compelled, testimonial self-incrimination.

JOHN M. GROGAN, JR.

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256 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)(quoting 8 J. WIGMORE, EVIDENCE § 2251 at 317 (McNaughton rev. ed. 1961); Quinn v. United States, 349 U.S. 155, 162 (1955))(citations omitted).