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Constitutional Law: Another Chapter in the Collective Entity Doctrine

Robert Dixon Windus
University of Dayton

CASENOTES

CONSTITUTIONAL LAW: ANOTHER CHAPTER IN THE COLLECTIVE ENTITY DOCTRINE—*Braswell v. United States*, 108 S. Ct. 2284 (interim ed. 1988).

I. INTRODUCTION

In several decisions over the last seventy-seven years the United States Supreme Court addressed whether corporate representatives may refuse to produce corporate documents pursuant to a government subpoena.[1] Corporate representatives have often refused to produce requested documents on the ground that such compliance would provide personally incriminating testimony that is protected under the fifth amendment.[2] The Supreme Court historically has addressed the issue by applying the "collective entity doctrine."[3] Simply stated, the doctrine provides that collective entities such as corporations,[4] partnerships[5] and labor unions[6] do not enjoy fifth amendment rights.[7] When

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1. The Supreme Court first considered this issue in 1911. Wilson v. United States, 221 U.S. 316, 367 (1911). The most recent Supreme Court decision regarding this issue occurred in 1988. Braswell v. United States, 108 S. Ct. 2284, 2286 (interim ed. 1988). In addition to the two above decisions, the Supreme Court has addressed this issue in at least six other decisions that have involved either corporate representatives or collective entity representatives. *See infra* notes 54–143 and accompanying text; *see also* Essgee Co. of China v. United States, 262 U.S. 151, 158 (1923) (officer of corporation must turn over its books even though said books contain incriminating information); Wheeler v. United States, 226 U.S. 478, 490 (1913) (corporation books are property of the corporation and corporate officers have no constitutional right to hold them when demanded).

2. *See Braswell*, 108 S. Ct. at 2286 *Essgee Co. of China*, 262 U.S. at 152; Grant v. United States, 227 U.S. 74, 77 (1913); *Wheeler*, 226 U.S. at 484; Dreier v. United States, 221 U.S. 399, 400 (1911); *Wilson*, 221 U.S. at 370 (1911).

3. *See Braswell*, 108 S. Ct. at 2286; Bellis v. United States, 417 U.S. 85, 88–89 (1974); *Essgee Co. of China*, 262 U.S. at 155, 158; Grant v. United States, 227 U.S. 74, 80 (1913); *Wheeler*, 226 U.S. at 489–90; *Dreier*, 221 U.S. at 400; *Wilson*, 221 U.S. at 377–79. The "collective entity doctrine" is a principle applied by the courts in cases in which collective entities or their representatives have attempted to obtain fifth amendment protection regarding the contents of subpoenaed documents or the testimonial communications created by the act of producing documents. In such cases, the doctrine bars fifth amendment protection of self-incriminating evidence.

4. Hale v. Henkle, 201 U.S. 43, 74 (1906) (holding that a corporation possesses no fifth amendment privileges).

5. *Bellis*, 417 U.S. at 93 (neither partnerships nor their partners have fifth amendment protection regarding partnership documents).

6. United States v. White, 322 U.S. 694, 701 (1944) (labor unions are collective entities

an individual acts on behalf of an entity, he or she is considered to be acting in a representative capacity.[8] Thus, the Supreme Court has held that when acting in a representative capacity, the individual relinquishes the personal rights he or she normally possesses.[9] Instead, the individual possesses rights commensurate with those of the entity.[10] For this reason, a corporate representative is not afforded fifth amendment rights.[11]

Although the doctrine appears straightforward, its proper application has become uncertain in light of recent Supreme Court decisions[12] altering the standard of review that had been used to evaluate the doctrine's applicability.[13] Before 1976, the Supreme Court based the application of the collective entity doctrine on a privacy standard.[14] Under the privacy standard, entity representatives received fifth amendment protection if the subpoenaed documents were the representative's "private writings."[15] The Court abandoned the privacy standard in the 1976 decision of *Fisher v. United States*.[16] The *Fisher* Court adopted a new standard that focused on whether a representative's *act of producing* subpoenaed documents constituted testimonial and incriminating evidence to be afforded protection under the fifth amendment.[17] The *Fisher* standard, however, created confusion in the circuit courts, and caused the courts to split in their application of the new standard.[18]

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possessing no fifth amendment privileges).

7. *Id.*

8. *Id.* at 699.

9. *Id.* Under the collective entity doctrine, the individual waives his fifth amendment privilege against self-incrimination when he is acting on behalf of a collective entity. *See id.*

10. *Id.*

11. When closely-held corporations are involved, the issue of whether a corporate representative should lose his or her fifth amendment protection becomes difficult. *See In re* Grand Jury Proceedings, 814 F.2d 190, 192–93 (5th Cir.), *aff'd sub nom.*, Braswell v. United States, 108 S. Ct. 2284 (interim ed. 1988). The difficulty arises because the operation of a closely-held corporation often resembles the operation of a sole proprietorship. Since sole proprietorships may be afforded fifth amendment protection, United States v. Doe, 465 U.S. 605, 613–14 (1984), it has been argued that corporate representatives should likewise be afforded fifth amendment protection. *In re Grand Jury Proceedings*, 814 F.2d at 190–91.

12. *See generally Doe*, 465 U.S. at 613–17 (fifth amendment protection for sole proprietor's act of producing documents); Fisher v. United States, 425 U.S. 391, 408–11 (1976) (no fifth amendment protection to taxpayer's production of documents).

13. *See* Heidt, *The Fifth Amendment and Documents Cutting Fishers Tangled Line*, 49 MO. L. REV. 440, 470–81 (1984); Comment, *The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine*, 80 N.W. U.L. REV. 1605, 1614–24 (1987).

14. *See supra* notes 65–109 and accompanying text.

15. *See* Wilson v. United States, 221 U.S. 361, 377–78 (1911); *See also infra* notes 65–109 and accompanying text.

16. 425 U.S. 391 (1976).

17. *Id.* at 40 (emphasis added).

18. *In re* Grand Jury Proceedings, 814 F.2d 190, 193 (5th Cir.), *aff'd sub nom.*, Braswell v.

The First, Fifth, Sixth, Eighth and Tenth Circuits did not follow *Fisher*, and therefore, refused to acknowledge that collective entity representatives are entitled to fifth amendment protection.[19] The Second, Third, Fourth and Eleventh Circuits followed the new standard, thus allowing entity representatives to enjoy fifth amendment protection.[20] Consequently, the conflicting circuit court interpretations made it difficult to determine the proper application of the collective entity doctrine.

The Supreme Court granted certiorari to the case of *Braswell v. United States*[21] in order to resolve the conflict among the federal circuit courts.[22] This note discusses *Braswell* and the history of the collective entity doctrine. In addition, it analyzes the Supreme Court's holding in *Braswell* to determine the proper application of the collective entity doctrine. Finally, this note states a conclusion based in part on the Court's holding and in part on logical deductions derived from an analysis of the Court's decision.

II. FACTS AND HOLDING

Mr. Randy Braswell was the president and sole shareholder of two Mississippi corporations, Worldwide Machinery Sales, Inc. and Worldwide Purchasing, Inc.[23] In 1986, a federal grand jury issued a subpoena *duces tecum* to Braswell as president of Worldwide Purchasing, Inc.

United States, 108 S. Ct. 2284 (interim ed. 1988).

19. *See In re* Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir.), *cert. dismissed*, 107 S. Ct. 918 (1987); *In re* Grand Jury Proceedings (Morganstern), 771 F.2d 143, 148 (6th Cir.) (en banc), *cert. denied*, 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 (Vargus), 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).

20. *See In re* Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569, 574 (11th Cir. 1987); United States v. Sancetta, 788 F.2d 67, 74 (2d Cir. 1986); United States v. Lang, 792 F.2d 1235, 1240 (4th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *In re* Grand Jury Matter (Brown), 768 F.2d 525-38 (3d Cir. 1985) (en banc).

21. 108 S. Ct. 2284 (interim ed. 1988).

22. *Id.* at 2287. The *Braswell* Court stated, "[w]e granted certiorari to resolve a conflict among the Courts of Appeals." *Id.*

23. *In re* Grand Jury Proceedings, 814 F.2d 190-91 (5th Cir. 1987), *aff'd sub nom., Braswell*, 108 S. Ct. at 2284. In 1980, Braswell incorporated Worldwide Machinery Sales, Inc. *Id.* at 191. In 1981, Braswell formed a second corporation, Worldwide Purchasing, Inc. *Id.* In accordance with Mississippi law, both corporations kept current corporate books, financial records, minutes and corporate income tax returns. *Id.*; MISS. CODE ANN. § 79-3-99 (1972). Mississippi law requires that every corporation have no less than three directors. *Id.* § 79-3-69 (1972). Braswell's corporations had the same directors: Mr. Braswell himself, his wife, and his mother. *In re Grand Jury Proceedings*, 814 F.2d at 191. Braswell's mother and wife occupied the offices of vice-president and secretary-treasurer, respectively, in both corporations. *Id.* Braswell claimed his wife and mother had no authority in the affairs of either corporation. *Id.*

and Worldwide Machinery Sales, Inc.[24] The subpoena requested that Braswell produce documents[25] from both corporations for the years 1982 through 1985.[26]

Braswell moved to quash the subpoena on the ground that his act of producing the requested documents would be self-incriminating, and therefore, would violate his fifth amendment rights.[27] The district court denied his motion, concluding that the "collective entity doctrine" prevented Braswell from claiming protection under the fifth amendment.[28] Hence, Braswell was required to comply with the subpoena.[29] He appeared before the grand jury, but refused to produce the documents requested by the grand jury.[30] Pursuant to a government motion, the district court held Braswell in contempt of court.[31]

Braswell appealed his contempt citation to the Fifth Circuit Court of Appeals.[32] On appeal, Braswell presented a number of arguments to support his claim that "his personal privilege against self-incrimination justif[ied] his refusal to produce the [subpoenaed] corporate documents."[33] Braswell argued that the fifth amendment privilege which applies to sole proprietorships should also apply to closely held corporations for the same reason.[34] Braswell cited *Doe v. United States*,[35] in

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

25. *In re Grand Jury Proceedings*, 814 F.2d at 190–91. The subpoenas gave Braswell two alternatives. *Id.* He could give the requested documents to the agent serving the subpoena or he could present the documents directly to the grand jury. *Id.* The subpoena did not require him to testify verbally. *Id.*

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

Braswell, 108 S. Ct. at 2286 n.1.

26. *In re Grand Jury Proceedings*, 814 F.2d at 191 n.1.

27. Braswell v. United States, 108 S. Ct. 2284, 2286 (interim ed. 1988).

28. *Id.* At the district court hearing on the subpoena, Braswell argued that the "collective entity doctrine" did not apply in his situation. *Id.* He claimed the rule is inapplicable when "a corporation is so small that it constitutes nothing more than the individual's alter ego." *Id.* The district court rejected his argument. *In re* Grand Jury Proceedings, 814 F.2d 190, 192 (5th Cir.), *aff'd sub nom.*, *Braswell*, 108 S. Ct. at 2284. The district court agreed that Braswell operated his business like a sole proprietorship. *Id.* Nevertheless, the district court stated that Braswell was doing business through the corporate form. *Id.*

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

30. *Id.*

31. *Id.* Braswell's incarceration for contempt was stayed, pending appeal. *See id.*

32. *Id.* at 190.

33. *Id.* at 191.

34. *See In re Grand Jury Proceedings*, 814 F.2d at 192. Braswell contended that his corporations were formed for appearance only. *Id.* He claimed that his corporations were not formed "for tax purposes, for limitation of shareholder liability, or for the creation of pension or profit

which the Supreme Court stated that the sole proprietor had a fifth amendment privilege when his act of producing documents involved testimonial self-incrimination.[36] Braswell contended that since he operated his corporations as if they were sole proprietorships,[37] *Doe* was applicable in his case.[38]

The Fifth Circuit Court of Appeals stated that *Doe* did not apply to closely-held corporations.[39] The *Braswell* court of appeals cited another Fifth Circuit decision which stated that *Doe* did not extend act of production privileges to representatives of collective entities.[40] For this reason, the Fifth Circuit Court of Appeals rejected Braswell's arguments that *Doe* enabled him to assert fifth amendment privilege.[41]

Braswell's second argument contended that closely-held corporations were not collective entities.[42] Braswell supported his argument by contending that the holding in the Supreme Court decision of *Bellis v. United States*[43] excluded closely-held corporations from the collective entity doctrine.[44] Therefore, Braswell argued that his refusal to produce the requested documents was protected by the fifth amendment.[45]

Braswell's reliance on *Bellis* was misplaced. The *Braswell* Fifth

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sharing plans." *Id.* at 192 n.3. Braswell contended that the manner in which he operated his corporations had not changed from the manner in which he operated the same businesses when they were sole proprietorships. *Id.* at 192.

35. 465 U.S. 605 (1984). Doe owned several sole proprietorships. *Id.* In 1980, the sole proprietorships' records were subpoenaed by a grand jury investigating corruption. *Id.* Doe refused to produce the records on the ground that his act of production would provide self-incriminating testimony protected under the fifth amendment. *Id.* at 608.

36. *Doe,* 465 U.S. at 613 n.11, 614 n.12. The United States Supreme Court in *Doe* deferred to the findings of the district court and the court of appeals below. *Id.* According to the *Doe* court, when one produces requested documents he admits the documents exist, the documents are in his possession, and the documents are authentic. *Id.* at 613 n.11. Whether these three "tacit averments . . . are both 'testimonial' and 'incriminating' for the purposes of applying the Fifth Amendment . . . depend on the facts and circumstances of particular cases or classes thereof." *Id.* at 613. (quoting Fisher v. United States, 425 U.S. 391, 410 (1976)) In *Doe,* both courts below found that the government could not show it actually knew the requested documents were in existence, or in Doe's possession. *Id.* at 613, 613 n.11, 614, 614 n.12. For this reason, the courts below found that Doe's act of producing the documents constituted testimonial self-incrimination. *Id.*

37. *See supra* note 34.

38. *See In Re Grand Jury Proceedings,* 814 F.2d at 192.

39. *Id.* at 193.

40. *Id.* The Fifth Circuit Court of Appeals cited *In re* Grand Jury Proceedings (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985), which held that *Doe* did not reject the holding in *Bellis,* 417 U.S. at 85. According to *Bellis,* representatives of collective entities possess no fifth amendment privilege regarding the production of entity records. *Bellis,* 417 U.S. at 100–01.

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

42. *Id.*

43. 417 U.S. 85 (1974).

44. *In re Grand Jury Proceedings,* 814 F.2d at 191–92.

45. *Id.*

Circuit Court of Appeals, citing *Bellis,* stated that collective entities are organizations independent from their individual members.[46] Here, Braswell operated his businesses as corporations, and consequently, the corporations existed as separate legal entities that were distinct from Braswell as an individual.[47] For this reason, Braswell's corporations, regardless of form, were collective entities.[48]

The Fifth Circuit Court of Appeals affirmed the *Braswell* district court's judgment.[49] The Fifth Circuit stated that it was bound by the precedent of its jurisdiction which supported *Bellis.*[50] The Fifth Circuit Court of Appeals held that Braswell, as custodian of corporate documents, did not have a privilege with respect to production of documents under the fifth amendment.[51] Braswell appealed to the United States Supreme Court and certiorari was granted.[52] In a 5-4 decision, the United States Supreme Court held that Braswell "could not resist the subpoena for corporate documents on the ground that the act of production might tend to incriminate him."[53]

III. BACKGROUND

The United States Supreme Court has developed the collective entity doctrine through a line of decisions over the last eighty-two years.[54] Since its inception, however, the doctrine's scope has changed. Originally the doctrine applied strictly to corporations.[55] As time progressed, the Supreme Court found that a number of unincorporated organiza-

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46. *Id.*

47. *Id.*

48. *Id.* Braswell's third argument contended that some of the papers requested were "private writings," and as such he claimed they were protected under the fifth amendment. *Id.* at 191. The Fifth Circuit Court of Appeals did not address this issue. At the district court's hearing on Braswell's motion to quash the subpoena, the district court only considered the issue regarding Braswell's act of production. *Id.* at 192. For this reason, the Fifth Circuit Court of Appeals determined that Braswell's claim regarding fifth amendment protection of private papers was not an issue that the Fifth Circuit should review on appeal. *Id.* at 192 n.2, 193.

49. *Id.* at 193.

50. *Id.*

51. *Id.*

52. Braswell v. United States, 108 S. Ct. 2284, 2287 (interim ed. 1988).

53. *Id.* at 2295. Chief Justice Rehnquist delivered the Court's opinion. *Id.* at 2286. Justices White, Blackman, Stevens and O'Conner joined Rehnquist. *Id.* Justice Kennedy wrote the dissenting opinion and was joined by Justices Brennan, Marshall and Scalia. It is interesting to note that Justice Kennedy and Justice Scalia split from the conservatives in the majority and joined with the more liberal members of the Court, Justice Brennan and Justice Marshall, in dissenting.

54. *See id.* at 2284; Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974); Curcio v. United States, 354 U.S. 118 (1957); United States v. White, 322 U.S. 694 (1944); Grant v. United States, 227 U.S. 74 (1913); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkle, 201 U.S. 43 (1906).

55. *See Hale,* 201 U.S. at 74–75.

tions constituted collective entities within the scope of the doctrine.[56]

In addition to the change in scope, the standard upon which the doctrine is based also changed. Prior to 1976, the Supreme Court based the application of the collective entity doctrine on a privacy standard.[57] According to the Court, records of collective entities were not considered to be private.[58] Thus, prior to 1976, an entity representative was unable to invoke his personal privilege against self-incrimination when documents were subpoenaed, since the documents were not his "private papers."[59] The documents were the property of the entity which was not considered to possess fifth amendment protection.[60]

Since 1976, the Supreme Court has based the application of the collective entity doctrine on a compelled testimony standard.[61] In applying the compelled testimony standard, the Court addressed whether the entity representative's act of producing requested documents creates testimonial self-incriminating evidence.[62] If the act of producing documents involves testimonial self-incrimination, the representative enjoys the protection of the fifth amendment.[63] However, despite the change in the standard, the doctrine has actually remained essentially the same: The records of collective entities "are not private and therefore are not protected by the Fifth Amendment."[64]

A. Development of the Privacy Standard

The Supreme Court first considered the fifth amendment rights of a collective entity in *Boyd v. United States*.[65] Boyd argued that the fifth amendment shielded him from producing records of his partner-

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56. *See Bellis*, 417 U.S. at 100–01 (Partnerships); McPhaul v. United States, 364 U.S. 372, 380 (1960) (Civil Rights Congress); Rogers v. United States, 340 U.S. 367, 371–72 (1951) (Communist Party of Denver); United States v. Fleischman, 339 U.S. 349, 357–58 (1950) (Joint Anti-Fascist Refugee Committee); *White*, 322 U.S. at 705.

57. *See* Heidt, *supra* note 13, at 440–60; Comment, *supra* note 13, at 1605–14.

58. *Bellis*, 417 U.S. at 88–100; *see also infra* notes 65–109 and accompanying text.

59. *See infra* notes 65–109 and accompanying text.

60. *Id.*

61. *See infra* notes 120–42 and accompanying text.

62. *See* Fisher v. United States, 425 U.S. 391, 410–11 (1976). The *Fisher* Court explained that an individual's act of producing documents communicated testimony by showing the documents exist, the documents are in fact the items requested and the documents are in the individual's control. *Id.* According to the *Fisher* Court, if these tacit averments create testimony not originally known by the party requesting the documents, the testimony created in the act of production would constitute self-incriminating evidence. *Id.* at 410–13.

63. *Id.*

64. Braswell v. United States, 108 S. Ct. 2284, 2290 (interim ed. 1988).

65. 116 U.S. 616 (1886). Boyd involved a partnership that was ordered by the district court to produce an invoice pertaining to glass that it had imported. *Id.* at 618. Boyd produced the requested invoice but protested the constitutionality of the law that compelled this production. *Id.*

ship that were to be used against him in court.[66] The Supreme Court agreed.[67] Writing for the Court, Justice Bradley stated that the fifth amendment prohibits any "invasion of . . . [an individual's] indefeasible right of personal security . . . and private property."[68] For this reason, the "compulsory production of . . . [Boyd's] private books and papers . . . compel[led] him to be a witness against himself, within the meaning of the Fifth Amendment."[69]

The *Boyd* holding created a privacy standard regarding the protection of requested documents.[70] This broad standard afforded fifth amendment protection to all private papers.[71] If the person being subpoenaed personally owned or possessed the requested property, he was protected by the fifth amendment.[72]

The next collective entity case the Supreme Court considered was *Hale v. Hinkle.*[73] *Hale* involved a corporate officer who invoked the fifth amendment on behalf of his corporation.[74] Justice Brown, writing for the *Hale* Court, stated that the corporation had no fifth amendment privilege.[75] Justice Brown explained that a "corporation is a creature of the state."[76] According to the Court, the state vested the corporation with special privileges and franchises.[77] Therefore, the corporation could not now refuse a state's request to produce documents when these privileges allegedly had been abused.[78]

The Court's decision in *Hale* created an exception to the privacy standard set in *Boyd.* After *Hale,* corporate documents were no longer considered "private papers" protected by the fifth amendment.[79] Consequently, the privacy standard pronounced in *Boyd* was narrowed.

Seven years after *Hale,* the Supreme Court considered whether a corporate representative could invoke his or her own fifth amendment privilege with respect to the contents of corporate documents. In *Wilson v. United States,*[80] a corporate president refused to produce subpoe-

66. *Id.*
67. *Id.* at 641.
68. *See id.* at 630 (citing Lord Camden's decision Entick v. Carrington, 19 Howell St. Tr. 1029 (1762)).
69. *Id.* at 635.
70. *See* Heidt, *supra* note 13, at 444–50.
71. *See Boyd,* 116 U.S. at 635.
72. Heidt, *supra* note 13, at 440–48.
73. 201 U.S. 43 (1906).
74. *Id.* at 74–75.
75. *Id.* at 74.
76. *Id.*
77. *Id.* at 74–75.
78. *Id.*
79. *See id.* at 74–76.
80. 221 U.S. 361, 369 (1911). Mr. Wilson, President of United Wireless Telegraph Com-

naed documents on the ground that their contents may personally incriminate him.[81] The Supreme Court stated that when documents are subject to inspection under state law, "the custodian [of the documents] has no privilege to refuse production although their contents may tend to incriminate him."[82] Writing for the Court, Justice Hughes reasoned that when an individual takes custody of such documents, he concedes to the state's right of inspection.[83]

The right of inspection, according to the Court, is derived from the visitorial powers of the state.[84] Since a corporation receives privileges from the state when operating in the corporate form, the state reserves the right to inspect corporate documents kept in accordance with the state's laws.[85] The *Wilson* Court concluded that this "reserved power of visitation would seriously be embarassed, if not wholly defeated . . . if guilty officers could refuse inspection of"[86] corporate documents on the ground that the documents may personally incriminate the corporate representative.[87]

Thirty-four years after *Wilson*, the Supreme Court considered whether the documents of an unincorporated organization were protected by the fifth amendment. *United States v. White*[88] involved a union official who refused to produce subpoenaed documents on the ground that the contents of the documents would personally incriminate him.[89] The *White* Court determined that members, agents and officers affiliated with collective entities have no personal rights when act-

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pany, was served a subpoena *duces tecum* requiring him to produce the letter-press copy books of his company. *Id.* at 367–68. At the grand jury proceedings, Wilson admitted that the books requested were in his possession, however he claimed they were essential to his defense and refused to produce them. *Id.* at 369.

81. *Id.* at 367–69.

82. *Id.* at 382. Two years later Justice Hughes held this judgment applicable to the former sole shareholder of a defunct corporation. Grant v. United States, 227 U.S. 74, 77 (1913). The *Grant* decision held that it did not matter whether the title of the documents had passed to the individual when the corporation concluded its business. *Id.* at 80. The *Grant* Court reasoned that the status of the documents had not changed, and therefore, the state had the right to inspection. *Id.*

83. *Wilson*, 221 U.S. at 382.

84. *Id.* The *Wilson* Court also referred to the Federal Government's right to inspect corporate documents when activities of the corporation are within congressional authority. *Id.*

85. *Id.* at 383–84.

86. *Id.* at 384–85.

87. *Id.*

88. 322 U.S. 694 (1944).

89. *Id.* at 695–96. In *White*, a subpoena *duces tecum* had been served upon Local No. 542 of the International Union of Operating Engineers. *Id.* at 695. It demanded copies of union documents regarding the formation of the union and financial records pertaining to work-permit fees. *Id.* A union representative appeared before the grand jury and identified himself as the Union's "assistant supervisor." *Id.* He refused to produce the requested documents on the ground that they might have incriminated the Union, him, personally, or him, as an officer of the Union. *Id.* at 696.

ing on behalf of the entity.[90] Instead, "they assume the rights, duties and privileges"[91] possessed by the collective entity.[92] Therefore, since a collective entity has no fifth amendment privileges, its representatives have no such privilege when acting in their official capacity.[93]

The Court, however, could not apply the above reasoning to respondent-White, until it had first determined whether a labor union was a collective entity. Justice Murphy, who wrote the *White* Court's opinion, outlined a test which focused upon the character of the organization, as well as the affiliation of its members, in order to determine when an organization, such as a labor union, constitutes a collective entity.[94] Applying the test, the Court considered unions to be collective entities.[95] Therefore, since the respondent-White was acting as a union representative, he had no fifth amendment privilege.[96]

Prior to *White,* only documents of a corporation did not enjoy fifth amendment protection under the privacy standard.[97] Consequently, the Supreme Court holding in *White* narrowed the privacy standard. After *White,* the documents of any organization representing "common or group interests"[98] were not considered "private papers" protected by the fifth amendment.

Thirty years after *White,* the Supreme Court considered whether partners could invoke their fifth amendment privilege with respect to the contents of partnership records. In *Bellis v. United States,*[99] a for-

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90. *Id.* at 699.

91. *Id.*

92. *Id.* The *White* Court concluded that an entity representative did not conduct business in his personal capacity. *Id.* Instead, the representative conducts business in an official capacity representing the collective entity. *Id.* For this reason, when the entity representative conducts business in his official capacity, he possesses rights commensurate with those of the entity. *Id.*

93. *Id.*

94. *Id.*

> 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 only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions - national or local, incorporated or unincorporated - clearly meet that test.

Id.

95. *Id.* at 700–01.

96. *Id.* Before *White*, the Court based its right to inspect corporate documents on the state's visitorial powers. *Id.* The state, however, does not have visitorial powers over the documents of unincorporated organizations. *Id.* The Court stated that the authority to compel the production of documents from unincorporated organizations is derived from the "inherent and necessary powers of the federal and state government to enforce their laws . . . ." *Id.* at 701.

97. *See supra* notes 66–96 and accompanying text.

98. *White*, 322 U.S. at 701.

99. 417 U.S. 85 (1974).

mer member of a small dissolved law partnership refused to produce subpoenaed partnership financial records.[100] The petitioner-Bellis contended that the partnership did not meet the collective entity requirements pronounced in *White*.[101] According to petitioner-Bellis, since the partnership represented personal interests rather than group interests,[102] the partnership's records were private papers protected under the fifth amendment.[103]

The *Bellis* Court stated that the *White* test was not helpful in defining collective entities such as partnerships because such entities possess a combination of personal interests and group interests.[104] Hence, the *Bellis* decision suggests that the *White* test is not the definitive method to determine whether documents of unincorporated organizations are protected under the fifth amendment.[105]

Instead of the *White* test, the *Bellis* Court relied on the institutional identity of the partnership to determine the applicability of fifth amendment privilege.[106] Writing for the *Bellis* Court, Justice Marshall stated that the partnership had "an established institutional identity independent of its individual partners."[107] In addition, the Court determined that the records were held by Bellis in a representative capacity.[108] Since the partnership was a collective entity and Bellis held the records in a representative capacity, the Court determined that Bellis had no "personal privilege against compulsory self-incrimination."[109] The *Bellis* decision thus narrowed the *Boyd* privacy standard even further by excluding partnership records from fifth amendment protection.

The previous decisions discussed in this section establish the pa-

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100. *Id.* at 86. Mr. Bellis was the former member of a three person partnership that had been dissolved. *Id.* Bellis had departed and the partnership was winding up business. *Id.* Bellis, at this point, obtained some of the partnership's records. *Id.* Shortly after this, Bellis was served a subpoena requesting, *inter alia*, that he produce all partnership records in his possession. *Id.* Bellis refused to comply on the ground that he was protected by his fifth amendment privilege. *Id.*

101. *Id.* at 100.

102. *Id.*

103. *Id.* at 95 n.2.

104. *Id.* The problem with the *White* test was that it set rigid classifications to determine the applicability of the fifth amendment privilege to organizations. Organizations with purely personal interests in their members enjoyed fifth amendment privilege. *White*, 322 U.S. at 701. On the other hand, organizations which embodied a common or group interest had no fifth amendment privilege. *Id.*; *see supra* note 94 and accompanying text. Hence, according to the *Bellis* Court the *White* test provided no help in collective entity cases such as *Bellis*, in which the entity possessed personal as well as group interests. *Bellis*, 417 U.S. at 100.

105. *Bellis*, 417 U.S. at 100–01.

106. *Id.* at 95, 101.

107. *Id.* at 95.

108. *Id.* at 97. The Court, determined that the financial records were not the private property of Bellis. *Id.* at 98. According to Pennsylvania state partnership laws, the documents were the property of the partnership. *Id.* at 96–99.

109. *Id.* at 101.

rameters of the collective entity doctrine under the privacy standard. Simply stated, corporations and unincorporated organizations, such as labor unions and partnerships, are not afforded fifth amendment protection. In addition, individuals representing these entities are likewise afforded no fifth amendment protection regarding the contents of entity documents that may incriminate the individuals personally.

B. Development of the Compelled Testimony Standard

Seventeen years prior to *Bellis,* the Supreme Court addressed the collective entity case of *Curcio v. United States.*[110] Although the Supreme Court applied the privacy standard to collective entity cases when *Curcio* was decided, the *Curcio* decision is presented at this point since it is so closely related to the compelled testimony standard adopted by the Court nineteen years later.

In *Curcio,* the Supreme Court considered whether an entity representative's oral testimony, requested by a federal grand jury, is protected by the representative's fifth amendment privilege against self-incrimination.[111] Curcio's union was subpoenaed to produce documents for a grand jury.[112] Curcio appeared before the grand jury but stated that the documents were not in his possession.[113] Curcio refused to answer further questions pertaining to the documents on the ground that his oral testimony might incriminate him in violation of the fifth amendment.[114] Justice Burton stated that requiring Curcio to give oral testimony regarding the location and identity of those individuals who possessed the documents was "more than 'auxiliary to the production' of unprivileged corporate or association records."[115] The Court in *Curcio* compared oral testimony given when answering questions, to oral testimony given when authenticating or identifying documents for

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110. 354 U.S. 118 (1957).

111. *Id.* at 118–19. The Court's focus in *Curcio* was upon petitioner-Curcio's oral testimony. *Id.* at 118–19, 124–28. *Curcio* is distinguished from the collective entity decisions of *Boyd, Hale, Wilson, White* and *Bellis* because of *Curcio's* focus upon oral testimony. The Court in *Boyd, Hale, Wilson, White* and *Bellis* focused on testimony/evidence to be derived from the contents of entity documents. *See supra* notes 65–109 and accompanying text. *Curcio,* on the other hand, sought testimony derived from an entity representative's own personal knowledge. *Curcio,* 354 U.S. at 125–28.

112. *Curcio,* 354 U.S. at 119. Curcio was the secretary-treasurer of Local 269 of the International Brotherhood of Teamsters. *Id.* at 119. He was served two subpoenas, one of which demanded he produce the union's books and records at a grand jury proceeding. *Id.* He testified at the grand jury proceeding that the union had the requested documents; however, he did not possess the documents. *Id.* Further, he refused to answer any questions regarding who possessed the documents or the documents' location, basing his denial on the fifth amendment. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 125 (quoting United States v. Austin Bagley Corp., 31 F.2d 229 (2d Cir. 1929)).

admission into evidence.[116] The latter oral testimony, according to Justice Burton, "merely makes explicit what is implicit"[117] in the act of production.[118]

The *Curcio* Court seems to suggest that the testimony proffered by the act of producing documents causes little threat of self-incrimination. However, Justice Burton determined that compelling the custodian to answer the questions regarding the documents "require[d] him to disclose the contents of his own mind . . . [which] is contrary to the spirit and letter of the Fifth Amendment."[119]

In 1976, the Supreme Court considered *Fisher v. United States.*[120] *Fisher* involved an attorney who received an Internal Revenue summons to produce documents given to him by a client.[121] The attorney refused to produce the documents on the ground that the documents would be incriminating to his client, and therefore, a violation of his client's fifth amendment rights.[122]

Fisher was a turning point for the collective entity doctrine. The Supreme Court abandoned the privacy standard of review pronounced in *Boyd* and narrowed by *Hale, Wilson, White,* and *Bellis.*[123] In *Fisher,* the Court switched to a compelled testimony standard of review.[124] The *Fisher* Court stated 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."[125] The Court noted that the language of the fifth amendment did not make it the "general protector of privacy."[126] Instead, the Court stated that the language of the fifth amendment focuses upon whether an individual has been compelled to be a witness against himself.[127] There-

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 127. Although the *Curcio* Court held that the fifth amendment protected Curcio from testifying orally, he still could have been penalized for not producing the requested documents. *See id.* at 127 n.7.

120. 425 U.S. 391 (1976).

121. *Id.* at 394. The *Fisher* Court concluded that the attorney-client privilege between Fisher and his client did not bar production of the documents. *Id.* at 402–05. According to the *Fisher* Court, when a client has no fifth amendment protection regarding the production of documents, the attorney-client privilege does not allow the attorney to refuse production of the subpoenaed documents given to him by his client. *Id.* at 403–05;

122. *Id.* at 395.

123. *See id.* at 396–409.

124. *See id.* at 409–12.

125. *Id.* at 409.

126. *Id.* at 401. The *Fisher* Court stated that the concept of protecting the disclosure of private information was addressed in the fourth amendment. *Id.*

127. *Id.* at 396–98; "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

fore, a fifth amendment claim regarding subpoenaed documents should address whether the individual subpoenaed is compelled to give self-incriminating testimony.[128]

According to the *Fisher* Court, the three ways testimony may be created when an individual is compelled to produce documents are as follows: The individual admits the documents exist; the individual admits the documents are in his possession; and the individual admits the documents are the items sought by the subpoena.[129] The Court suggested that when the above testimonial communications provide evidence that is not known by the party seeking the documents, the individual requested to produce the documents may refuse on the ground that his act of production involves self-incriminating testimony protected by the fifth amendment.[130]

The Supreme Court applied the compelled testimony standard in *Fisher*. The Court determined that the existence and the possession of the documents requested were a foregone conclusion[131] which contributed no valuable evidence to the government.[132] Further, the Court found that Fisher's act of production did not authenticate the documents in Fisher's particular case.[133] Therefore, the Court rejected Fisher's claim and found that his act of producing the requested documents did not involve incriminating testimony protected by the fifth amendment.[134]

Fisher had a profound impact on the collective entity doctrine. Before *Fisher*, under the privacy standard, the Supreme Court focused on whether the documents requested were private property or property of the entity. If the documents were the property of the collective entity, they were not protected by the fifth amendment and the representative producing the documents on behalf of the entity possessed no fifth amendment privilege.[135] In *Fisher*, under the compelled testimony standard, the Supreme Court focused on whether the act of producing documents would involve compelled testimonial communications cov-

128. *Fisher*, 425 U.S. at 409.

129. *Id.* at 410.

130. *See id.* at 410–11.

131. *Id.* at 411.

132. *Id.*

133. *Id.* at 412–13. The Court explained that Fisher's production of the documents in question only expressed that he believed the documents were actually the authentic documents sought. *Id.* Since the documents were the work papers of Fisher's accountant, the Court believed that Fisher's production would not authenticate the documents. *Id.* at 113. Fisher "did not prepare the papers and could not vouch for their accuracy." *Id.*

134. *Id.* at 411.

135. *See supra* notes 54–119 and accompanying text.

ered by the fifth amendment.[136] If the communications were found to be "sufficiently testimonial,"[137] the representative could refuse production on the ground that his acts were self-incriminating, and therefore, protected by the fifth amendment.

Fisher, which was reaffirmed in *Doe v. United States*,[138] caused uncertainty in the circuit courts of appeals. The Second, Third, Fourth, and Eleventh Circuits granted collective entity representatives fifth amendment protection regarding the act of producing entity documents.[139] However, the First, Fifth, Sixth, Ninth, and Tenth Circuits refused to allow collective entity representatives to enjoy fifth amendment privileges regarding the act of producing entity documents.[140] The latter group of circuit courts viewed *Fisher* and *Doe* as decisions inapplicable in collective entity cases.[141] Therefore, these circuit courts continued to apply the privacy standard in collective entity cases.[142] In order to resolve the conflict between the circuit courts, the Supreme Court granted certiorari in *Braswell v. United States*.[143]

IV. ANALYSIS

The United States Supreme Court heard *Braswell v. United States*[144] in order to resolve the split that occurred among the circuit courts regarding the application of the collective entity doctrine under the compelled testimony standard.[145] The primary issue in *Braswell* was whether a corporate representative could refuse to produce corporate documents pursuant to a subpoena *duces tecum* on the ground that his act of production would provide self-incriminating testimony protected under the fifth amendment.[146] In addition, the Supreme Court addressed whether the remedies proffered by Braswell, granting statutory immunity, or having an agent produce documents, were applicable in collective entity cases.[147] The Supreme Court held that Braswell, as the corporate representative, could not refuse compliance with the subpoena.[148] Furthermore, the Court determined that neither proffered

136. *See supra* notes 120–34 and accompanying text.
137. *Id.*; *see supra* note 130 and accompanying text.
138. 465 U.S. 605 (1984); *See supra* notes 34–36 and accompanying text.
139. *See* cases cited *supra* note 20.
140. *See* cases cited *supra* note 19.
141. *Id.*
142. *Id.*
143. Braswell v. United States, 108 S. Ct. 2284, 2287 (interim ed. 1988).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 2294.
148. *Id.* at 2295.

remedy was satisfactory.[149] In an effort to determine the proper application of the collective entity doctrine under the compelled testimony standard, the *Braswell* Court's rationale regarding the act of production and proffered remedies will henceforth be analyzed.

A. Act of Production

The compelled testimony standard focuses upon whether a corporate representative's act of producing subpoenaed corporate documents constitutes compelled testimonial self-incriminating communication, protected by the fifth amendment.[150] The petitioner-Braswell based his claim on this standard.[151] The Supreme Court rejected Braswell's claim, concluding instead that a corporate representative's act of production is not protected by the fifth amendment.[152]

The *Braswell* majority discussed two reasons why petitioner-Braswell was not afforded fifth amendment protection. First, the court reasoned that the "agency rationale"[153] supporting the collective entity doctrine precluded Braswell from invoking the fifth amendment; second, the production of documents by Braswell was "deemed not to constitute testimonial self-incrimination."[154]

1. The Agency Rationale

The agency rationale supporting the collective entity doctrine is essentially derived from a combination of three Supreme Court decisions.[155] In 1886, the Supreme Court decision of *Hale v. Henkle*[156] determined that corporations have no fifth amendment privilege.[157] Justice Brown noted in *Hale* that a corporation only possesses the rights granted to it by the state, and protection against self-incrimination is not one of these rights.[158]

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149. *Id.* at 2294–95.

150. *See supra* notes 110–142 and accompanying text.

151. *Braswell*, 108 S.Ct. at 2287. Braswell claimed "that his act of producing the documents has independent testimonial significance, which would incriminate him individually, and the Fifth Amendment prohibits government compulsion of that act." *Id.*

152. *Id.* at 2292.

153. *See infra* notes 154–69 and accompanying text.

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

155. The term "agency rationale" is used by the *Braswell* majority to depict a principle "undergirding the collective entity decisions, . . . in which [entity representatives have claimed] . . . that production of entity records would incriminate them personally." *Id.* at 2291. While the Court has utilized an agency rationale in a number of collective entity decisions, *see* cases cited *supra* note 3, the meaning of this term is best understood in light of three particular Supreme Court decisions: United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkle, 201 U.S. 43 (1906).

156. 201 U.S. 43 (1906); *see supra* notes 73–79 and accompanying text.

157. *Hale*, 201 U.S. at 74–75.

158. *Id.*

The Supreme Court in *Wilson v. United States*[159] determined that corporate representatives possessed no fifth amendment privilege with respect to producing corporate documents.[160] The *Wilson* Court reasoned that by assuming custody of corporate documents, an act which enjoys no fifth amendment protection, the representative is "obligate[d] to permit inspection . . . [of the documents] although their contents tend"[161] to incriminate the representative.[162] In other words, the representative waives his right to fifth amendment privilege when he takes custody of corporate documents.[163]

The Supreme Court, in *United States v. White*,[164] agreed that organization representatives possess no fifth amendment privilege.[165] However, the *White* Court articulated an agency rationale supporting the collective entity doctrine. Thus, the *White* Court concluded that a representative "assume[s] the rights, duties and privileges"[166] of the organization he represents.[167] As a result, a representative acting on behalf of the corporation possesses no fifth amendment rights because the corporation possesses no such rights.[168]

The majority in *Braswell* stated that this agency rationale is still valid under the compelled testimony standard.[169] Writing for the *Braswell* majority, Justice Rehnquist quoted the *Wilson* Court's pronouncement that an entity representative was obligated to produce the documents in his custody, even though the contents of the documents may incriminate the representative.[170] In addition, Justice Rehnquist quoted the *White* Court's conclusion, stating that a representative acting on behalf of an organization assumed the position of the organization and therefore has no fifth amendment privilege.[171] Justice Rehnquist further supported his determination by pointing out that the Supreme Court's decision in *Bellis v. United States*[172] relied on the agency ra-

159. 221 U.S. 361 (1911); *see supra* notes 80–88 and accompanying text.

160. *Wilson*, 221 U.S. at 382.

161. *Id.* The *Wilson* Court explained that when a representative takes custody of documents "subject to examination by the demanding authority" (e.g. corporate documents within the visitorial power of the state) the representative is obligated to allow inspection of the documents. *Id.*

162. *Id.*

163. *See id.*

164. 322 U.S. 694 (1944); *see supra* notes 89–99 and accompanying text.

165. *White*, 322 U.S. at 699. Although *White* involved a labor union, the same conclusion would be valid for a corporation because both organizations are collective entities. *Id.* at 699–700.

166. *Id.* at 699.

167. *Id.*

168. *See White*, 322 U.S. at 699–701.

169. *Braswell*, 108 S. Ct. at 2290–91.

170. *Id.* at 2291 (quoting *Wilson*, 221 U.S. at 382).

171. *Id.* (quoting *White*, 322 U.S. at 699).

172. 417 U.S. 85 (1974).

tionale to conclude that Bellis possessed no fifth amendment rights.[173] While the *Braswell* majority is unquestionably correct that these prior Supreme Court cases all support the agency rationale,[174] the applicability of these decisions to Braswell and to the compelled testimony standard is questionable.

The *Braswell* dissent, written by Justice Kennedy, focuses attention on the fact that *Wilson, White* and *Bellis* all address the collective entity doctrine under the privacy standard.[175] The privacy standard focuses on whether the subpoenaed documents are the "private papers" of an individual.[176] In all three cases, the entity representatives refused to produce documents on the ground that the contents of the documents would tend to incriminate them.[177] However, in his defense, Braswell stated a claim different than those claimed in the above cases.[178] Braswell argued that his "*act of producing* the documents . . . would incriminate him individually."[179]

The above trilogy never focused on the fifth amendment implications regarding the act of production.[180] Rather, the opinions focused on whether the requested documents were the property of the individuals who were compelled to produce the documents.[181] The *Braswell* majority even recognized that the *Bellis* Court "did not focus on the testimonial aspect of the act of production."[182] However, the *Braswell* majority stated that it did "not think such a focus would have affected the results reached."[183]

Justice Kennedy, in his dissent in *Braswell,* stated that the analysis in the decision should focus on the unique arguments made by Bras-

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173. *Braswell,* 108 S. Ct. at 2291.

174. *See infra* notes 156–69 and accompanying text. In *Bellis* the Supreme Court relied on the representative's status to enforce the production of entity documents. *Bellis,* 417 U.S. at 95–97. The Supreme Court concluded that *Bellis* held documents that were "subject to the rights granted to the other partners [in the company] by the state partnership law." *Id.* at 98. Hence, the *Bellis* Court's decision supports the *Braswell* majority's position with respect to the agency rationale.

175. *See Braswell,* 108 S. Ct. at 2297–98 (Kennedy, J., dissenting). The privacy standard came to an end in 1976. *See supra* notes 80–109 and accompanying text.

176. *See supra* notes 65–109 and accompanying text.

177. *See supra* notes 80–109 and accompanying text.

178. *See Braswell,* 108 S. Ct. at 2298–99 (Kennedy, J., dissenting). The petitioner in *Wilson* refused to produce his corporation's documents on the ground that their contents might tend to incriminate him. *Wilson,* 221 U.S. at 366. The respondent in *White* refused to produce union documents on the ground that their contents might tend to incriminate him. *White,* 322 U.S. at 396. The respondent in *Bellis* claimed the documents requested were "private papers," and as such they were protected by the fifth amendment. *Bellis,* 417 U.S. at 95, n.2.

179. *Braswell,* 108 S. Ct. at 2287 (emphasis added).

180. *See id.* at 2288–90.

181. *See Bellis,* 417 U.S. at 98; *White,* 322 U.S. at 704; *Wilson,* 221 U.S. at 377.

182. *Braswell,* 108 S. Ct. at 2291.

183. *Id.*

well and not on prior cases.[184] The *Braswell* dissent is correct. The *Braswell* majority based its opinion on claims entirely different than Braswell's, thus weakening its argument considerably.

The *Braswell* majority's position is further weakened because the conclusion it derived from the agency rationale is at odds with the Court's prior decision in *Curcio v. United States*.[185] The *Braswell* majority concluded that a corporate representative's act of production is deemed to be an act of the corporation, and therefore is not protected under the fifth amendment.[186] In *Curcio*, the Supreme Court held that a collective entity representative's act of providing oral testimony was protected by the fifth amendment.[187] Thus the *Braswell* majority's conclusion conflicts with the *Curcio* holding.[188]

Presumably, the *Braswell* majority did not address this conflict because the majority thought that the *Curcio* decision distinguished oral testimony from testimony derived from one's act of producing documents. The *Braswell* majority suggested that the *Curcio* decision precludes act of production testimony from receiving protection under the fifth amendment.[189] The *Braswell* majority recognized that the *Curcio* Court did address the testimonial implications involved in the act of production.[190] However, according to the *Braswell* majority, the *Curcio* Court did not believe that the testimony proffered in the act of production posed a significant threat to self-incrimination.[191] In addition, the *Braswell* majority viewed the *Curcio* decision as drawing a "line . . . between oral testimony and other forms of incrimination."[192] Consequently, the *Braswell* majority viewed only the oral testimony of entity representatives as being protected by the fifth amendment.[193]

The *Curcio* Court determined that an individual's oral testimony regarding the identification and authentication of documents "merely makes explicit what is implicit in the act of production."[194] In addition, the *Curcio* Court stated that answering questions regarding the documents is "more than 'auxiliary to the production'"[195] of corporate docu-

184. *Id.* at 2298 (Kennedy, J., dissenting).
185. 354 U.S. 118 (1957); *see supra* notes 110–19 and accompanying text.
186. *Braswell*, 108 S. Ct. at 2291.
187. *Curcio*, 354 U.S. at 127–28.
188. *Braswell*, 108 S. Ct. at 2300 (Kennedy, J., dissenting).
189. *Id.* at 2293.
190. *Id.*
191. *Id.* at 2293–94.
192. *Id.* at 2293.
193. *Id.*
194. *See Curcio*, 354 U.S. at 125.
195. *Id.*

ments.[196] The *Curcio* decision may support the *Braswell* majority's interpretation in that *Curcio* might suggest that the testimonial implications from the act of production are not as threatening to self-incrimination as testimony given orally.[197] However, the holding in *Curcio* does not explicitly exclude act of production testimony from fifth amendment protection.[198] For this reason, the *Braswell* majority's determination that *Curcio* precludes production testimony merely because it is not oral testimony restricts what may be fairly drawn from *Curcio*.

In order to determine whether the *Curcio* decision precludes production testimony, Braswell's production testimony must be analyzed in the same manner as Curcio's oral testimony.[199] If this analysis indicates Braswell's production testimony is equivalent to Curcio's oral testimony, the *Braswell* majority's distinction is flawed.

The *Braswell* dissent contends that the act of production testimony must receive fifth amendment protection because it is no different from the oral testimony in *Curcio*.[200] The *Curcio* Court, however, only provided a brief explanation regarding why it determined that Curcio's oral testimony was protected by the fifth amendment.[201] According to the *Curcio* Court, the oral testimony was protected because it compelled Curcio "to disclose the contents of his own mind."[202] The Court reasoned that forcing Curcio to testify orally regarding the location of documents required him to draw upon his own personal knowledge.[203] For this reason, the Court found that Curcio's testimony was protected by the fifth amendment.[204]

The *Braswell* dissent noted that Braswell's act of production also required him "to draw upon his personal knowledge."[205] Braswell's act of production provided testimony regarding the existence and location of the documents sought by the subpoena.[206] In order to produce the requested documents, Braswell was required to draw upon the contents of his own mind to locate and select the documents.[207] Hence, according to the *Braswell* dissent, Braswell would communicate his personal

196. *Id.* (quoting United States v. Bagley Corp., 31 F.2d 229 (2d Cir. 1929)).
197. *Id.*; *see supra* notes 110–20 and accompanying text.
198. *See Curcio*, 354 U.S. at 125–27.
199. *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).
200. *Id.* at 2299–2300.
201. *See Curcio*, 354 U.S. at 128.
202. *Id.*
203. *See id.* at 125.
204. *Id.* at 125–28.
205. *Braswell*, 108 S. Ct. at 2299, 2300 (Kennedy, J., dissenting).
206. *See id.* at 2297.
207. *See id.* at 2299, 2300.

knowledge when producing the documents.[208] The dissent reasoned that the testimony offered in Braswell's act of production is equivalent to Curcio's oral testimony. The *Braswell* dissent appears correct in this regard. Both individuals were required to disclose the location of subpoenaed documents. Furthermore, both individuals were asked to disclose what was in their minds in order to comply with the subpoena. Consequently, when Braswell's act of production testimony is compared to the oral testimony in *Curcio,* it is logical that Braswell's production testimony should be protected by the fifth amendment.

Since the testimony offered by Braswell's act of production is equivalent to the oral testimony in *Curcio,* the *Braswell* majority's distinction of *Curcio* is flawed. Although *Curcio* recognized a difference between two types of testimony, the difference appears to be one of form. Further, the *Braswell* dissent is correct in stating that the majority's conclusion drawn from the agency rationale conflicts with *Curcio.* The *Braswell* majority concluded that the representative's act of production is an act of the corporation which is not protected by the fifth amendment.[209] The representative's act of production, however, was shown to be equivalent to the act of giving oral testimony. Since the oral testimony in *Curcio* was afforded fifth amendment protection by the Supreme Court, Braswell's act of production testimony should likewise have been afforded fifth amendment protection.

2. Testimonial Self-Incrimination

The Supreme Court decisions of *Fisher v. United States*[210] and *United States v. Doe*[211] address the possibility that self-incriminating testimony may be conveyed by the act of producing subpoenaed documents. *Fisher* determined that the testimonial communications inherent in the act of producing documents may be protected under the fifth amendment.[212] Although *Doe* did little more than reaffirm *Fisher, Doe* has been recognized as the persuasive authority on the issue because the Supreme Court allowed testimony gained from the act of producing documents to be protected under the fifth amendment.[213]

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208. *Id.*

209. *Id.* at 2291.

210. 425 U.S. 391 (1976); *see supra* notes 120–42 and accompanying text.

211. 465 U.S. 605 (1984); *see supra* notes 34–36 and accompanying text.

212. *Fisher,* 425 U.S. at 110. Although the *Fisher* decision stated that production testimony was within the protection of the fifth amendment, the *Fisher* Court determined that Fisher's testimonial communications created by his act of producing documents was not sufficient to warrant the protection. *See id.* at 410–11.

213. *Doe,* 465 U.S. at 613–14. *Doe* is also recognized because *Doe* unequivocally rejected the privacy standard pronounced in Boyd v. United States, 116 U.S. 616 (1886); *Doe,* 465 U.S. at 618 (O'Conner, J., dissenting).

In *Braswell*, the petitioner contended that the precedent set by the Supreme Court in these two decisions supported his fifth amendment claim.[214] The *Braswell* majority, however, rejected this contention.[215] Justice Rehnquist, writing for the majority, reasoned that "[a] sole proprietor does not hold records in a representative capacity."[216] Hence, the *Braswell* majority considered *Doe* inapplicable because *Doe* involved a sole proprietorship, which is not a collective entity.[217]

The *Braswell* dissent, however, found *Doe* did apply to Braswell's case.[218] According to the dissent, a determination that Doe's sole proprietorships were not collective entities had no bearing on the decision's applicability.[219] The *Braswell* dissent stated that "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."[220]

The *Braswell* dissent appears correct. Although *Doe* involved a sole proprietorship, the decision was applicable in *Braswell* with respect to the precedent it set regarding act of production testimony. However, the *Doe* precedent regarding act of production testimony merely reaffirmed the precedent set by *Fisher*.[221] For this reason, the *Braswell* majority's decision to disregard *Doe* presumably had little or no effect on the *Braswell* holding, since the majority recognized *Fisher* as being applicable to Braswell's case.[222]

The *Braswell* majority determined that precedent indicated that Braswell's act of production does not produce testimony worthy of fifth amendment protection.[223] According to the *Braswell* majority, the *Fisher* decision pronounced that a custodian's act of producing corporate records does not constitute testimonial self-incrimination.[224] In other words, the *Braswell* majority viewed the *Fisher* decision as stand-

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214. *Braswell*, 108 S. Ct. at 2287. Braswell claimed "his act of producing the documents has independent testimonial significance, which would incriminate him individually, and that the Fifth Amendment prohibits government compulsion of that act." *Id.*

215. *Id.* at 2292 n.5 (rejecting support from *Doe*); *id.* at 2292 (rejecting support from *Fisher*).

216. *Id.*

217. *Id.* A sole proprietorship never has been considered a collective entity within the parameters of the collective entity doctrine. *See supra* notes 54–140 and accompanying text; *see also In re* Grand Jury Proceedings, 814 F.2d 190, 192–93 (5th Cir.), *aff'd. sub nom.*, Braswell v. United States, 108 S. Ct. 2284 (interim ed. 1988).

218. *Braswell*, 108 S. Ct. at 2298–99 (Kennedy, J., dissenting).

219. *Id.*

220. *Id.* at 2298.

221. *See Braswell*, 108 S. Ct. at 2290.

222. *Id.* at 2291–92.

223. *Id.* at 2292.

224. *Id.*

ing for the proposition that an entity representative's act of producing requested documents is not sufficiently testimonial to warrant fifth amendment protection.[225] The *Fisher* Court stated that: "This Court has . . . time and again allowed subpoenas against . . . collective entities . . . over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor."[226] The quotation from *Fisher* suggests that the *Fisher* Court considered testimony created by an entity representative's act of production to be insufficient to warrant fifth amendment protection.

The Court's holding in *Doe*, however, contradicts this conclusion. The testimony offered by the sole proprietor's act of producing subpoenaed documents in *Doe* was found by the *Doe* Court to be sufficiently testimonial to warrant fifth amendment protection.[227] When one focuses upon the act of production, there is no difference between a sole proprietor and a sole shareholder of a closely-held corporation.[228] The act of producing subpoenaed documents may constitute testimonial self-incrimination regardless of the position occupied by the individual. This analysis indicates that a corporate representative's act of producing subpoenaed documents could quite possibly create testimony worthy of fifth amendment protection. Therefore, the *Braswell* majority is arguably incorrect in its absolute conclusion that "a custodian's production of corporate records is deemed not to constitute testimonial self-incrimination."[229]

In addition, it should be noted that some circuit courts and the *Braswell* dissent do not adopt the *Braswell* majority's narrow reading of *Fisher*.[230] The Second, Third, Fourth, and Eleventh Circuit Courts of Appeal read *Fisher* as extending fifth amendment protection to any

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225. *See id.*; *see also Fisher*, 425 U.S. at 411 ("It is doubtful that implicitly admitting the existence and position of papers rises to the level of testimony within the protection of the Fifth Amendment."); *see supra* notes 129–30 and accompanying text.

226. *See Braswell*, 108 S. Ct. at 2292 (citing *Fisher*, 425 U.S. at 411). The *Fisher* Court supports its statement by citing past collective entity decisions of *Wilson*, *White* and *Bellis*. The *Fisher* Court also cites Dreier v. United States, 221 U.S. 394 (1911), which was a companion case to *Wilson*. *Id.* at 400. Dreier had refused to produce the subpoenaed records of his corporation on the ground that the documents would incriminate him personally. *Id.* at 399. The only difference between *Wilson* and *Dreier* was that the subpoena Dreier had received was addressed to him personally rather than his corporation. *Id.* at 402. The *Dreier* Court determined that the name on the subpoena did not excuse Dreier from his obligation to produce the corporate documents he held because the documents were not his "private papers." *Id.*

227. *Doe*, 465 U.S. at 614 n.13.

228. *Braswell*, 108 S. Ct. at 2298 (Kennedy, J., dissenting). Braswell is the sole shareholder of two closely-held corporations. *See also supra* notes 23–24 and accompanying text.

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

230. *See* cases cited *supra* note 20; *Braswell*, 108 S. Ct. at 2298 (Kennedy, J., dissenting).

entity representative whose act of production conveys testimonial self-incriminating communications.[231] These circuit courts focus on the individual's act of production. If the individual's act of production proves the documents exist, proves the documents are in the individual's control or the documents are in fact the items sought by the subpoena, then the party requested to produce the documents should receive fifth amendment protection.[232] Hence, these circuit courts follow the compelled testimony standard pronounced by *Fisher*.[233]

B. Remedies

Petitioner-Braswell contended that having the corporation select an agent to produce requested documents would allow the government access to the desired information, without involving a representative who might be incriminated by producing documents.[234] The suggested procedure entails addressing the subpoena to the corporation and then allowing the corporation to select an agent who can produce the records without incriminating himself.[235] Braswell insisted that he could not be required to help the appointed agent locate the records since any statement to the agent would be a testimonial self-incriminating communication.[236] Petitioner-Braswell makes a valid argument. The agent would not risk self-incrimination, and therefore, could legally be required to give testimony regarding how he acquired the documents.[237] For this reason, Braswell's production to the agent's testimony would be no different than his production to the grand jury. The grand jury could still determine from the agent's testimony who had produced the documents.

The fact that Braswell would not aid the appointed agent prompted the *Braswell* majority to find the agency remedy unsatisfactory.[238] According to the Court, since the agent would not receive any information regarding the location of the documents, he would "essentially be sent on an unguided search."[239] If the case involved a sole shareholder corporation, like *Braswell*, that shareholder could easily be

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231. *See* cases cited *supra* note 20. Although these decisions allow entity representatives the protection of the fifth amendment, the collective entities are still required to produce the subpoenaed documents by appointed agents or otherwise.

232. *Id.*

233. *See supra* notes 120–42 and accompanying text.

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

235. *Id.*

236. *Id.*

237. *See id.*

238. *See id.*

239. *Id.*

the only person who knows where the documents are located.[240] For this reason, the *Braswell* majority viewed the appointment of an agent as a remedy that will not ensure the production of desired documents.[241]

There are two circuit courts of appeals that do not share the *Braswell* majority's apprehension of appointing an agent.[242] In situations in which the corporate representative would be incriminated by his act of production testimony, the eleventh and the second circuits suggested that the corporation could select an agent outside the corporate structure to produce the documents.[243] The Eleventh Circuit Court of Appeals stated that a corporate representative would not "commit a testimonial act by providing general corporate records to an agent selected by the corporation."[244] But the Eleventh Circuit did not offer an explanation as to why the representative's act of producing documents for an agent would be any different from the representative's act of producing documents for a grand jury.[245]

There is, however, an explanation that supports the Eleventh Circuit's conclusion. The court could have ordered Braswell to have his attorney produce the documents. If Braswell's attorney is considered his agent, the testimonial self-incriminating communications created, if and when Braswell produced the documents, would be protected by Braswell's attorney-client privilege.[246] Since Braswell's testimonial communications could be considered confidential disclosures made to his attorney, there is no risk associated with his attorney providing testimony regarding Braswell himself and the production of documents.[247] Appointing Braswell's attorney as an agent would have enabled Braswell to assist the agent-attorney in locating the requested documents and would have prevented the "unguided search"[248] that concerned the *Braswell* Court. Thus, when an appointed agent is the attorney of the corporate representative who is requested to produce documents, the agency remedy suggested by petitioner-Braswell appears satisfactory.

Braswell further contended that the testimonial communications provided from his act of production could be granted statutory immu-

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240. *Id.*

241. *Id.*

242. *See In re* Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987); United States v. Sancetta, 788 F.2d 67 (2d Cir. 1986).

243. *See In re Grand Jury No. 86-3,* 816 F.2d at 574; *Sancetta,* 788 F.2d at 74–75.

244. *In re Grand Jury No. 86-3,* 816 F.2d at 574. *Sancetta* did not comment on the testimony offered when a representative produces documents to an agent. *Sancetta,* 788 F.2d at 74–75.

245. *See In re Grand Jury No. 86-3* 816 F.2d at 574.

246. *See* 8 J. WIGMORE, EVIDENCE §§ 2292 (1961).

247. *See id.*

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

nity from prosecution.[249] The grant of immunity would bar the government from using testimony against Braswell which was gained from his act of production.[250] The government, therefore, could not use Braswell's act of production to prove the documents existed, the documents were in Braswell's possession or that the documents were in fact the items sought by the subpoena.[251]

The *Braswell* majority determined that granting statutory immunity was an unsatisfactory remedy.[252] The majority noted that if the government decided to prosecute Braswell individually, the government would face an increased burden of proof.[253] According to *Braswell,* once the custodian demonstrates that he testified under a grant of immunity, the government must meet a "heavy burden of proving that all of the evidence it purposes to use was derived from legitimate independent sources."[254] Although only the act of production testimony would be protected in such a circumstance, the *Braswell* majority reasoned that a grant of immunity might affect other areas of the government's prosecution.[255] The *Braswell* majority stated that the higher burden of proof might prevent the admissibility of evidence that the government is permitted to use.[256] Due to the possible adverse effect upon evidence outside that which is protected, the *Braswell* majority concluded that granting immunity would harm the prosecution's efforts in collective entity cases.[257]

Granting of statutory immunity may have some negative effect

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249. *Id.*; *see* 18 U.S.C. § 6002–6003 (1970).

250. 18 U.S.C. § 6002 (1970).

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding . . . and the person presiding over the proceeding communicates to the witness an order issued under this part [18 U.S.C.S. § 6001], 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.

Id.

251. *See Braswell,* 108 S. Ct. at 2301 (Kennedy, J., dissenting).

252. *Id.* at 2294.

253. *Id.* at 2294–95; *see* Kastigar v. United States, 406 U.S. 441, 461–62 (1972). *Kastigar* involved two individuals the government believed would invoke their fifth amendment privilege if called upon to testify. *Id.* at 442. The government granted statutory immunity to the individuals' testimony; however, the indivduals refused to testify on the ground that the immunity "statute was not co-extensive with the scope of the [fifth amendment] privilege against self-incrimination." *Id.* The Supreme Court found that the immunity statute was co-extensive with the fifth amendment. *Id.* at 462.

254. *Braswell,* 108 S. Ct. at 2295 (quoting *Kastigar,* 406 U.S. at 461–62).

255. *Id.* at 2295.

256. *See id.*

257. *Id.* at 2294.

upon the prosecutorial efforts of the government. Any evidence the government intends to use regarding the existence, authentication or possession of documents must be proven to have been obtained from a source other than the act of production of the protected individual.[258] Proving an independent source of such evidence could make prosecution more difficult.

The *Braswell* majority is also correct because other evidence outside that which is protected by a grant of immunity may be affected. The Supreme Court decision of *Kastigar v. United States*[259] explained that the testimony protected by a grant of immunity cannot be used as an "investigatory lead."[260] Thus the government will be prevented from expanding its investigation if information obtained from the protected individual's act of production implicates questionable conduct unrelated to the government's original investigation. It is questionable, however, whether the magnitude of these negative effects justified the *Braswell* majority's conclusion that granting statutory immunity is an unsatisfactory remedy.

Although there are drawbacks to statutory immunity, the negative factors are not so great as to outweigh the statute's utility. The government can acquire the requested documents and the individual possessing the documents can be afforded protection equal to that offered by the fifth amendment.[261] In addition, the government is able to use the contents of the documents to prosecute any individual, including the individual who is granted immunity.[262] The only evidence the government cannot use is the testimony created by the act of production which shows the existence, the authenticity, and the individual's possession of the documents.

However, the government can use means other than the act of production to prove the tacit averments created by producing documents.[263] According to the *Braswell* majority's argument these tacit averments are not sufficient testimony to warrant fifth amendment protection.[264] Consequently, if the government cannot prove these tacit averments by means other than the act of production, the magnitude of the testimony forfeited by the government will not be of great significance. Hence, affording the individual his fifth amendment rights and

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258. Kastigar v. United States, 406 U.S. 441, 460-62 (1972).

259. 406 U.S. 441 (1972).

260. *Id.* at 460.

261. *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting); *see also Kastigar*, 406 U.S. at 462 (court held that immunity statute, 18 U.S.C. § 6002 (1970), was co-extensive with the fifth amendment).

262. *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting).

263. *Id.*

264. *Braswell*, 108 S. Ct. at 2292; *see supra* notes 120–42 and accompanying text.

affording the government access to the documents, without a significant forfeiture of evidence, will assure that the granting of statutory immunity is satisfactory.

V. CONCLUSION

The United States Supreme Court's holding in *Braswell v. United States*[265] places the collective entity doctrine in the position it occupied prior to the compelled testimony standard. The Supreme Court applied the agency rationale supporting the collective entity doctrine to conclude that corporate representatives have no fifth amendment protection because their act of producing subpoenaed documents is an act of the corporation, not the individual.[266] A reviewing court applying this conclusion to collective entity cases would never reach the question whether the testimonial communications inherent in the act of production are self-incriminating. But apparently the Supreme Court did not want to leave the question open for future decision. Therefore, the Court determined that the compelled testimony standard pronounced in *Fisher v. United States*[267] was not applicable to collective entity cases. After rejecting the representative's ability to invoke fifth amendment protection, the Supreme Court went further and denounced other protection from self-incrimination sought by corporate representatives.

The Supreme Court rejected a grant of statutory immunity due to the negative effect it posed on the prosecution of collective entity cases.[268] However, when these negative effects were analyzed in light of the positive factors derived from granting statutory immunity, the analysis indicated that the granting of immunity would be a satisfactory remedy to prevent self-incrimination. In addition, the Supreme Court rejected the apparently feasible remedy of allowing the representative to appoint an agent to produce the subpoenaed documents.[269]

Hence, the United States Supreme Court set forth in *Braswell* what five Justices[270] view as the proper application of the collective entity doctrine. The compelled testimony standard is not a part of that doctrine. Consequently, the collective entity doctrine is back to a privacy standard and the effect of *Braswell* on future cases may be determined by looking to past collective entity decisions. Such decisions

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265. 108 S. Ct. 2284 (interim ed. 1988).

266. *Id.*

267. 425 U.S. 391 (1976).

268. *See supra* notes 249–64 and accompanying text.

269. *See supra* notes 234–41 and accompanying text.

270. *Braswell*, 108 S. Ct. at 2286. Chief Justice Rehnquist delivered the Court's opinion and was joined by J. White, J. Blackmon, J. Stevens, and J. O'Conner. *Id.*

often have held that representatives of collective entities have no fifth amendment privilege against self-incrimination, and must therefore produce entity documents when they are subpoenaed.

Robert Dixon Windus