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SUPREME COURT RAMIFICATIONS

THE RIGHT AGAINST SELF- INCRIMINATION AND THE PRODUCTION OF CORPORATE DOCUMENTS: *BRASWELL v. UNITED STATES*

The fifth amendment of the United States Constitution assures the individual the right to refuse to incriminate himself by his own testimony in a criminal proceeding.¹ The right against self-

¹ U.S. CONST. amend. V. The fifth amendment provides in part that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .” *Id.* Although the ability to avoid self-incrimination is as much a “right” as others granted by the Constitution, it has consistently been referred to as a privilege. See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* at vii-viii (1968).

The self-incrimination clause is a constant reminder of the belief in the importance of the individual. See *Murphy v. Waterfront Comm’n*, 378 U.S. 52 (1964). Justice Goldberg, writing for the Court, enumerated the policies supporting the privilege as:

reflect[ing] many of our fundamental values and most noble aspirations: 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 . . .

Id. at 55. See generally Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOKLYN L. REV. 31, 51-63 (1982) (discussing policies of mercy, privacy, and fairness as foundation for privilege); Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect*, 43 S. CAL. L. REV. 597, 601-05 (1970) (discussing integrity of judicial system and individual privacy); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 679-98 (1968) (discussing privacy, cruelty, fairness, political liberty and equal protection).

The concern with protecting the individual from self-incrimination is the result of a long

incrimination is available in any proceeding, criminal or civil, administrative or judicial, investigatory or adjudicatory, and protects any disclosures which could be used to incriminate the individual in any future criminal proceeding.² The privilege is "essentially a personal one, applying only to natural individuals."³ Organiza-

struggle between the conflicting concepts of individual liberty and the exercise of collective state power. See *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (quoting appellant's counsel). The First Congress proposed the language of the fifth amendment "in order to ensure that the right against self-incrimination would be protected against interference by the newly created federal government." M. BERGER, *TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION* 1 (1980). See also CORWIN, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 5 (1930) (privilege traced to administration of oath of *ex officio* in proceedings of English ecclesiastical courts and High Commission); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1 (1949) (same); Note, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 775-83 (1935) (tracing constitutional privilege to proceedings of the supreme colonial courts). See generally C. McCORMICK, *McCORMICK ON EVIDENCE* §§ 114-117 (E. Cleary 3d ed. 1984); 8 J. WIGMORE, *A TREATISE IN THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2250 (McNaughton rev. 1961).

The self-incrimination clause of the fifth amendment has been held applicable to the states through the due process clause of the fourteenth amendment. See *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). In *Malloy*, the Court noted that "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court." *Id.* The *Malloy* decision overruled the long standing doctrine held in *Twining v. New Jersey*, 211 U.S. 78 (1908), which precluded implication of fifth amendment concerns in state actions through the fourteenth amendment. *Id.* at 89.

² See *Miranda v. Arizona*, 384 U.S. 436, 467, *reh'g denied*, 385 U.S. 890 (1966). The privilege protects persons "in all settings . . . from being compelled to incriminate themselves." *Id.* See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (grand jury investigation); *United States v. Kordel*, 397 U.S. 1 (1970) (pretrial discovery); *In re Gault*, 387 U.S. 1 (1967) (juvenile hearing); *Brown v. United States*, 356 U.S. 148 (civil suit for denaturalization), *reh'g denied*, 356 U.S. 948 (1958); *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983) (psychiatric evaluations). See generally C. McCORMICK, *supra* note 1, § 121 (privilege protects against danger of legal criminal liability); 8 J. WIGMORE, *supra* note 1, §§ 2254-2257 (discussing facts protected from disclosure). The privilege may be invoked only when the testimonial activity is compelled. See *Couch v. United States*, 409 U.S. 322, 328 (1973) (surrender of incriminating documents by taxpayer's accountant is not action of compelling nature directly against taxpayer); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79-80 (1964) (state witness cannot be compelled to give testimony, incriminating him under federal law, unless testimony will not be used against him by federal officials). See also Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 398-429 (1977) (delineating permissible government conduct and exercise of privilege); Comment, *On Claiming the Fifth Amendment for Mixed Purpose Documents: The Problem of Categorizing Documents as Personal or Corporate in a Business Setting*, 17 U.S.F. L. REV. 333, 337 n.23 (1973) (distinguishing coercion from compulsion in obtaining evidence); C. McCORMICK, *supra* note 1, § 125 (testimonial act must be compelled).

³ *United States v. White*, 322 U.S. 694, 698 (1944). See *Couch v. United States*, 409 U.S. 322, 327 (1973) (fifth amendment ensures respect of "a private inner sanctum of individual feeling and thought"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (individual has

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tions and associations are not “persons” within the meaning of the fifth amendment.⁴ As collective entities, organizations and associations are not entitled to claim any fifth amendment privilege to prevent self-disclosure.⁵ Upon proper demand, a collective entity

zone of privacy within which government may not intrude); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (invasion of personal liberty constitutes essence of offense); *United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting) (right as “an important ‘substantive’ value, as a safeguard of individual’s . . . right to private enclave where he may lead a private life”), *rev’d*, 353 U.S. 391 (1957). The privilege is limited to a person who shall be compelled to be a “witness against himself.” *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (emphasis supplied by Court). In *Hale*, the Court stated that the privilege was “never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person . . .” *Id.* at 69-70. *See also Couch* 409 U.S. at 328 (privilege “adheres basically to the person, not to information that may incriminate him”); Comment, *supra* note 2, at 335-36 (1983) (defining “person” for fifth amendment purposes). *See generally* C. McCORMICK, *supra* note 1, § 120 (privilege personal in nature).

⁴ *See United States v. White*, 322 U.S. 694 (1944). The Supreme Court defines an organization as “[having] 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.” *Id.* at 701. The factors which the *White* Court considered were: 1) the existence of a constitution, rules and by-laws, 2) the independent existence of the entity, 3) the formation of records and funds distinct from its individual members. *Id.* at 701-02. *See also Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Chief Justice Marshall defined a corporation as:
an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

Id. at 636. The Supreme Court has denied fifth amendment protection to most organizations. *See, e.g., Bellis v. United States*, 417 U.S. 85 (1974) (partnership); *California Bankers Ass’n v. Shultz*, 416 U.S. 21 (1974) (incorporated bank); *United States v. White*, 322 U.S. 694 (1944) (labor union); *Brown v. United States*, 276 U.S. 134 (1928) (unincorporated manufacturer’s association); *Grant v. United States*, 227 U.S. 74 (1913) (sole shareholder corporation); *Communist Party v. Subversive Activities Control Board*, 223 F.2d 531 (D.C. Cir. 1955) (political party), *rev’d on other grounds*, 351 U.S. 115 (1956).

⁵ *See Bellis* (“no artificial organization may utilize the personal privilege against compulsory self-incrimination”); *United States v. Kordel*, 397 U.S. 1, 7 (1970) (“corporation had no privilege of its own”); *White*, 322 U.S. at 704 (labor union denied protection under fifth amendment). The Supreme Court first addressed the applicability of the fifth amendment to collective entities in *Hale v. Henkel*, 201 U.S. 43 (1906). In *Hale*, the Court denied a corporation the right to plead the fifth amendment privilege. *Id.* at 74-75. The Court reasoned that the corporation was a creature of the state, receiving special privileges and franchises subject to the laws of the state and concurrently owed a duty to the state. *Id.* In granting the corporate charter, the state reserved the power to investigate abuses and any restriction on this power would be an investigative barrier to corporate crime. *Id. Accord Bellis*, 417 U.S. at 90; *White*, 322 U.S. at 700. *See generally* M. BERGER, *supra* note 1, at 57-66 (discussing historical, practical and functional grounds for denying fifth amendment coverage to organizations); C. McCORMICK, *supra* note 1, § 128 (general discussion of applicability of privilege to collective groups); 8 J. WIGMORE, *supra* note 1, § 2259a (same).

may not resist production of its books and records.⁶

I. PRODUCTION OF DOCUMENTS BY ENTITIES

A. *The Collective Entity Rule*

The leading case on the subject of compulsory production of papers by a collective entity is *Boyd v. United States*.⁷ In *Boyd*, a partnership was issued a subpoena compelling production of a business invoice.⁸ Treating the invoice as a private business record, the Supreme Court held that the seizure of an individual's private books and papers to be used in evidence against him was compelling him to be a witness against himself in violation of the fifth amendment.⁹

Twenty years later, in *Hale v. Henkel*,¹⁰ the Supreme Court limited the holding in *Boyd* by establishing that corporate books and records were not "private papers" protected by the fifth amendment.¹¹ The Court opined that there was a "clear distinction between an individual and a corporation."¹² As a creature of the

⁶ See *infra* notes 13 and 16 and accompanying text.

⁷ 116 U.S. 616 (1886).

⁸ *Id.* This was an action for the forfeiture of thirty-five cases of plate glass, allegedly imported in violation of the customs laws. *Id.* at 617.

⁹ *Id.* at 634-35. The Court held that a compelled disclosure of the contents of private papers violated both the fourth and fifth amendments. *Id.* at 638. Although no actual search and seizure in violation of the fourth amendment was involved, the Court concluded that the same results had been achieved. *Id.* at 635. Requiring "an owner to produce his private books and papers, in order to prove his breach of the laws . . . is purely compelling him to furnish evidence against himself." *Id.* at 637 (emphasis added). Scholars have been unwilling to recognize the *Boyd* Court's alignment of the fourth and fifth amendments on this issue. See 8 J. WIGMORE, *supra* note 1, § 2264 at 381 n.4 (*Boyd* has created unnecessary confusion between fourth and fifth amendments); Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 363 (1979) (blending of fourth and fifth amendments in *Boyd* weakened fifth amendment protection); Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 695 (1961) (scholars unable to perceive such intimate relationship between amendments).

¹⁰ 201 U.S. 43 (1906). In *Hale*, a corporate officer, protected by personal immunity, sought to invoke a fifth amendment privilege on behalf of the corporation. *Id.* at 46.

¹¹ *Id.* at 74-75. See Sullivan, *Fifth Amendment Protection and the Production of Corporate Documents*, 135 U. PA. L. REV. 747 (1987). Professor Sullivan reasoned that by establishing documents as private or corporate the Court's focus shifted to the identity of the owner. *Id.* at 751. "Thus the implicit rationale emerged that the business person's act of incorporation waived fifth amendment rights for corporate documents." *Id.*

¹² 201 U.S. at 74. See *supra* notes 3 and 4.

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state, the corporation's grant included visitatorial rights by the state and therefore the corporation had no right to refuse to submit its books and papers to examination.¹³

The Supreme Court further narrowed the scope of fifth amendment protection in *Wilson v. United States*¹⁴ where it held that a corporate custodian could not assert his personal fifth amendment privilege to resist the production of corporate books held in a representative capacity, although the contents proved personally incriminating.¹⁵ The Court reasoned that in assuming custody of the books the custodian had accepted the obligation to permit inspection.¹⁶

In *United States v. White*,¹⁷ the Supreme Court found no fifth amendment obstacle to prevent the production of records by a labor union.¹⁸ Recognizing the economic power of unincorporated organizations, the Court found that public necessity required the regulation of such entities.¹⁹

This reliance on the visitatorial powers of the state was followed in *Bellis v. United States*.²⁰ In *Bellis*, the Court held that a partner

¹³ 201 U.S. at 74-75. The Court stated that a corporation was chartered for the "benefit of the public." *Id.* at 74. The charter granted certain privileges, and its powers were limited by the state. *Id.* The corporation had a "duty" to produce its books upon demand. *Id.* at 75.

¹⁴ 221 U.S. 361 (1911). In *Wilson*, a grand jury issued a subpoena to a corporation demanding the production of corporate letter press copy books which were in the possession of the corporate president. *Id.* at 371.

¹⁵ *Id.* at 384-85. The Court concluded that the visitatorial powers of the state extended to the contents of the books without regard to the conduct of the custodian. *Id.*

¹⁶ *Id.* at 382. The Court reasoned that the president of the corporation maintained custody of the books to facilitate the business transactions committed to his charge. *Id.* at 385. The president could assert no personal right to retain the books if another was to take his place. *Id.* Subject to corporate directives, the president could assert no personal right to retain the corporate books upon demand of the government. *Id.*

¹⁷ 322 U.S. 694 (1944).

¹⁸ *Id.* at 701. The Court analogized a labor union to a corporation, devising a test to categorize the union as a collective entity. *See supra* note 4.

¹⁹ 322 U.S. at 700. The *White* Court stated:

[T]he absence of [visitatorial powers over] a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws

Id. at 700-01.

²⁰ 417 U.S. 85 (1974). In *Bellis*, a member of a three-partner law firm that had been

could not invoke his personal fifth amendment privilege to resist production of partnership records since the partnership had an institutional identity and the records were held in a representative capacity.²¹

From *Boyd* to *Bellis*, the Supreme Court distinguished between documents held in a personal capacity and those held in a representative capacity.²² In determining the potential for self-incrimination, the collective entity decisions were concerned with the contents of the documents subpoenaed.²³ It is suggested that the collective entity rule fails to focus on the communicative nature of the custodian's act of production.

B. The Act of Production Doctrine

The fifth amendment does not proscribe the compelled production of evidence absent some communicative act.²⁴ Evidence is communicative or "testimonial" when it "reveals a person's subjective knowledge or thought processes."²⁵ It is submitted that

dissolved was held in contempt for refusing to produce partnership records pursuant to a grand jury subpoena. *Id.* at 86-87.

²¹ *Id.* at 100. The Court conceded that the test devised in *White* for determining the applicability of the fifth amendment privilege to collective groups was not particularly helpful since the partnership embodied a mingling of personal and group interests. *Id.* Nevertheless the Court found the partnership to be an entity independent from its partners. *Id.* at 101.

²² See *supra* notes 9 and 16 and accompanying text.

²³ See *supra* notes 9 and 15 and accompanying text discussing collective entity rule. See generally Comment, *supra* note 11 at 749-54 (general discussion of development of collective entity rule); Note, *Sole Shareholder's Privilege Against Self-Incrimination in Producing Corporate Documents*, 59 TEMP. L.Q. 219, 226-90 (1986) (same).

²⁴ See *United States v. Dionisio*, 410 U.S. 1 (1973). The fifth amendment offers no protection against compelled display of identifiable physical characteristics. *Id.* at 5-6. See, e.g., *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplar); *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); *Holt v. United States*, 218 U.S. 245 (1910) (donning of clothing); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (urinalysis); *State v. Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976) (paternity test); *State v. Cozart*, 352 S.E.2d 152 (W. Va. 1986) (breathalyzer). See generally *Dann*, *supra* note 1, 613-30 (comprehensive discussion of admissible forms of evidence); C. McCORMICK, *supra* note 1, § 124 (privilege limited to testimonial acts).

²⁵ *People v. Hagar*, 69 N.Y.2d 141, 142, 505 N.E.2d 237, 238, 512 N.Y.S.2d 794, 795 (1987). See *Dudley v. State*, 548 S.W.2d 706, 707 (Tex. Crim. App. 1977) ("communication, written, oral, or otherwise [which] involves an accused's consciousness of the facts and operations of his mind . . . is testimonial and communicative in nature"). The privilege prohibits the state from obtaining evidence against the accused through "the cruel, simple expedient of compelling it from his own mouth" *Schmerber v. California*, 384 U.S.

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some methods of obtaining evidence have communicative aspects wholly aside from the contents of the evidence²⁶ and the act of producing evidence in compliance with a subpoena may involve testimonial self-incrimination.²⁷

In *Fisher v. United States*,²⁸ the Supreme Court rejected the notion that the contents of business records produced by subpoena were privileged under the fifth amendment.²⁹ The Court held that an individual may invoke his personal privilege against self-incrimination to resist compelled production of papers when the "act of producing" itself would communicate information separate from their contents.³⁰

Eight years later the Supreme Court successfully applied the

757, 763 (1966) (quoting *Miranda v. Arizona*, 384 U.S. 436, 460, *reh'g denied*, 385 U.S. 890 (1966)). All forms of testimonial communication are protected by the privilege. *See, e.g.*, *United States v. Doe*, 465 U.S. 605, 617 (1984) (physical production of business documents involved testimonial assertions); *Curcio v. United States*, 354 U.S. 118, 128 (1957) (oral testimony self-incriminating); *Goldsmith v. Superior Court*, 152 Cal. App. 3d 76, 85-86, 199 Cal. Rptr. 366, 375 (Cal. Ct. App. 1984) (compelled production of weapon testimonial communication); *State v. Alexander*, 281 N.W.2d 349, 353 (Minn. 1979) (compelled production of obscene film violative of fifth amendment rights). *See also Schmerber*, 384 U.S. 757, 761 n.5 (1966) (nod or head-shake is "testimonial" act). *But cf.* 8 J. WIGMORE, *supra* note 1, § 2263 (privilege limited to oral disclosures). *See generally Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 42-48 (1982) (distinguishing testimonial from real evidence).

²⁶ *See Fisher v. United States*, 425 U.S. 391, 410 (1976). *See also Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber* the Court declined to extend fifth amendment protection to physical evidence whose compulsion did not elicit incriminating testimonial communication. *Id.* at 764. The Court reasoned that the distinction between testimonial and nontestimonial evidence may break down in some cases when, in obtaining the physical evidence, actual testimonial responses would be elicited. *Id.*

²⁷ *See infra* notes 28-33 and accompanying text.

²⁸ 425 U.S. 391 (1976). In *Fisher*, an attorney sought to resist a subpoena directing the production of tax documents entrusted to him by his client and prepared by his client's accountants. *Id.* at 394-95.

²⁹ *Id.* at 409. The Court noted that *Boyd's* holding that the compelled disclosure of the contents of private papers was prohibited by the fifth amendment "[had] not stood the test of time." *Id.* at 406-07. *See supra* notes 7-9 and accompanying text. *See generally Note, Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1563 (1986) ("*Fisher* and *Doe* rendered privacy and ownership irrelevant to analysis of self-incrimination claims").

³⁰ *See Fisher v. United States*, 425 U.S. 391 (1976). The Court stated that compliance with a subpoena could communicate the existence of the evidence, its possession by the respondent, and the respondent's belief that the evidence produced was that described in the subpoena. *Id.* at 410. In *Fisher*, the Court held that the act of production "would not itself involve testimonial self-incrimination" because "the existence and location of the papers [were] a foregone conclusion . . ." *Id.* at 411.

Fisher analysis to a sole proprietor in *United States v. Doe*.³¹ Following its decision in *Fisher*, the Court held that the contents of business records were not privileged.³² In addition, the Court held that the sole proprietor's act of producing the documents was privileged since it involved testimonial self-incrimination.³³

Neither *Fisher* nor *Doe* addressed the application of the act of production privilege to an individual holding entity documents in a representative capacity.³⁴ Recently the United States Supreme Court decided this issue in *Braswell v. United States*.³⁵ The Court held that a custodian of corporate records could not resist the compelled production of documents on the ground that the act of production itself would prove incriminating.³⁶

This Article will examine the *Braswell* decision and discuss the ramifications of the case with respect to the self-incrimination clause in the corporate context. It is submitted that the Court has impermissibly denied corporate employees their constitutional right against self-incrimination by ruling that the government may use compulsion to elicit incriminating testimony from agents of collective entities.

II. BRASWELL V. UNITED STATES

The petitioner Braswell was the president of two corporations.³⁷ In 1986 a federal grand jury issued a subpoena to Braswell, in his capacity as president, ordering the production of books and records.³⁸ The subpoena did not require Braswell to testify.³⁹

³¹ 465 U.S. 605 (1984).

³² *Id.* at 612.

³³ *Id.* at 617. The *Doe* Court relied on the findings of the District Court. *Id.* at 614.

³⁴ See Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 647-48 (1986). The author has interpreted the act of production privilege as creating an exception to the collective entity rule.

³⁵ 108 S.Ct. 2284.

³⁶ *Id.* at 2292.

³⁷ *Id.* at 2286. Braswell's business activities consisted of the purchase and sale of equipment, land, timber, and oil and gas interests. *Id.* From 1965 to 1980, Braswell operated his business as a sole proprietorship. *Id.* In 1980 and 1981 he incorporated his business into World Wide Machinery Sales and Worldwide Purchasing. *Id.* In compliance with Mississippi law, the corporations had three directors: Braswell as president, his wife as secretary-treasurer and his mother as vice-president. *Id.* See MISS. CODE ANN. § 79-3-69 (1972).

³⁸ *Braswell*, 108 S.Ct. at 2286. The subpoena was directed to: "Randy Braswell, President Worldwide Machinery, Inc. [and] Worldwide Purchasing, Inc." *Id.* The subpoena re-

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Braswell moved to quash the subpoena on the ground that the act of producing the records would incriminate him in violation of his fifth amendment right against self-incrimination.⁴⁰ The district court denied the motion, ruling that the collective entity doctrine prevented Braswell from asserting his fifth amendment right.⁴¹ The Court of Appeals for the Fifth Circuit affirmed the judgment.⁴² The United States Supreme Court granted certiorari to resolve the conflict among the circuits.⁴³

Braswell argued that the fifth amendment prohibits the government from compelling any act which would have independent testimonial significance and incriminate him individually.⁴⁴ Braswell further argued that the collective entity doctrine does not address the issue of whether the act of production is self-incriminating.⁴⁵

Writing for the Court, Chief Justice Rehnquist rejected Braswell's argument, holding that the collective entity doctrine pre-

quested "all books, records, and papers and other data relating to Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc., for the years 1982, 1983, 1984 and 1985." *In re Grand Jury Proceedings*, 814 F.2d 190, 191 n.1 (5th Cir. 1987), *aff'd*, 108 S.Ct 2284 (1988).

³⁹ *Braswell*, 108 S.Ct. at 2286.

⁴⁰ *Id.*

⁴¹ *Id.* See *In re Grand Jury Proceedings*, 814 F.2d 190, 192 (5th Cir. 1987). The *per curiam* decision noted that Braswell was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled. Nevertheless, the court rejected Braswell's argument that the collective entity doctrine is not applicable when the corporation is so small as to amount to no more than the owner's alter ego. *Id.*

⁴² *Braswell*, 108 S.Ct. at 2286.

⁴³ *Id.* at 2287. Compare *In re Will Roberts Corp.*, 816 F.2d 569, 573 (11th Cir. 1987) (custodian may invoke fifth amendment privilege when production would be communicative in nature); *In re Brown*, 768 F.2d 525, 528-29 (3d Cir. 1985) (en banc) (sole owner of incorporated accounting firm may resist production if act would prove incriminating); *In re Two Grand Jury Subpoena Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (where production of corporate documents would violate fifth amendment rights of individual, corporation must produce documents through some other agent); *with In re Morganstern*, 771 F.2d 143, 147 (6th Cir.) (en banc) (production of partnership documents not violative of fifth amendment right against self-incrimination under collective entity rule), *cert. denied*, 474 U.S. 1033 (1985); *United States v. G&G Advertising Co.*, 762 F.2d 632, 634 (8th Cir. 1985) (production of corporate documents unprivileged); *In re Vargas*, 727 F.2d 941, 946 (10th Cir.) (production of papers held in representative capacity by attorney, although testimonial, are not protected), *cert. denied*, 469 U.S. 819 (1984).

⁴⁴ *Braswell*, 108 S.Ct. at 2287. The petitioner based his argument on the doctrine espoused in *Fisher* and affirmed in *Doe*. See *supra* notes 28-33 and accompanying text.

⁴⁵ *Id.* at 2290. The Court conceded that *Fisher* and *Doe* recognized a new fifth amendment analysis and that the act of production may be privileged. The Court, however, adhered to the collective entity rule having considered it not to be obsolete. *Id.* at 2290-91.

vented the assertion of a fifth amendment claim.⁴⁶ By operating in the corporate form, Braswell held the entity records in a representative capacity and his act of production was not deemed a personal act, but rather the act of the corporation.⁴⁷ The Court conceded that the custodian's "individual" act of production could not be used in evidence against him, however, the government had the right to use the "corporation's" act of production against the custodian.⁴⁸ The Court bolstered its holding with the public policy argument that the prosecution of white collar crime should not be hindered.⁴⁹

In his dissenting opinion, Justice Kennedy argued that the case should have been resolved solely on the premise that the act of production had independent testimonial significance.⁵⁰ Joined by Justices Brennan, Marshall and Scalia, Justice Kennedy urged that the issue must be viewed in its most essential terms: whether the collective entity rule contains any principle which overrides an individual's fifth amendment rights?⁵¹ The dissent found the majority's reliance on the agency rationale undergirding the collective

⁴⁶ *Id.* at 2292.

⁴⁷ *Id.* at 2290-91. The Court seemed to have implied that, by taking on his representative duties, Braswell had actually waived his fifth amendment rights. *Id.* Following the reasoning in *White*, the Court stated that individuals acting in a representative capacity were not exercising their personal rights or duties but rather those of the artificial entity. *Id.* at 2291. Because artificial entities have no fifth amendment privilege, an individual acting in an official capacity may not invoke the privilege to avoid production of entity documents. *Id.* The Court observed: "Any claim of fifth amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege." *Id.*

⁴⁸ *Id.* at 2295. The Court noted that the government could not introduce into evidence the fact that the subpoena was served and the documents delivered by one particular individual. *Id.* However, the government would be permitted to offer into evidence testimony that the corporation produced the documents subpoenaed from which a jury could infer the custodian's possession or knowledge of their contents. *Id.*

⁴⁹ *Id.* at 2294. The Court noted 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." *Id.* (quoting *United States v. White*, 322 U.S. 694, 700 (1944)). The Court feared that recognition of a fifth amendment privilege would frustrate government regulation. *Id.*

⁵⁰ *Id.* at 2297 (Kennedy, J., dissenting). The dissent noted that the majority had accepted this assumption at oral argument. *Id.*

⁵¹ *Id.* at 2299 (Kennedy, J., dissenting). The dissent found no support for the majority's reliance on the collective entity rule. *Id.* at 2298. The collective entity decisions were premised on the claim that the custodian would be incriminated by disclosure of the documents' contents, in contrast to the act of producing the documents. *Id.* at 2298.

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entity rule flawed.⁵² Through the acts of locating and selecting the documents demanded, a custodian conveys his personal knowledge, a fact which cannot be dismissed by clothing the act in the language of agency.⁵³ The majority's argument that the compelled production of entity documents would necessarily carry with it a grant of constructive immunity was rejected.⁵⁴ The dis-

⁵² *Id.* at 2299-300 (Kennedy, J., dissenting). See *supra* notes 47 and 48 and accompanying text.

⁵³ *Id.* at 2299-300 (Kennedy, J., dissenting). See *Curcio v. United States*, 354 U.S. 118 (1956). In *Curcio*, a custodian of union books had been asked to testify in a representative rather than individual capacity as to the whereabouts of union books. *Id.* at 119. The Court held that compelled testimony of that sort was constitutionally impermissible because it would require the disclosure of personal knowledge which could not be divorced from the custodian who spoke it. *Id.* at 128.

⁵⁴ *Id.* at 2300-301 (Kennedy, J., dissenting). The dissent noted that the majority "impinges on its own analysis." *Id.* at 2300. A grant of constructive immunity, protecting the individual from the introduction of any evidence pertaining to his "individual" act of production, recognized that "the Fifth Amendment protects the person without regard to his status as corporate employee." *Id.* The dissent further stated that the *Doe* decision rejected a constructive grant of immunity. *Id.* The government must make a formal request for statutory immunity. *Id.* See 18 U.S.C. §§ 6002, 6003 (1982). 18 U.S.C. § 6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but 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. 18 U.S.C. § 6003 provides:

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

(b) A United States attorney may, . . . 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.

Id. See also *Kastigar v. United States*, 406 U.S. 441 (1972) (upholding constitutionality of

sent further argued that the fifth amendment right against self-incrimination is not waived by employees of entities.⁵⁵

III. RAMIFICATIONS

Although the *Braswell* Court sought to maintain nearly eighty years of precedent, it is submitted that the decision obscures the very purposes of the fifth amendment. In order to vindicate the collective entity rule, the Court concluded that a corporate custodian's act of production is not testimonial self-incrimination, or in the alternative, that he waives his right to exercise the privilege upon employment.⁵⁶

As the dissent observed, the Court employed a corporate agency fiction⁵⁷ to reach the conclusion that *Braswell's* use of the corporate form was a general waiver of fifth amendment rights.⁵⁸ It is submitted that the chosen mechanism through which business is conducted is not a general waiver of the right against self-incrimination. Waivers of constitutional rights must be knowing, intelligent and voluntary acts done with sufficient awareness of the consequences.⁵⁹ The issue of waiver involves the evaluation of the individual's subjective state of mind, in light of the totality of facts

use immunity statute).

⁵⁵ *Braswell*, 108 S.Ct. at 2301 (Kennedy, J., dissenting). The dissent stated that fifth amendment jurisprudence did not recognize acceptance of employment as a waiver of an individual's constitutional right against self-incrimination. *Id.* See *supra* note 47.

⁵⁶ *Braswell*, 108 S.Ct. at 2292.

⁵⁷ *Braswell*, 108 S.Ct. at 2300 (Kennedy, J., dissenting). See *supra* notes 47-48 and accompanying text.

⁵⁸ *Braswell*, 108 S.Ct. at 2301 (Kennedy, J., dissenting). Employees do not always have their choice of employer or the business form under which the employer operates. See *id.*

⁵⁹ *Brady v. United States*, 397 U.S. 742, 748 (1970); See *Miranda v. Arizona*, 384 U.S. 436, *reh'g denied*, 385 U.S. 890 (1966). In *Miranda*, the Supreme Court provided some procedural safeguards to secure the privilege:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.

Id. at 444. Waiver has been defined as "the intentional or voluntary relinquishment of a known right . . ." BLACK'S LAW DICTIONARY 1417 (5th ed. 1979). See generally Note, *Waiver of the Privilege Against Self Incrimination*, 14 STAN. L. REV. 811 (1962) (comprehensive study of waiver); C. MCCORMICK, *supra* note 1, § 140 (waiver by disclosure of incriminating facts); 8 J. WIGMORE, *supra* note 1, § 2276(b)(1) (same).

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and circumstances.⁶⁰ In its failure to recognize this the *Braswell* decision permits undue deference to the state's interest in securing information by compulsion.

Although in many instances the act of production may imply no self-incriminating declarations,⁶¹ in those situations where the production of documents would result in testimonial assertions, statutory immunity should be granted. Immunity would not impede government investigations.⁶² It is submitted that the Court's constructive grant of partial use immunity is not only unworkable as an effective safeguard against testimonial self-incrimination, but also usurps the Justice Department's authority to grant immunity.⁶³ A grant of immunity would insulate the individual solely with respect to evidence obtained from the "act" of production.⁶⁴ The documents' contents may be used freely against the representative and the entity.⁶⁵

The majority addressed the facts of *Braswell* by asserting that an individual, acting in a representative capacity, may not resist production of corporate documents on the ground that the "act" would tend to incriminate him because all acts of a corporate cus-

⁶⁰ *United States v. Carra*, 604 F.2d 1271 (10th Cir.), *cert. denied*, 444 U.S. 994 (1979). In determining validity of waiver, courts must assess the mental capacity, educational level, and conduct of the person holding the privilege. *Toliver v. Gathright*, 501 F. Supp. 148, 150 (D.C. Va. 1980).

⁶¹ *See Fisher v. United States*, 425 U.S. 391 (1976). In *Fisher*, the Court stated that use of the fifth amendment was limited to prohibit the "physical or moral compulsion executed on the person claiming the privilege." *Id.* at 409-10. Documents prepared voluntarily and requiring no testimonial affirmations or declarations by the taxpayer would not involve testimonial self-incrimination. *Id.* *See supra* notes 24 and 30 and accompanying text.

⁶² *See Braswell*, 108 S.Ct. at 2301 (Kennedy, J., dissenting).

⁶³ *See United States v. Doe*, 465 U.S. 605 (1984). In *Doe*, the Court refused to adopt a doctrine of constructive use immunity. *Id.* at 616. Under this proposed doctrine, "the courts would impose a requirement on the government not to use the incriminating aspects of the act of production against the person claiming the privilege even though the statutory procedures had not been followed." *Id.* The Court refused to extend to the courts the Justice Department's "exclusive authority to grant immunities." *Id.* (quoting *Pillsbury Co. v. Conboy*, 459 U.S. 248, 253-54 (1983)). *See also* notes 48 and 54 and accompanying text.

⁶⁴ *Id.* A grant of immunity need be only as broad as the privilege against self-incrimination. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 253 & n.8 (1983); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 107 (1964) (White, J., concurring).

⁶⁵ *See Braswell*, 108 S.Ct. at 2301 (Kennedy, J., dissenting). Testimony pursuant to a grant of immunity shifts to the government the burden of proving that all the evidence comes from legitimate independent sources. *See Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). Testimony may be used against the witness neither directly nor derivatively. *See* 18 U.S.C. § 6002, *supra* note 54.

odian are those of the corporation and not the individual.⁶⁶ The Court, however, left open the very question on which *Braswell* turns: "whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish . . . that he is the sole employee and officer of the corporation," thereby leaving the jury to inevitably conclude that he produced the records?⁶⁷ If the Court had addressed this question, its reliance on the collective entity rule would appear to be misplaced and its agency rationale inappropriate.⁶⁸ A recognition of the right to assert a privilege in such an instance would be based on the belief that "the fifth amendment protects the person without regard to his status as corporate employee" and once this is admitted, the Court's support for the collective entity rule collapses.⁶⁹

CONCLUSION

The *Braswell* decision unnecessarily limits the scope of fifth amendment protection. In its effort to curtail corporate crime, the Court has relegated the individual to a lower consideration. The ideals embodied in the fifth amendment do not permit such action. It is submitted that individual rights should not be sacrificed for the government's interest in the prosecution of white collar crime. The simple solution is a statutory grant of immunity for testimonial self-incriminating acts of production.

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⁶⁶ See *Braswell*, 108 S.Ct. at 2295. See also *supra* note 47.

⁶⁷ See *Braswell*, 108 S.Ct. at 2295.

⁶⁸ See *Braswell*, 108 S.Ct. at 2297 (Kennedy, J., dissenting). "The majority does not challenge the assumption that compliance with the subpoena would require testimonial self-incrimination . . . the question presented . . . is whether an individual may be compelled, simply by virtue of his status as a corporate custodian . . . [t]he majority relies solely on the collective entity rule in holding such compulsion constitutional." *Id.*

⁶⁹ See *Braswell*, 108 S.Ct. at 2300 (Kennedy, J., dissenting).