

## The One-Man Corporation and the Fifth Amendment Privilege Against Self-Incrimination

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# THE ONE-MAN CORPORATION AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The fifth amendment of the United States Constitution guarantees that no person will be compelled to testify against himself.<sup>1</sup> This privilege is intended to protect the individual from divulging information that might be incriminating,<sup>2</sup> and as such it is per-

<sup>1</sup> U.S. CONST. amend. V. The fifth amendment of the United States Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." *Id.* This fifth amendment privilege against compelled self-incrimination has been applied to the states through the Due Process Clause of the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1 (1964). While the existence of this privilege in the United States dates back to the adoption of the Bill of Rights, an Anglo-American legal tradition which dates back to the thirteenth century undergirds the privilege. M. BERGER, *TAKING THE FIFTH* 39 (1980). See generally L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 55-80 (1968) (definitive history of the fifth amendment); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935) (detailed treatment of historical development of privilege against self-incrimination).

Though leaving few clues, the Framers intimated that the fifth amendment typified their estimation that "in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty." L. LEVY, *supra*, at 430-32. Attempts to identify the policies which underlie the privilege against self-incrimination have not produced unanimous results. See 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, 344-45 (1983). The Supreme Court of the United States articulated its perception of what the privilege against self-incrimination stands for in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). The Court stated:

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspect 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 respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life;' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often a 'protection for the innocent.'

*Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). For a critical evaluation of the language used by the *Murphy* Court see M. BERGER, *supra*, at 27-57.

<sup>2</sup> See *Rogers v. United States*, 340 U.S. 367, 372-73 (1951); *United States v. Gordon*, 236 F.2d 916, 919 (2d Cir. 1956); see also C. McCORMICK, *EVIDENCE* § 121 (1984); see generally M. BERGER, *supra* note 1, at 81-88 (general discussion of type of incrimination which impli-

sonal in nature and may only be asserted by an individual on his own behalf.<sup>3</sup>

Courts and grand juries have the power to issue a subpoena *duces tecum* which commands the production of documents, papers, and other physical items.<sup>4</sup> It is well established that no fifth amendment privilege attaches to the contents of these documents even when the information was recorded by the accused party.<sup>5</sup> However, the "act of producing" the item does trigger the privilege, since the act itself does involve some implicit testimonial communication on the part of the producer.<sup>6</sup> Upon production of

icates fifth amendment). The rationale behind the privilege against self-incrimination is that a person should not be forced to articulate information that could be used as evidence against him. *See Bellis v. United States*, 417 U.S. 85, 87 (1974); *United States v. White*, 322 U.S. 694, 698 (1944); *see also* 8 J. WIGMORE, EVIDENCE § 2263 (McNaughten rev. 1940) (object of protection is extracting from person's own lips an admission of guilt).

<sup>3</sup> *United States v. White*, 322 U.S. 694, 698 (1944); *Baltimore & Ohio R.R. Co. v. I.C.C.*, 227 U.S. 612, 622 (1911); *Hale v. Henkel*, 201 U.S. 43, 69 (1906). A person may not invoke his fifth amendment privilege on behalf of another, nor may he claim a violation of the privilege when a third party is called to testify as to matters which would incriminate the person invoking the privilege. *Hale*, 201 U.S. at 69-70; *see also* C. McCORMICK, *supra* note 2, § 120 (criminal defendant may not invoke privilege of witnesses, codefendants or co-conspirators). *See generally* M. BERGER, *supra* note 1, at 57-66 (general discussion of fifth amendment privilege as a personal right).

<sup>4</sup> *E.g.*, FED. R. CIV. P. 45; FED. R. CRIM. P. 17. *See generally* C. McCORMICK, *supra* note 2, § 126 (general discussion of subpoena *duces tecum*).

<sup>5</sup> *Fisher v. United States*, 425 U.S. 391, 409-10 & n.11 (1976); Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 644-45 (1986). The seminal case which established the proposition that private documents were protected from compelled production was *Boyd v. United States*, 116 U.S. 616 (1886). In *Boyd*, Boyd was ordered to produce the invoices of cases of plate glass which had been illegally imported. *Id.* at 617-18. The Court considered the invoices to be Boyd's private property and denounced "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him. . . ." *Id.* at 630. It has been suggested that the *Fisher* case signalled the demise of the privacy doctrine posited in *Boyd*. *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) (*Fisher* sounded the "death knell" for *Boyd*); *see also* Comment, *supra* note 1, at 339. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. REV. 343 (1979) (rise and fall of *Boyd* doctrine); Glanzer, Schiffman, and Packman, *The Use of the Fifth Amendment in SEC Investigations*, 41 WASH. & LEE L. REV. 895, 904 (1984) (*Fisher* shifted the focus away from contents to the act of production); McKenna, *The Constitutional Protection of Private Papers: The Role of a Heirarchical Fourth Amendment*, 53 IND. L.J. 55, 62 (1977-78) (*Boyd's* analytic basis undermined by *Fisher*).

<sup>6</sup> *Fisher*, 425 U.S. at 410. In *Fisher* a summons was served on a taxpayer requiring the production of worksheets prepared by his accountant. *Id.* at 394. The papers, however, were held by the taxpayer's attorney. *Id.* The attorney refused to comply with the summons, claiming that it would involve a violation of the taxpayer's privilege against self-incrimination. *Id.* at 395. The Court stated that the fifth amendment is violated only when a subpoena compels incriminating testimonial communications. *Id.* at 409. On the facts of the *Fisher* case, the Court held that compliance with the summons involved no such incrim-

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the documents an individual impliedly communicates that the documents were in his possession or control, that the documents produced are those that are demanded, and that the documents produced exist.<sup>7</sup> These implications arise from the act of production which has been considered a compelled incriminating testimonial communication.<sup>8</sup>

As a general rule, the privilege against compelled self-incrimination may not be invoked by a corporation.<sup>9</sup> The rationale espoused is that since the corporation is not a personal entity, but rather an entity of the state,<sup>10</sup> it can act only through its officers or agents in transacting business.<sup>11</sup> Accordingly, the corporation is not an "individual" and may not assert the privilege on its own behalf,<sup>12</sup> nor may any of its officers or agents refuse to testify or produce the material requested by invoking his personal fifth amendment privilege.<sup>13</sup> Recently, in the wake of two circuit courts

inating testimony. *Id.* at 414. For a general discussion of the *Fisher* case, see Note, *supra* note 5, at 643-50; Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982); Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L.J. 351, 360-61 (1977).

<sup>7</sup> *Fisher*, 425 U.S. at 410; C. McCORMICK, *supra* note 2, § 126.

<sup>8</sup> See *In re Grand Jury Subpoena Duces Tecum Dated June 13 and June 22, 1983*, 722 F.2d 981, 984 (2d Cir. 1983); *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 860 (3d Cir. 1979); *Segmond v. United States*, 589 F. Supp. 568, 575-76 (S.D.N.Y. 1984).

<sup>9</sup> *Wheeler v. United States*, 226 U.S. 478, 489-90 (1913); *Hale v. Henkel*, 201 U.S. 43 (1906); C. McCORMICK, *supra* note 2, § 128; 8 J. WIGMORE, *supra* note 2, § 2259. See generally M. BERGER, *supra* note 1, at 57-66.

<sup>10</sup> *Hale*, 201 U.S. 43, 74-75 (1906). As an entity of the state the corporation is subject to the state's right of visitation, that is, "the right to inspect the corporation's books and records, to assure that the entity is not abusing its powers." C. McCORMICK, *supra* note 2, § 128; M. BERGER, *supra* note 1, at 59; see also *Hale*, 201 U.S. at 74-75; *In re Two Grand Jury Subpoena Duces Tecum, One Dated January 28, 1985, the other undated, appeal docketed*, No. 85-8067 (2d Cir. July 28, 1985).

<sup>11</sup> *Wilson v. United States*, 221 U.S. 361, 374-75 (1911); *In re Grand Jury Empanelled March 8, 1983*, 722 F.2d 294, 297 (6th Cir. 1983); H.W. BALLANTINE, PRIVATE CORPORATIONS § 6 (1927); C. McCORMICK, *supra* note 2, § 128.

<sup>12</sup> See Comment, *supra* note 1, at 335-36 (fifth amendment only protects natural persons). Corporations have been considered persons for other constitutional purposes. *E.g.*, *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 543-44 (1963) (association protected under fourteenth amendment Due Process Clause); *Smyth v. Ames*, 169 U.S. 466, 522 (1898) (corporation's property protected by Due Process Clause). See M. BERGER, *supra* note 1, at 57-58.

<sup>13</sup> *Wilson v. United States*, 221 U.S. 361 (1911); see *McPaul v. United States*, 364 U.S. 372, 380 (1960); 8 J. WIGMORE, *supra* note 2, § 2259(b). See generally Tragos, *The Corporate Officer Versus the Fifth Amendment*, 55 FLA. B.J. 52 (1981) (what criminal practitioners should

of appeal decisions, some confusion has surfaced with regard to the applicability of the fifth amendment privilege to one-man corporations.<sup>14</sup> This article will discuss these cases and the importance of the wording of the subpoena *duces tecum*. In addition, certain relevant legal precepts will be analyzed, and this article will ultimately conclude that the fifth amendment privilege against compelled self-incrimination should be afforded to the sole owner of a one-man corporation.

### I. RECENT DECISIONS

Recently, in *In re Grand Jury Matter (Brown)*,<sup>15</sup> the sole owner of a professional corporation, Brown, was served with a subpoena *duces tecum* compelling him to produce certain papers.<sup>16</sup> Brown contended that the act of production pursuant to the subpoena would be an authentication of the documents requested and would, therefore, be a compelled incriminating testimonial communication.<sup>17</sup> In this case it was clearly established that the government sought to compel Brown to testify as to the authenticity of the records.<sup>18</sup> The Court of Appeals for the Third Circuit quashed the subpoena, sustaining the invocation of the privilege.<sup>19</sup> In addition, the court noted that the wording of the subpoena was what made the production of the documents a compelled incriminating testimonial communication.<sup>20</sup>

know when representing corporate clients).

<sup>14</sup> See *infra* notes 15-29 and accompanying text.

<sup>15</sup> 768 F.2d 525 (3d Cir. 1985) (en banc).

<sup>16</sup> *Id.* at 531. The subpoena read:

You are hereby commanded to appear in the United States District Court for the Eastern District of Pennsylvania . . . and bring with you all workpapers, reports, records, correspondences and copies of tax returns in your possession or under your control relating to accounting services performed by you or under your supervision on behalf of the below listed persons or entities for the years 1977 through 1982.

*Id.* (emphasis in original).

<sup>17</sup> *Id.* at 526.

<sup>18</sup> *Id.* at 529. The court reasoned that the government "candidly concedes that what it wants amounts to compelled authentication testimony which may later be used against the target of a grand jury investigation." *Id.*

<sup>19</sup> *Id.* The court held that a sole stockholder of a professional corporation could not be required to supply the prosecutor with evidence which the prosecutor intended to use against him. *Id.*

<sup>20</sup> *Id.* at 531; see *infra* note 37 and accompanying text.

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In *In Re Two Grand Jury Subpoenae Duces Tecum*,<sup>21</sup> two subpoenae *duces tecum* were issued to a corporation and its sole owner, demanding the production of certain corporate records.<sup>22</sup> The owner maintained that if he complied with the subpoena that was issued to him directly, he would be compelled to supply incriminating testimony against himself.<sup>23</sup> After the district court limited the subpoena to the production of business records,<sup>24</sup> the owner attempted to assert his privilege on behalf of the corporation. The United States Court of Appeals for the Second Circuit held that the producer of the documents was not to be accorded the privilege against self-incrimination because the custodian was never personally requested to produce any documents.<sup>25</sup> The subpoena placed the burden of production upon the corporation, which could produce the documents through a non-target employee.<sup>26</sup> The appellant argued that his business was inherently a sole proprietorship, and that as such the subpoena was in essence compelling production from him personally,<sup>27</sup> and not from a collective entity.<sup>28</sup> The court rejected this argument, reasoning that an individual cannot prevent a corporation from producing its records pursuant to a subpoena *duces tecum* by asserting his personal fifth amendment privilege.<sup>29</sup>

<sup>21</sup> 769 F.2d 52 (2d Cir. 1985).

<sup>22</sup> *Id.* at 54.

<sup>23</sup> *See id.* The court reasoned that the facts in *In re Two Grand Jury Subpoenae Duces Tecum* did not put the case within the limited scope of *Fisher* since the appellant was not compelled to make any incriminating testimonial communication. *Id.*

<sup>24</sup> *Id.* at 54.

<sup>25</sup> *Id.* at 55.

<sup>26</sup> *Id.* The court concluded:

Only the corporation is being directed to produce the records, and it is directed to produce them not through the act of the custodian who is appealing, but through the act of some other employee or agent who is not a grand jury target.

*Id.*

<sup>27</sup> *See id.* at 54. The appellant attempted to rely on the holding in *United States v. Doe*, 465 U.S. 605 (1984), which allowed a sole proprietor to assert his fifth amendment privilege with respect to the records of his business. Appellant sought to equate his business with a sole proprietorship in that although it is technically a corporation, appellant is the sole operating officer in a capacity equal to that of a sole proprietor. *See infra* note 41 and accompanying text.

<sup>28</sup> *See infra* note 45.

<sup>29</sup> *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 56 (2d Cir. 1985).

## II. PROPOSED ANALYSES

A. *Substance Over Form*

Very often courts will examine the substance of a corporation over its form to determine its status with respect to the law controlling the issues of a particular case.<sup>30</sup> That is, the courts have focused on the incorporator's intention for forming the corporation, and the corporation's compliance with the controlling incorporation statutes to determine if the organization is a corporation in the true sense of the term, or rather an entity using the corporate form for some ulterior purpose.<sup>31</sup> In these cases the individual operating the corporate entity and the entity itself are deemed inseparable.<sup>32</sup> It is submitted that such is the case in one-man cor-

<sup>30</sup> See, e.g., *Inryco, Inc. v. CGR Bldg. Sys. Inc.*, 780 F.2d 879 (10th Cir. 1986) (owners of a corporation insufficiently funded could not use corporate form to escape liability as it would exalt form over substance); *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979); *Fidelity & Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 758 (5th Cir. 1975) (corporate form will be disregarded if refusal to do so "would work an injustice on innocent third parties"). The courts will frequently "pierce the corporate veil" of a one-man corporation to hold the owner personally liable to claims the corporation cannot satisfy. H.W. BALLANTINE, *supra* note 11, § 6.

Prof. Ballantine has noted:

If a corporation is organized as a 'sham, a delusion, and a snare,' fraudulent in intent and execution, wholly without capital, and the business is carried on in such a way that the corporation will have no assets to meet its debts, it may well be held that the associates cannot set up such a 'straw man' corporation to escape individual liability. Even though on the face of the incorporation papers there is a regular and complete compliance with the incorporation statute, the fraudulent use of the corporate entity may be ineffectual to exempt the dishonest associates from personal liability.

*Id.*

<sup>31</sup> See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984); *Sunkist Growers Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962). The Court in both cases was called upon to examine the status of two corporations with respect to sections 1 and 2 of the Sherman Act, to determine if these corporations were capable of conspiracy thereunder. The Court concluded that substance and not form should determine whether a separately incorporated entity is capable of conspiracy under the Act. *Copperweld*, 467 U.S. at 771-77.

<sup>32</sup> See *supra* note 30. When "piercing the corporate veil" the courts view the owner of the corporation as the alter-ego of his corporation. The owner is considered inseparable from the corporate entity, and is therefore not able to use the organization he has created as a shield from liability. The owner is held liable for transactions as if he had made them in his personal capacity. Therefore, the owner of the one-man corporation is tied to the corporation as though he were a member of a partnership. It is suggested that if the owner of a one-man corporation can have liability imputed to him regardless of the form in which he conducts his business, he should also be allowed to assert an important constitutional privilege regardless of that form. Cf. Davidian, *Corporate Dissolution in New York: Liberalizing*

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porations, since the owner and his business are typically organically related, and not discrete unrelated entities.

To divest the owner of a one-man corporation of the privilege against self-incrimination would emasculate the policy behind the fifth amendment privilege.<sup>33</sup> The privilege is traditionally invoked to protect one from being subjected "to the cruel trilemma of self-accusation, perjury or contempt."<sup>34</sup> The Framers of the Constitution intimated that an integral element of a free society was that no one should be made to contribute to his own conviction unwillingly.<sup>35</sup> The owner of a one-man corporation would be subject to the very abuses which the fifth amendment was fashioned to guard against if he were denied the privilege simply because he chose the corporate form.<sup>36</sup> It is submitted that the policy goals which undergird the privilege would be thwarted if this were allowed.

### *B. The Wording of the Subpoena Duces Tecum: Doing Indirectly What Cannot Be Done Directly*

It is submitted that the wording used in the subpoena issued to the corporation or custodian of records is critical in determining if the production of the documents will compel incriminating testimonial communication. If the subpoena is worded in a way that could be interpreted as asking a person to supply incriminating testimonial communication, that person will not be held in contempt for refusing to testify.<sup>37</sup> If the person subpoenaed is the tar-

*the Rights of Minority Shareholders*, 56 ST. JOHN'S L. REV. 24, 25 (1981); Israels, *The Close Corporation and the Law*, 33 CORNELL L.Q. 488, 488 (1948); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal and Common Law*, 95 HARV. L. REV. 853, 853 (1982); see also Glanzer, Schiffman, & Packman, *supra* note 5, at 899-900. One commentator has suggested that it would be anomalous to deprive a one-man corporation of the fifth amendment privilege while allowing a sole proprietor with a hundred employees to invoke it. *Id.*

<sup>33</sup> See *supra* note 1.

<sup>34</sup> *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); see *supra* notes 1-2 and accompanying text.

<sup>35</sup> L. LEVY, *supra* note 1, at 430.

<sup>36</sup> See *supra* notes 30-32 and accompanying text.

<sup>37</sup> *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 531 (3d Cir. 1985) (Becker, J., concurring). Justice Becker noted that the wording of the subpoena as issued to Brown constituted an interrogatory asking if it was he who prepared the requested documents. *Id.* Justice Becker further stated that compliance with the subpoena would have provided an



get of the grand jury investigation, it is more likely that the prosecutor is attempting to secure vital testimony from the target himself and not the corporation.<sup>38</sup> Prosecutors frequently will artfully draft a subpoena which on its face compels a corporation to produce documents, but, in effect, elicits information from an individual.<sup>39</sup> Such is the case with the sole owner of a one-man corporation.

In the Civil Rights arena, the courts are especially careful to assure that an individual is not deprived of his constitutional rights, either directly or indirectly, by governmental activities.<sup>40</sup> Reasoning by analogy, therefore, it is submitted that it would not be consistent with this doctrine to allow a prosecutor to serve a corporation with a subpoena *duces tecum* knowing that the corporation is run solely by the target of the investigation. The prose-

answer to that question amounting to incriminating testimonial communications, beyond what the *Fisher* standard permitted, and therefore concluded that the contempt order issued to Brown should be vacated. *Id.*; accord *Curcio v. United States*, 354 U.S. 118, 123-24 (1957).

<sup>38</sup> Compare *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985) with *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985). In *Two Grand Jury Subpoenae Duces Tecum*, the intent of the prosecutor to obtain the documents of the corporation without incriminating the target was obvious in that the prosecutor conceded willingly to have the documents produced by a non-target employee. In *Brown*, the prosecutor would not agree to have any other officer of the corporation produce the documents, nor would the prosecutor accept Brown's offer to have his attorney produce the documents.

<sup>39</sup> See *supra* note 37.

<sup>40</sup> Cf. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 23 (1971). The Court in *Swann* ascertained the constitutionality of a desegregation plan for a North Carolina school system. The Court stated that the "objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school directly or indirectly, on account of race. . . ." *Id.* In *Brown v. Califano*, 627 F.2d 1221, 1227 (D.C. Cir. 1980), eighteen school children brought an action against the Department of Health Education and Welfare (HEW) for an unauthorized attempt by HEW to amend certain federal provisions assuring nondiscrimination in public schools receiving federal support. The court held that "congress explicitly intended that HEW could not use its power to require 'directly or indirectly' student transportation beyond the school closest to their home." *Id.* In *Hooks v. Wainright*, 352 F. Supp. 163 (M.D. Fla. 1972), an action was brought by inmates against the Florida State Director of Corrections for the Director's failure to provide inmates with an adequate law library. *Id.* at 166. The court held that failure to provide an adequate law library for the inmates would discriminate against impoverished inmates in that they would be unable to retain counsel to appeal their convictions whereas the more wealthy inmates were so able. *Id.* at 167. Since the state could not deprive the inmates of an opportunity to obtain legal assistance at their own expense, failure to provide an adequate law library would amount to an indirect sanction, as the less wealthy inmates would be denied access to the courts due to a lack of legal authority on which to base their appeals. *Id.* at 167-68.

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ctor would be indirectly depriving the target of his privilege against self-incrimination by compelling the corporation to comply with the subpoena, since there would be no other officer available to produce the documents.

### C. Merger of Capacity

When a corporate director brings an action on behalf of the corporation, and at the same time is the real party in interest in the litigation, he is subject to a counterclaim in his personal capacity.<sup>41</sup> Therefore the courts have readily “merged” the corporate director’s capacity with his personal capacity, thereby subjecting the director to liability. This “merger” indicates that the strict corporate form should be disregarded when the sole owner acts on behalf of the corporate entity and has sufficient stake in its operation to be affected personally.<sup>42</sup> It is suggested that this “merger of capacity” should also be utilized to accord the owner of a one-man corporation the privilege against self-incrimination. It seems anomalous to permit a merger of capacity in cases dealing with financial liability and not to permit it where a fundamental constitutional privilege is involved.

## III. THE COLLECTIVE ENTITY DOCTRINE

Though a corporation, regardless of its size, has no fifth amend-

<sup>41</sup> *Conant v. Schnall*, 33 App. Div. 2d 326, 307 N.Y.S.2d 902 (3d Dep’t 1970). In *Conant*, the defendant agreed to buy out plaintiff’s interest in a corporation of which they were the sole shareholders. *Id.* at 327, 307 N.Y.S.2d at 904. Defendant refused to make any final payments, resulting in plaintiff’s commencing an action against defendant in his capacity as a corporate officer for the balance owed. *Id.* Defendant counterclaimed in his personal capacity against plaintiff on the theory of waste and mismanagement. *Id.* Plaintiff argued that the counterclaim should have been dismissed as defendant could only counterclaim in the capacity in which he was sued. *Id.* at 328, 307 N.Y.S.2d at 905. The court refused to dismiss the counterclaim, reasoning that the general rule requiring a person to counterclaim in the same capacity in which he is sued, breaks down when that person has a real party interest in the litigation. *Id.*

It is suggested that the court here merged the individual and personal capacity of the owner of a one-man corporation. It is further suggested that this case stands for the proposition that the owner of a one-man corporation maintains an identity inseparable from that of his business as his capacity as an individual and corporate director are one and the same. See *Geer Jr. & Co. v. Fagan*, 255 App. Div. 253, 7 N.Y.S.2d 395 (3d Dep’t 1938); *Anderson v. Carlson*, 201 App. Div. 260, 194 N.Y.S.2d 112 (2d Dep’t 1922).

<sup>42</sup> See *supra* note 41.

ment privilege against self-incrimination,<sup>43</sup> it has been held that the owner of a sole proprietorship may assert his personal fifth amendment privilege with respect to the records of his business.<sup>44</sup> In recent years the courts have utilized a test whereby an organization is either defined as a collective or non-collective entity.<sup>45</sup> The organization is deemed to be a collective entity when it is comprised of many persons whose interests are represented by the collective view of the entire group.<sup>46</sup> Such a group will not be accorded the fifth amendment privilege since the privilege against self-incrimination is personal in nature.<sup>47</sup> Accordingly, documents of a corporation held in a representative capacity cannot be the subject of this personal privilege.<sup>48</sup> On the other hand, a non-collective entity such as a sole proprietorship is afforded the privilege.<sup>49</sup> Recently, however, courts have construed this standard and found certain partnerships and organizations to be non-collective entities while other such organizations have been deemed

<sup>43</sup> See *supra* notes 9-11 and accompanying text.

<sup>44</sup> *United States v. Doe*, 465 U.S. 605 (1984). The *Doe* Court held that while the contents of business records of a sole-proprietorship are not subject to the owner's personal fifth amendment privilege, the owner may assert his privilege over his business records if he is not guaranteed a grant of use immunity pursuant to 18 U.S.C. §§ 6002, 6003. 465 U.S. at 617.

<sup>45</sup> See *United States v. White*, 322 U.S. 694, 701-02 (1944); accord *Bellis v. United States*, 417 U.S. 85, 92-93 (1974). The *White* Court has articulated the collective entity test:

The test, rather, is whether one can fairly say under all 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 group interests only.

*White*, 322 U.S. at 701; see also M. BERGER, *supra* note 1, at 61 (general discussion of *White* standard).

In *White* a union official sought to assert his personal fifth amendment privilege over records of a labor union. *White*, 322 U.S. at 696. The Court held that the official possessed the records of a collective group in a representative capacity, and was therefore, precluded from asserting his personal privilege with respect to these documents. *Id.* at 699. See generally Note, *The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. PA. L. REV. 394, 407-14 (1964) (application of *White* test to several organizational forms).

<sup>46</sup> *Bellis*, 417 U.S. at 92; *White*, 322 U.S. at 699. When the organization performs organized institutional activities, and takes on an identity distinct and independent from that of its members, it will be viewed by the courts as a collective entity. *Bellis*, 417 U.S. at 92.

<sup>47</sup> See *supra* notes 2-3.

<sup>48</sup> See *supra* notes 9-12 and accompanying text.

<sup>49</sup> *United States v. Doe*, 465 U.S. 605, 617. The privilege extended only to the act of producing the documents and not to the contents of the business records. *Id.*

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“collective entities.”<sup>50</sup>

### IV. APPLICATION OF THE COLLECTIVE ENTITY DOCTRINE

Courts thus far have not utilized this test with respect to one-man corporations, reasoning that since the corporate form is used to gain certain attendant benefits, it will not be disregarded in order to shield business records from production.<sup>51</sup> This argument, at best, is without foundation. Admittedly, a corporation is afforded certain benefits as a result of its form.<sup>52</sup> However, these benefits should not outweigh the important constitutional privilege lost as a result of incorporation.<sup>53</sup> When these are balanced, it is submitted that there is no rational basis for depriving the owner of a one-man corporation of the much valued privilege against self-incrimination.

It is suggested that the collective entity test should be applied to

<sup>50</sup> See *United States v. Slutsky*, 352 F. Supp. 1105, 1107 (S.D.N.Y. 1972). The *Slutsky* court applied the *White* standard objectively in order to ascertain the substance of the organization. Here a family partnership owned and operated a hotel in New York. In finding the organization to have an identity inseparable from its members, the court noted:

[T]he partners here, give their personal attention to the day-to-day business activities of the partnership. Only the partners and their two sons can sign checks, and all four live on the business premises. . . . [The organization had] only the size, not the nature of a corporation.

*Id.* at 1108; *But see In re September*, 1975 Special Grand Jury, 435 F. Supp. 538, 543 (N.D. Ind. 1977). In this case a trailer park owned and operated by a family partnership was deemed to have possessed an institutional identity apart from its constituents. The court based its decision on testimony by one of the partners, that he performed work at the trailer park in both his personal capacity and in his capacity as member of the partnership. *Id.*

It is suggested that this case stands for the proposition that the critical issue in determining if an organization has a separate institutional identity is whether the owner demonstrates such an identity to third parties. In the one-man corporation situation, the organization can only have the identity of its owner simply because it cannot exist without him.

<sup>51</sup> *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985). The court in this case construed *Bellis* as standing for the proposition that the corporate form is chosen by the shareholders to gain certain attendant benefits, and should therefore, not be disregarded to shield documents from production. *Id.*

It is submitted that such a construction favoring form over substance is inconsistent with the collective entity test applied in *Bellis*. When applying the collective entity doctrine, the courts examine the substance of the organization to determine whether or not it has an identity apart from its members.

<sup>52</sup> See generally H.G. HENN, J.R. ALEXANDER, *LAW OF CORPORATIONS*, §§ 68-76 (1983) (general discussion of the benefits accorded to incorporated business entities).

<sup>53</sup> See generally C. MCCORMICK, *supra* note 2 §§ 128-29 (overview of the fifth amendment privilege with respect to corporations).

the one-man corporation in light of the proposed analyses.<sup>54</sup> Focusing on the substance of a one-man corporation over its form, it cannot be said to have an identity distinct and apart from the identity of its owner.<sup>55</sup> Since the scope of the one-man corporation's activities is not impersonal, it embodies the personal interest of the owner.<sup>56</sup> Having recognized that the corporate form does not necessarily suggest a detached business run by absentee members,<sup>57</sup> indicative of a collective entity, courts should view the substance of a one-man corporation as a non-collective entity entitled to the privilege against self-incrimination.

When viewed as a non-collective entity, the one-man corporation is inextricably intertwined with its owner to such an extent that service of a subpoena *duces tecum* on the corporation necessarily compels its owner to comply therewith.<sup>58</sup> To indirectly compel the owner of a one-man corporation to possibly incriminate himself is as egregious a violation as direct compulsion to incriminate himself.<sup>59</sup>

It is further suggested that the notion of merger of capacity<sup>60</sup> in

<sup>54</sup> See *supra* notes 30-42 and accompanying text.

<sup>55</sup> Cf. *United States v. Slutsky*, 352 F. Supp. 1105, 1108 (S.D.N.Y. 1972). The court in *Slutsky* clearly found that due to the personal contact maintained between the family and their partnership, the organization, albeit large and successful, was not a distinct institutional organization. *Id.* at 1108. The several members were held to have close enough contacts to the business to allow them to invoke their fifth amendment privilege with respect to the records of the organization. *Id.* at 1109.

Reasoning by analogy, it is submitted that a person who is the sole member of a business organization maintains the same personal contact with his business, regardless of the fact that he has incorporated that business.

<sup>56</sup> Cf. *Slutsky*, 352 F. Supp. at 1108. It has been suggested that "truly private or personal associations would be entitled to assert the privilege because they are really not separate from the interest of the individual who comprises them." M. BERGER, *supra* note 1, at 61.

<sup>57</sup> See *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, —, 328 N.E.2d 505, 512 (1975); *Clark v. Dodge*, 269 N.Y. 410, 416, 199 N.E. 641, 643 (1936); *Topper v. Park Sheraton Pharmacy, Inc.*, 107 Misc. 2d 25, 32-34, 433 N.Y.S.2d 359, 365 (Sup. Ct. N.Y. County 1980). The court in *Donahue* noted that inherent in the close corporation is a fiduciary duty between the members similar to that which exists between partners in a partnership. *Donahue*, 367 Mass. at —, 328 N.E.2d at 512. The court also noted that this duty arose because ownership and management were in control of the same person. *Id.*

<sup>58</sup> See *supra* notes 37-42 and accompanying text. See also M. BERGER, *supra* note 1, at 61 (degree of personal affiliation should determine applicability of privilege). Professor Berger has observed that to extract information from a truly private association "through its agent is to effectively force him to provide his own rather than the entity's records, thereby compelling self-incrimination in violation of the fifth amendment." *Id.*

<sup>59</sup> Cf. *supra* note 40 and accompanying text.

<sup>60</sup> See *supra* notes 41-42 and accompanying text; cf. *Conant v. Schnall*, 33 App. Div. 2d

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the context of a one-man corporation is consonant with its status as a non-collective entity. That is, since a one-man corporation embodies the personal interests of its owner,<sup>61</sup> the owner is at once acting on behalf of himself and the corporate entity, and therefore should be afforded the much guarded privilege against self-incrimination.<sup>62</sup>

### CONCLUSION

In light of the analyses which have emerged through case law and consistent with the policy that undergirds the privilege against self-incrimination, it is clear that the owner of a one-man corporation should not be compelled to produce documents pursuant to a subpoena *duces tecum*. Having focused on the essence of the corporation, courts should extend their awareness to owners of one-man corporations so that the assertion of the privilege against self-incrimination is not made to depend on the organizational form one chooses.

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326, 307 N.Y.S.2d 902 (3d Dep't 1970); *supra* note 41. If the owner of a one-man corporation possesses sufficient contacts with the organization so as to establish in him a real party interest in any litigation to which the corporation becomes a party, it follows that the activity in which the one-man corporation engages represents the personal interests of the person controlling the corporation. This organization with its personal contact between the owner and the business, and the inseparable identity of the owner and the business would clearly be viewed as a non-collective entity under the *White* test.

<sup>61</sup> See *supra* notes 41-42 and accompanying text.

<sup>62</sup> *Id.*

