

Braswell v. United States: The Collective Entity Doctrine and the Compelled Testimony Standard

Introduction

For over one hundred years the United States Supreme Court has wrestled with the question whether an individual representing a collective entity¹ may resist a subpoena demanding the production of the entity's documents on the ground that he might incriminate himself.² Answering the question has been difficult because of the need to balance individual interests such as privacy³ and freedom from self-incrimination⁴ against the Government's interest in effective law enforcement.⁵ To balance these interests, the Court developed the collective entity doctrine, which withholds the self-incrimination privilege from collective entities and their representatives.⁶

In 1976 the Supreme Court in *Fisher v. United States*⁷ introduced a new approach to self-incrimination analysis by applying a compelled testimony standard.⁸ In its application of this standard, the Court recognized an individual's right to resist a subpoena for sole proprietorship business documents if the act of producing them represented compelled

1. A "collective entity" is "an organization which is recognized as an independent entity apart from its individual members." *Bellis v. United States*, 417 U.S. 85, 92 (1974). While there is no definitive standard of what constitutes a collective entity, case law has included corporations, labor unions, and partnerships within the collective entity definition. *See infra* notes 36 & 40-41 and accompanying text.

2. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that the Government could not compel members of a partnership to produce receipts to be used as evidence against the partners in a proceeding to forfeit property for alleged fraud in violation of federal revenue laws.

3. *Couch v. United States*, 409 U.S. 322, 327 (1973) (privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (privilege reflects respect for right of an individual to lead a private life).

4. *See infra* notes 21-22.

5. *United States v. White*, 322 U.S. 694, 700 (1944) (effective law enforcement is impossible if the privilege is granted to corporate representatives); *Bellis*, 417 U.S. at 90 (recognizing an organizational representative's privilege would frustrate legitimate governmental regulation).

6. *See infra* notes 33-48 and accompanying text.

7. 425 U.S. 391 (1976).

8. *Id.* at 410. *See infra* notes 49-53 and accompanying text.

testimonial communication which could incriminate that individual.⁹

The introduction of the *Fisher* compelled testimony standard raised a question whether this new standard supplemented or replaced the older collective entity doctrine. The Supreme Court subsequently affirmed the compelled testimony standard for sole proprietors¹⁰ but had no opportunity to decide if the standard applied to representatives of collective entities.¹¹ A majority of the circuit courts concluded the new standard did not.¹²

In 1988 the Supreme Court decided *Braswell v. United States*,¹³ a case in which a corporate president asserted that the act of producing subpoenaed corporate records would violate his privilege against self-incrimination.¹⁴ *Braswell*, the corporate president, based his claim upon the compelled testimony standard, thus placing the collective entity doctrine and the *Fisher* standard in conflict.

The *Braswell* Court held that the compelled testimony standard does not extend to collective entities.¹⁵ In reaching this decision, the Court applied an innovative twist to the traditional agency rationale underlying the collective entity doctrine.¹⁶ Although the decision appears to foreclose availability of the compelled testimony standard to custodians of collective entity records, careful analysis suggests the issue is not entirely settled.¹⁷

Part I of this Comment reviews the fifth amendment privilege as it pertains to representatives of business entities. This review sets the background for Part II, which discusses the majority and dissenting opinions in *Braswell*. Part III analyzes the Court's decision and discusses the fundamental tension between protecting the individual privilege and prosecuting white-collar crime.

This analysis demonstrates that the *Braswell* Court attempted to resolve the conflict between the collective entity doctrine and the compelled testimony standard by drawing a bright-line distinction between

9. *Fisher*, 425 U.S. at 410. See *infra* notes 52-53 and accompanying text.

10. *United States v. Doe*, 465 U.S. 605 (1984). Although the Court affirmed the standard, it did not clarify its application. Rather than applying the compelled testimony standard to the facts of the case, the Court merely upheld a lower court finding that a sole proprietor could withhold subpoenaed business documents because the act of producing those documents involved testimonial self-incrimination. *Id.* at 613-14.

11. *Id.* at 606. *Doe* did not provide the Court with an opportunity to address the collective entity doctrine issue because the defendant in *Doe* was a sole proprietor.

12. Comment, *The Fifth Amendment Privilege and Collective Entities*, 48 OHIO ST. L.J. 295, 308, 315 (1987) [hereinafter *Collective Entities*] (Only the Third Circuit, and in limited cases, the Second, Fourth, and Eleventh Circuits have departed from the majority rule).

13. 108 S. Ct. 2284 (1988).

14. *Id.* at 2286.

15. *Id.* at 2291.

16. See *infra* text accompanying notes 137-142.

17. See *infra* notes 143 & 192-201 and accompanying text.

collective entities and sole proprietorships. The Court actually prolonged the conflict, however, by introducing a new basis for the traditional agency rationale underlying the collective entity doctrine. This Comment concludes that although the *Braswell* decision held little practical significance for petitioner Braswell, the Court's reasoning leaves unsettled the ability of some collective entity custodians to successfully assert their privilege against self-incrimination.

I. Background

A. Conflict Between the Privilege and Effective Law Enforcement

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"¹⁸ At various times the Supreme Court has construed this provision to protect individual property¹⁹ and privacy interests²⁰ as well as a natural person's "privilege"²¹ to resist governmental compulsion of incriminating testimony.²² The privilege is not absolute. It may not be asserted to resist disclosure of evidence which is not compelled,²³ not incriminating,²⁴ or not testimonial.²⁵ The privilege may not be claimed by one individual to withhold testimony that threatens incrimination of another.²⁶

Furthermore, the privilege may be claimed only by a natural person

18. U.S. CONST. amend. V.

19. *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[I]t is the invasion of his indefeasible right of . . . private property" that "constitutes the essence of [the offense].").

20. See cases cited *supra* note 3.

21. The term "privilege" appears throughout this Comment. It is commonly used in commentaries and cases to refer to the protection against self-incrimination afforded by the Fifth Amendment. Some commentators prefer the term "right" because it more correctly implies the protection may not be withdrawn by the Government. See Comment, *The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine*, 80 NW. U.L. REV. 1605 n.2 (1986).

22. See *Doe v. United States*, 108 S. Ct. 2341, 2345-46 (1988) ("[T]he privilege protects a person only against being incriminated by his own compelled testimonial communications." (quoting *Fisher v. United States*, 425 U.S. 391, 409 (1976)); *Braswell v. United States*, 108 S. Ct. at 2296 (Kennedy, J., dissenting) ("[T]wo of the critical foundations for the constitutional guarantee against self-incrimination [are] first, that it is an explicit right of a natural person, protecting the realm of human thought and expression[, and] second, that it is confined to governmental compulsion.").

23. *Couch v. United States*, 409 U.S. 322, 328 (1973) ("It is extortion of information from the accused himself that offends our sense of justice.").

24. Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1552 n.69 (1986) (The privilege does not apply unless the testimonial admissions might incriminate the person in future criminal proceedings. The privilege does not protect against other harms such as embarrassment, scorn, and civil liability.).

25. *Fisher*, 425 U.S. at 408. See Note, *supra* note 24, at 1549-50 (Examples of nontestimonial acts include giving blood, creating voice exemplars, creating handwriting exemplars, furnishing fingerprints, participating in a lineup, trying on clothes, or displaying wounds.).

26. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

and is not available to a collective entity,²⁷ nor may a natural person raise his personal privilege to protect a collective entity.²⁸ The privilege has been withheld from collective entities because of the government's concern for effective business regulation and prosecution of white-collar crime.²⁹

A conflict occurs between the personal privilege and the law enforcement interest whenever an individual, because of his position within a collective entity, is compelled to furnish business records that are required for effective law enforcement, but which also incriminate that individual. To resolve this conflict, the Supreme Court developed the collective entity doctrine. This doctrine holds that no individual agent or employee of a collective entity may invoke his personal self-incrimination privilege on behalf of the entity.³⁰ He also may not invoke the privilege on his own behalf to withhold production of entity documents even when the contents of those documents may be personally incriminating.³¹ The Court has relied on several rationales during the course of developing its collective entity doctrine.³²

B. Collective Entity Doctrine

The collective entity doctrine originated in *Hale v. Henkel*,³³ and was based upon two rationales. First, the fifth amendment privilege is purely personal; an individual cannot assert his personal privilege on behalf of another,³⁴ and therefore an individual cannot claim his own privilege to protect a corporation.³⁵ Second, a corporation is an entity created by the state for the public good, and the state holds a visitatorial power to investigate corporations to ensure they are not exceeding their authority.³⁶

The Supreme Court expanded the doctrine during the next eighty

27. *Id.* at 74.

28. *Id.* at 70.

29. See *supra* note 5, and *infra* notes 36-39 and accompanying text.

30. *Bellis v. United States*, 417 U.S. 85, 88 (1974).

31. *Id.*

32. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 50 (1987). The Court at various times has utilized five rationales in support of the collective entity doctrine: (1) custodian's lack of property rights in entity documents, (2) state's visitatorial power to monitor state-created entities, (3) custodian's lack of personal privacy interests in entity documents, (4) custodian's waiver of his personal privilege, and (5) government's concern for effective law enforcement.

33. 201 U.S. 43 (1906) (A corporate officer protected by immunity attempted to invoke his personal privilege on behalf of the corporation to resist production of corporate documents.).

34. *Id.* at 69-70.

35. *Id.* at 70.

36. *Id.* at 74-75 (A corporation is a state-created entity which possesses only those rights granted by the state. The state holds a power of visitation over state-created entities to ensure that they are not exceeding their authority or doing anything contrary to the public good.).

years.³⁷ In 1911, employing an agency theory, the Court held that a custodian waives his personal privilege to refuse production of incriminating documents when he voluntarily assumes his custodial position.³⁸ The Court subsequently held that when a custodian assumes the duties of his office, he also assumes "the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitatorial powers."³⁹ Later, the Court abandoned its reliance upon the state visitatorial power rationale when it extended the doctrine to representatives of other organizations such as labor unions⁴⁰ and partnerships.⁴¹ It relied instead upon a more general governmental need to regulate the affairs of economically powerful organizations.⁴² The Court also recognized a privacy rationale; because a custodian holds no privacy interests in entity documents, he may not claim any personal privilege to protect their contents.⁴³

In *Curcio v. United States*⁴⁴ the Court carved a narrow exception for oral testimony from the collective entity doctrine. The Court drew a distinction between compelled oral testimony and compelled production of corporate books when it overturned an order holding a labor union

37. For a more detailed discussion of the doctrine's development, see Mosteller, *supra* note 32, at 51-59; *Collective Entities*, *supra* note 12, at 298-305; Comment, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 642-44 (1986) [hereinafter *Organizational Papers*]; Note, *Pleading the Fifth: Record Custodians and the Act-of-Production Doctrine*, 8 CARDOZO L. REV. 633, 635-38 (1987).

38. *Wilson v. United States*, 221 U.S. 361, 386 (1911) (A corporate officer may not refuse to produce corporate records, even if those records might incriminate him, because he is bound by a duty to the corporation to produce those records.). See also Mosteller, *supra* note 32, at 53-54 (A custodian waived his personal privilege when he assumed his position.).

39. *Curcio v. United States*, 354 U.S. 118, 124 (1957).

40. *United States v. White*, 322 U.S. 694, 701 (1944). The Court recognized that the state's visitatorial power rationale was unavailable to justify withholding the privilege because the labor union was not a state-created entity. *Id.* at 700-01.

41. *Bellis v. United States*, 417 U.S. 85, 97 n.7 (1974) (A partnership has "enough of the indicia" found in other collective entities to justify similar treatment as to self-incrimination analysis.). Although the *Bellis* Court did not articulate any criteria that it considered significant in determining whether an organization qualifies as a separate entity, it did mention that the test for self-incrimination purposes cannot be reduced to a simple question of size, *id.* at 100, or "turn on an insubstantial difference in the form of the business enterprise," *id.* at 101. In addition, the Court expressly stated that the privilege is unavailable to a custodian of corporate records regardless how small the corporation. *Id.* at 100.

42. *White*, 322 U.S. at 700.

43. *Bellis*, 417 U.S. at 90 (Collective entity records are not subject to an individual's personal privilege because the records are not private.).

44. 354 U.S. 118 (1957). As officer of a labor union, Curcio was served two subpoenas, one demanding production of union documents and the other requiring him to testify. *Id.* at 119. Curcio failed to produce the documents, claimed they were not in his possession, and refused to testify as to the documents' location. *Id.* The trial court held Curcio in contempt. *Id.* at 121. The Supreme Court reversed the contempt order, holding that the Government may not compel self-incriminating oral testimony from a collective entity representative. *Id.* at 128.

officer in contempt for refusing to testify concerning the location of subpoenaed union records that he failed to produce.⁴⁵ Significantly, the *Curcio* Court realized that acts of production may carry their own testimonial significance.⁴⁶ Nevertheless, these acts of production may be compelled⁴⁷ whereas oral testimony cannot.⁴⁸

C. Compelled Testimony Standard

In 1976 the Supreme Court abruptly changed the course of its fifth amendment self-incrimination jurisprudence. In *Fisher v. United States*⁴⁹ the Court expressly rejected the privacy rationale.⁵⁰ In doing so, it introduced an entirely new rationale.⁵¹ The *Fisher* Court held that a sole proprietor will be permitted to assert his personal privilege if the *act* of producing the documents might be incriminating.⁵² The act of production is presumed self-incriminating if the individual claiming the privilege can show that the act (1) is compelled, (2) is a testimonial communication, and (3) is incriminating.⁵³

The Court recognized that when records have been subpoenaed, compulsion is clearly present.⁵⁴ “[T]he more difficult issues are whether

45. *Id.* at 124-25, 128.

46. *Id.* at 125. (“The custodian’s act of producing books or records in response to a subpoena . . . is itself a representation that the documents produced are those demanded by the subpoena.”).

47. *Id.* at 127 n.7.

48. *Id.* at 128. The Court’s basis for this distinction was that

[t]he compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. . . . That is contrary to the spirit and letter of the Fifth Amendment.

Id.

49. 425 U.S. 391 (1976). Justice Marshall recognized the novelty of the compelled testimony standard. “Today the Court adopts a wholly new approach for deciding when the Fifth Amendment privilege against self-incrimination can be asserted to bar production of documentary evidence.” *Id.* at 430 (Marshall, J., concurring) (footnote omitted).

50. *Id.* at 401. Justice White did not find any safeguards for privacy within the Fifth Amendment.

We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against “compelled self-incrimination, not [the disclosure of] private information.”

Id. (quoting *United States v. Noble*, 422 U.S. 225, 233 n.7 (1975)).

51. Mosteller, *supra* note 32, at 58 (“Much of what had come before became obsolete with the decision in [*Fisher*], where the Court . . . set out a new system for evaluating documentary subpoenas . . .”).

52. *Fisher v. United States*, 425 U.S. 391, 410 (1976).

53. *Id.* at 408. This test was developed from a strict construction of the language in the Self-Incrimination Clause. *See supra* note 50.

54. *Fisher*, 425 U.S. at 410.

the tacit averments of the [witness] are both 'testimonial' and 'incriminating'"⁵⁵ After recognizing that these are questions of fact which must be resolved in each individual case, the Court identified three ways in which an act of production might have testimonial significance: Production might (1) concede the existence of the documents, (2) concede possession or control of the documents, or (3) indicate the belief that the documents produced are those demanded by the subpoena.⁵⁶

By contrast, the contents of voluntarily created documents are not subject to the privilege.⁵⁷ In a subsequent case, *United States v. Doe*,⁵⁸ the Court explained that because such records are prepared voluntarily, the facts disclosed by their contents entail no compulsion.⁵⁹ Indeed, the *Doe* Court held that business records prepared without compulsion can be subpoenaed and the contents used to incriminate even the person compelled to produce them.⁶⁰

Prior to *Fisher*, collective entity decisions had frequently distinguished protected personal documents from unprotected entity documents on a privacy rationale.⁶¹ Private documents were subject to the privilege, but nonprivate documents were not.⁶² By abandoning the privacy rationale, the *Fisher* Court eliminated this basis for distinction and opened the door to the possibility that the compelled testimony standard applied to entity representatives as well as to individuals.⁶³ The circuit

55. *Id.*

56. *Id.*

57. *Id.* at 409-10 ("[T]he preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence").

58. 465 U.S. 605 (1984).

59. *Id.* at 612 n.10 ("If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.").

60. *Id.* at 611-12.

61. *Organizational Papers*, *supra* note 37, at 640-41 (The distinction between personal and organizational records has been based on privacy rights and regulatory efficacy. Under the compelled testimony standard, privacy is immaterial and regulatory concerns are mitigated.); Note, *supra* note 24, at 1562 ("In light of the Court's recent shift to compelled testimonial incrimination as the guide for determining the scope of fifth amendment protection, however, the principles behind the entity doctrine no longer justify withholding fifth amendment protection for testimony implicit in the act of producing corporate documents." (footnote omitted)).

62. *Curcio v. United States*, 354 U.S. 118, 122-23 (1957) ("[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity' ") (quoting *United States v. White*, 322 U.S. 694, 699 (1944)).

63. Some commentators have argued that the *Fisher* Court eliminated the privacy rationale underlying the self-incrimination privilege for individuals and collective entities. See, e.g., *Organizational Papers*, *supra* note 37, at 647-48 (Privacy is immaterial under the compelled testimony standard. Therefore, the privacy rationale that distinguishes personal from organizational documents is no longer valid.).

courts split on the issue.⁶⁴ A majority of the circuits decided that the *Fisher-Doe* analysis applied only to sole proprietorships, and that the collective entity doctrine still applied to other organizations such as corporations.⁶⁵

To resolve this issue, the Supreme Court required a controversy in which a collective entity representative claimed his personal privilege to resist governmentally compelled production of entity documents because the act threatened self-incrimination. That opportunity arrived in the form of *United States v. Braswell*.⁶⁶

II. Case Description

A. Factual Background

Randy Braswell began business as a sole proprietor in 1965, and conducted all private financial affairs through his business.⁶⁷ Braswell formed two Mississippi corporations, Worldwide Machinery Sales, Inc. in 1980, and Worldwide Purchasing, Inc. in 1981.⁶⁸ He was sole owner and president of each corporation, holding all of the stock in Worldwide Machinery, which in turn held all of the stock in Worldwide Purchasing.⁶⁹

Braswell chose to incorporate solely to enhance his business im-

64. See *supra* note 12 and accompanying text, and cases cited *infra* note 65. The courts relied upon two basic theories:

(1) The modern collective entity doctrine focuses on document contents and privacy. The act of production doctrine does not rely upon either. Therefore, the collective entity doctrine is not pertinent to any compelled testimony standard inquiry. See *Organizational Papers*, *supra* note 37, at 647.

(2) The compelled testimony standard applies only to sole proprietorships. Therefore, the collective entity standard is controlling in cases involving corporations and other entities. See *Collective Entities*, *supra* note 12, at 308.

65. See *Braswell v. United States*, 108 S. Ct. 2284, 2287 n.2 (1988) (citing the following cases which refused to recognize a fifth amendment privilege: *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985) (en banc); *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 918 (1987); *United States v. Malis*, 737 F.2d 1511 (9th Cir. 1984), *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir. 1984)); (and citing the following cases which recognized a fifth amendment privilege: *United States v. Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67 (2d Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc); *United States v. Lang*, 792 F.2d 1235 (4th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569 (11th Cir. 1987); *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987)).

66. 108 S. Ct. 2284 (1988).

67. Brief for Petitioner Randy Braswell at 3, *Braswell v. United States*, 108 S. Ct. 2284 (1988) (No. 87-3) [hereinafter Brief for Petitioner]. Before and after incorporation, Braswell did not have a personal checking account. *Id.* at 5. All of his personal finances were conducted through the company. *Id.*

68. *Id.* at 3-4.

69. *Id.* at 4.

age.⁷⁰ After incorporation, Braswell continued to commingle his personal and business assets.⁷¹ Braswell held total and absolute authority over the business.⁷² In short, Randy Braswell conducted his corporate affairs like a sole proprietor.⁷³

In 1986 the Internal Revenue Service served Braswell with a subpoena to testify before a federal grand jury.⁷⁴ In the alternative, the subpoena commanded Braswell to deliver to the serving agent all corporate records for specified years.⁷⁵ Braswell filed a "Motion To Quash Subpoena for Production of Documents," asserting a fifth amendment privilege to withhold the documents because the act of producing the documents would have a self-incriminating testimonial effect.⁷⁶

The issue before the district court was whether the *Fisher* compelled testimony standard,⁷⁷ previously applied only to sole proprietors, should be extended to Braswell.⁷⁸ The court found that earlier Fifth Circuit decisions had denied a fifth amendment privilege to corporate records custodians.⁷⁹ The principle authority for those decisions was language in

70. *Id.* The attorney who performed the legal work creating the corporations testified that Braswell did not incorporate for any of the traditional reasons, such as tax planning, profit sharing plans, or limited personal liability for corporate debts. *Id.* at 4-5.

71. *Id.* at 5-6. All of Braswell's personal assets, including his house, were held in the name of Worldwide Purchasing, Inc. *Id.* at 5. Braswell had no personal checking account, but used the corporate account for personal expenditures. *Id.* Credit cards he and his wife used for personal purchases were issued in the name of the corporation. *Id.* at 6.

72. *Id.* In compliance with Mississippi law, the board of directors consisted of three individuals: Braswell as president, his wife as secretary-treasurer, and his mother as vice-president. *Id.* at 5. The only employee, a secretary, was Braswell's sister-in-law. *Id.* Only Braswell was authorized, however, to act on behalf of the business. *Id.* at 5-6.

Although the Court never expressly mentioned it, the existence of the sole employee may have been significant. *See infra* text accompanying note 196.

73. Brief for Petitioner, *supra* note 67, at 4-5. The district judge concluded that "under the facts, Mr. Braswell was obviously doing business through the corporate name but was managing the affairs of the corporation as close to the manner in which a sole proprietorship would be handled as almost could be conceived." *Id.* at 6.

74. *Id.* at 1-2.

75. *Id.* at 2. The subpoena stated, "In the alternative, you are commanded to deliver the subpoenaed documents to the agent serving this subpoena, in which event you need not appear or bring the subpoenaed documents at the location, date and time specified above." *Id.* The documents requested included

receipts and disbursements 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 or ledgers; loan disclosure statements and agreements; liability ledgers; and retained copies of Forms 1120, W-2, W-4, 1099, 940 and 941.

Id. at 41 n.15.

76. *Id.* at 2-3. Portions of the procedural history not germane to the discussion here are omitted.

77. *See supra* note 53 and accompanying text.

78. Brief for Petitioner, *supra* note 67, at 6.

79. *Id.*

*Bellis v. United States*⁸⁰ which stated that the privilege is withheld from corporate representatives, regardless of corporate size.⁸¹ On appeal, the Fifth Circuit found *Bellis* controlling and upheld the lower court.⁸²

The issue presented in *Braswell* had engendered conflict among the circuit courts. A few of the circuits had found the *Fisher-Doe* standard applicable to corporate custodians in at least some situations.⁸³ To resolve the conflict, the Supreme Court granted certiorari.⁸⁴ The question certified for review was "whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment."⁸⁵

B. Majority Opinion

In a 5-to-4 decision, the Supreme Court affirmed the Fifth Circuit.⁸⁶ The Court held that a representative of a corporation, even a corporation operated like a sole proprietorship, does not have a fifth amendment self-incrimination privilege to resist compelled production of voluntarily prepared corporate records.⁸⁷ No privilege exists even if the subpoena is addressed to the representative personally or if the act of production might prove personally incriminating.⁸⁸

The Court recognized two distinct lines of authority: one line in-

80. *Id.* In *Bellis*, 417 U.S. 85 (1974), a partner in a then dissolved three-person law firm was directed by subpoena to produce partnership records in his possession. He was not permitted to resist production of those records by claiming his personal self-incrimination privilege.

81. *Bellis*, 417 U.S. at 100 ("It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be."). See *supra* note 41.

82. *In re Grand Jury Proceedings*, 814 F.2d 190, 193 (5th Cir. 1987). The precedential value of *Bellis* was attenuated, however, for two reasons. First, the language regarding corporate custodians was only dicta because the entity in *Bellis* was a partnership. *Bellis*, 417 U.S. at 85-86. Second, since *Bellis* was decided prior to *Fisher*, the *Bellis* Court did not have an opportunity to consider the compelled testimony standard.

83. See *supra* notes 12 & 65 and accompanying text.

84. Petition for writ of certiorari filed June 26, 1987 (No. 87-3), *Braswell v. United States*, cert. granted, 108 S. Ct. 64 (1987).

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

86. Chief Justice Rehnquist wrote the opinion for the Court, in which Justices White, Blackmun, Stevens, and O'Connor joined. Justice Kennedy wrote the dissenting opinion in which Justices Brennan, Marshall, and Scalia joined. *Id.*

This alignment of the Justices is an unusual fragmentation of the liberal-conservative blocs commonly seen in most other closely decided opinions by this Court. The dissenting Justices may represent an alliance of interests in personal rights and corporate protection. Schwartz, *Kennedy: The Newest Justice Stakes Out His Position: The 'Gray Market' Case, 'Plain Meaning,' and Other Portents*, Los Angeles Daily Journal, September 30, 1988, Daily Journal Report, at 2.

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

88. *Id.* at 2290.

volving sole proprietors and the other concerning collective entities.⁸⁹ Relying on an agency rationale, the Court reaffirmed the vitality of the collective entity doctrine, which withholds the privilege,⁹⁰ but it recognized a narrow exception for oral testimony.⁹¹ The Court also reaffirmed the importance of effective prosecution of white-collar crime,⁹² but proscribed the government's evidentiary use of the custodian's act of production by attributing the custodial act of production to the corporation itself.⁹³

1. *Two Distinct Lines of Authority*

The *Braswell* Court stated that, according to one line of cases, the compelled testimony standard applies to custodians of sole proprietorship records.⁹⁴ "Had petitioner conducted his business as a sole proprietorship, [he would] be provided the opportunity to show that his act of production would entail testimonial self-incrimination."⁹⁵

The Court explained, however, that the compelled testimony standard does not apply to custodians of collective entities.⁹⁶ "[P]etitioner has operated his business through the corporate form, and . . . for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."⁹⁷

2. *"Undergirding" Agency Rationale*

Braswell argued that the collective entity doctrine was founded upon a privacy rationale, and that fifth amendment protection was withheld from corporate document contents because they are not private.⁹⁸ Prior collective entity decisions were not concerned with the act of production.⁹⁹ *Fisher* replaced this privacy rationale "with a compelled testimony standard under which the contents of business documents are never privileged but the act of producing the documents may be."¹⁰⁰

The Court dismissed Braswell's argument and reaffirmed the viability of the collective entity doctrine upon an agency rationale, declaring

89. See *infra* text accompanying notes 94-97.

90. See *infra* notes 98-109 and accompanying text.

91. See *infra* notes 110-116 and accompanying text.

92. See *infra* notes 117-136 and accompanying text.

93. See *infra* text accompanying notes 137-143.

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

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 2290.

99. *Id.*

100. *Id.*

that *Fisher* had not rendered the doctrine obsolete.¹⁰¹

From *Wilson* forward, the Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. . . . [A] custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation.¹⁰²

The Court explained that because the act is impersonal and attributable to the corporation, granting a custodian his personal privilege would be "tantamount to [granting] a claim of privilege by the corporation"¹⁰³ "[I]t is well established that such artificial entities are not protected by the Fifth Amendment."¹⁰⁴ Therefore, Braswell acting as a corporate custodian could claim no privilege because his production was not a personal act.¹⁰⁵

Contrary to Braswell's assertion that *Fisher* had replaced the collective entity doctrine with the compelled testimony standard, the *Braswell* majority found that *Fisher* had cited with approval the collective entity doctrine cases which withheld the privilege from entity custodians.¹⁰⁶ The *Fisher* Court recognized the collective entity cases as factual situations in which the act of production would not "involve testimonial self-incrimination."¹⁰⁷ The *Braswell* majority acknowledged that only Justice Brennan's concurring opinion in *Fisher* had recognized the agency rationale for the collective entity doctrine cases.¹⁰⁸ The *Braswell* Court concluded, however, that whether *Fisher* had approved the collective en-

101. "To be sure, the holding in *Fisher* . . . embarked upon a new course of Fifth Amendment analysis. . . . [But t]he agency rationale undergirding the collective entity decisions . . . survives." *Id.* at 2290-91 (citations omitted).

102. *Id.* at 2291 (citations omitted). To underscore the agency theory, the Court noted that the privilege was withheld in prior collective entity cases even when the subpoena was addressed to a corporate custodian personally. *Id.* (citing *Dreier v. United States*, 221 U.S. 394 (1911), and *Bellis v. United States*, 417 U.S. 85 (1974)).

103. *Id.* at 2291.

104. *Id.* at 2287 (citing *Bellis*, 417 U.S. at 88).

105. *Id.* at 2291. Furthermore, Randy Braswell, acting as a corporate officer, could not rely upon the holding in *United States v. Doe*, 465 U.S. 605 (1984). There, the claimant of the privilege was a sole proprietor and he held the business records in a personal rather than a representative capacity. *Id.* at 2292 n.5.

106. *Id.* at 2292.

107. *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 411 (1976)).

108. *Id.* at 2292. Justice White, who wrote the majority opinion in *Fisher*, joined with the *Braswell* majority. *Id.* at 2286. On the other hand, Justice Brennan, who joined with the *Braswell* dissent, was the only one in *Fisher* who relied upon an agency theory. *Fisher v. United States*, 425 U.S. at 429-30 (Brennan, J., concurring).

Nothing in the language of the [collective entity] cases . . . indicates that the act of production . . . is insufficiently testimonial for purposes of the Fifth Amendment. . . . [T]hose issues . . . were disposed of on the ground . . . that one in control of the

tity cases upon an agency theory or because representative acts are not testimonial, the result was the same: "A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds."¹⁰⁹

3. Oral Testimony Exception

Braswell contended that *Curcio v. United States*¹¹⁰ had drawn a distinction between a custodian's personal privilege with respect to corporate record contents, which is not recognized, and his privilege with respect to testimony about those records, which must be recognized.¹¹¹ From this assertion, Braswell argued that a testimonial act may not be compelled if it presents a risk of incriminating the custodian.¹¹²

The *Braswell* majority rejected this argument, finding instead that the distinction drawn in *Curcio* was between compelled production of records and compelled oral testimony.¹¹³ A custodian, "by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian But he cannot lawfully be compelled . . . to condemn himself by his own oral testimony."¹¹⁴ The *Braswell* Court noted that *Curcio* had recognized the testimonial nature of acts of production,¹¹⁵ and had held that these acts may be compelled but oral testimony cannot.¹¹⁶ The act of production which Braswell wished to resist could not be excused under the *Curcio* oral testimony exception.

4. Law Enforcement Concerns

The Court observed further that recognizing a corporate custodial privilege would hamper the Government's efforts to prosecute white-collar crime, "one of the most serious problems confronting law enforce-

records of an artificial organization undertakes an obligation with respect to those records foreclosing any exercise of his privilege.

Id. (footnote omitted).

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

110. 354 U.S. 118 (1957). See *supra* notes 44-48 and accompanying text.

111. Brief for Petitioner, *supra* note 67, at 22.

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

113. *Id.*

114. *Id.* at 2293 (quoting *Curcio*, 354 U.S. at 123-24) (emphasis added by the Court).

"There is no hint in [the collective entity] decisions that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office. . . . [H]e 'has voluntarily assumed a duty which overrides his claim of privilege' only with respect to the production of the records themselves. [Wilson v. United States, 221 U.S. 361, 380 (1911).]" (emphasis in original).

Id. at 2293 n.6 (quoting *Curcio*, 354 U.S. at 124-25).

115. *Id.* at 2293 ("The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena.") (quoting *Curcio*, 354 U.S. at 125)).

116. *Id.* at 2293-94 (The petitioner in *Curcio* "might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*" (quoting *Curcio*, 354 U.S. at 127 n.7) (footnote omitted)).

ment authorities.”¹¹⁷ “[Most] evidence of wrongdoing by an organization or its representatives is usually found in [its records and documents].”¹¹⁸ If custodians were permitted to claim their personal privilege, “‘effective enforcement of many federal and state laws would be impossible,’”¹¹⁹ and prosecution of both the custodians and the organizations would be frustrated.¹²⁰ Because “‘an artificial entity can only act . . . through its . . . agents, recognition of the individual’s claim of privilege . . . would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege’”¹²¹

Braswell proposed two alternatives.¹²² The Government may either (1) address the subpoena to the corporation, allowing it to choose the individual to produce the desired records, or (2) grant the custodian statutory use immunity¹²³ with respect to the evidence derived from his act of producing the documents. The Court found neither alternative satisfactory.¹²⁴

Braswell observed that several lower courts had preserved the custodian’s privilege by directing the corporation to choose an agent who could produce the records without self-incrimination.¹²⁵ The Court conceded that the corporation would be forced to find the means to comply with the subpoena, and that a common means would be the appointment of an alternate custodian.¹²⁶ “But petitioner insists he cannot be required to aid the appointed custodian in his search for the demanded records, for any statement to the surrogate would itself be testimonial and incriminating.”¹²⁷ In situations such as this, the Court explained, the records custodian would probably be the only individual with the knowledge necessary to find and produce the demanded documents.¹²⁸ The Court doubted that an appointed custodian, sent on an unguided search, would be able to find the subpoenaed documents.¹²⁹

Braswell also argued that, by granting statutory use immunity, the Government could respect the custodian’s privilege yet still obtain the

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

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

119. *Id.*

120. *Id.*

121. *Id.* (quoting *Bellis v. United States*, 417 U.S. 85, 90 (1974)).

122. Brief for Petitioner, *supra* note 67, at 46-47; *Braswell*, 108 S. Ct. at 2294-95.

123. *See infra* notes 130-132.

124. *Braswell*, 108 S. Ct. at 2294-95.

125. Brief for Petitioner, *supra* note 67, at 46-47.

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

127. *Id.*

128. *Id.*

129. *Id.*

documents it sought.¹³⁰ Statutory use immunity would prohibit the Government from using any evidence derived from the immunized act of production against the custodian.¹³¹ In exchange for this immunity, Braswell would be required to produce the documents.¹³²

The Court rejected this suggestion because although statutory use immunity would permit free use of all evidence obtained from the custodian against the corporation, it could seriously hamper prosecution of the custodian.¹³³ First, any testimony obtained in exchange for the granted immunity could not be used directly or derivatively against the immunized party.¹³⁴ Second, a custodian would need show only that he testified under a grant of immunity to shift onto the Government the burden of proving that all evidence it wished to use was derived from legitimate independent sources.¹³⁵ Even if the immunized testimony were not used for any purpose, "the Government's inability to meet the 'heavy burden' it bears may result in the preclusion of crucial evidence that was obtained legitimately."¹³⁶ As a consequence, the custodian who was granted use immunity would have a good chance of avoiding criminal prosecution.

5. *Attributed Act*

The Court reaffirmed the collective entity doctrine on the basis of an agency rationale: a custodian's act of production is attributed to the cor-

130. 18 U.S.C. §§ 6002 to 6003 (1985). Congress provided statutory use immunity as a means to satisfy law enforcement needs when those needs infringed impermissibly upon an individual's self-incrimination privilege. *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972). For a more extensive discussion of statutory use immunity, see Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690 (1982).

131. Use immunity does not bar the Government from prosecuting the witness.

Originally, immunity was construed by the Supreme Court as protecting the witness from prosecution for any matter about which he testified ("prosecutorial" or "transactional" immunity). In 1972, however, the Supreme Court ruled that it sufficed to give the witness immunity only from having his testimony used against him. An immunized witness could be prosecuted for matters about which he testified, but his testimony could not be admitted into evidence at his trial or otherwise used. This protection is called "testimonial" or "use and derivative use" immunity.

Lushing, *supra* note 130, at 1690 (footnotes omitted). See *Kastigar v. United States*, 406 U.S. 441, 449-59 (1972) (citing *Counselman v. Hitchcock*, 142 U.S. 547 (1892)).

132. After immunity is granted, a witness must testify truthfully.

An immunity order requires that the witness testify despite his privilege against self-incrimination. The order prohibits use of the testimony and use of information derived from the testimony against the witness in criminal cases, except in perjury prosecutions. If the witness refuses to obey the order to testify, he faces contempt proceedings; if he testifies falsely, he faces a charge of perjury.

Lushing, *supra* note 130, at 1691-92 (footnotes omitted).

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

134. *Id.* (citing *Kastigar*, 406 U.S. 441; 18 U.S.C. § 6002).

135. *Id.* (citing *Kastigar*, 406 U.S. at 461-62).

136. *Id.*

poration as its own act,¹³⁷ and is not considered a personal act of the custodian. The Court explained that as a consequence of this attribution, the Government cannot make any evidentiary use of the individual's act against the individual.¹³⁸ This limitation is not constructive use immunity¹³⁹ but is a natural consequence of the agency rationale underlying the collective entity doctrine.¹⁴⁰ The Court explained that a jury could infer from the "corporate act" that the records at issue were authentic and accurate.¹⁴¹ "And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents."¹⁴²

Finally, in a footnote at the end of the opinion, the Court left "open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records."¹⁴³

C. Dissenting Opinion

"The question before us," wrote Justice Kennedy, "is not the existence of the collective entity rule, but whether it contains any principle which overrides the personal Fifth Amendment privilege of someone compelled to give incriminating testimony."¹⁴⁴ "The question presented . . . is whether an individual may be compelled, simply by virtue of his status as a corporate custodian, to perform a testimonial act which will incriminate him personally."¹⁴⁵

1. *Misapplication of the Collective Entity Doctrine*

The dissent found no support in the collective entity doctrine for withholding the privilege from Braswell. The dissent agreed that the collective entity doctrine remains valid, but argued that it stands only for the proposition that there is neither a self-incrimination privilege available to corporations and other collective entities, nor any privilege for custodians with respect to the contents of entity documents.¹⁴⁶

137. *See supra* note 102 and accompanying text.

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

139. *Id.* at 2295 n.11.

140. *See infra* notes 177-178 and accompanying text.

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

142. *Id.*

143. *Id.* at 2295 n.11.

144. *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).

145. *Id.* at 2297.

146. *Id.* at 2297-98.

From their reading of the collective entity cases, the dissent found that the collective entity doctrine addressed the claim of privilege only where applied to the contents of documents. By contrast, Randy Braswell asserted that his act of production would be incriminating.¹⁴⁷ “The distinction is central. . . . [T]he custodian has no privilege to refuse production although [the documents’] contents tend to criminate him.”¹⁴⁸ *Fisher* held that although no privilege may be claimed with respect to the contents of voluntarily prepared business records, “[t]he act of producing documents stands on an altogether different footing.”¹⁴⁹

The dissent noted that the analysis in *Fisher* made it clear that availability of the self-incrimination privilege depends upon the presence of compulsion.¹⁵⁰ Although no compulsion is involved with the contents of voluntarily prepared documents, production of those documents is compelled and is “inescapably” the custodian’s own act.¹⁵¹ Here, as in *Fisher*, a subpoena commands production of documents. Compulsion is “clearly present.”¹⁵²

2. Oral Testimony Standard

The dissent argued that “[p]roduction [of subpoenaed documents] . . . in some cases, will require the custodian’s own testimonial assertions. . . . [T]he potential for self-incrimination inheres in the act demanded of the individual, [and therefore] the nature of the entity is irrelevant to determining whether there is ground for the privilege.”¹⁵³ To determine if the act of production demanded of Braswell is testimonial, it “must be analyzed under the same principles applicable to other forms of compelled testimony.”¹⁵⁴

The dissent found these principles applied in *Curcio*,¹⁵⁵ in which the Government had attempted to compel a labor union custodian to disclose the location of subpoenaed documents.¹⁵⁶ “[T]he Government argued in *Curcio* that the custodian could not claim a personal privilege because he was performing only a ‘representative duty’ on behalf of the collective entity We rejected that argument.”¹⁵⁷

The dissent continued:

147. *Id.* at 2298.

148. *Id.* (quoting *Wilson v. United States*, 221 U.S. 361, 382 (1911)).

149. *Id.*

150. *Id.* See *supra* note 53 and accompanying text.

151. *Braswell*, 108 S. Ct. at 2298.

152. *Id.* at 2287 (quoting *Fisher v. United States*, 425 U.S. 391, 410 (1976)); *Id.* at 2296 (Kennedy, J., dissenting).

153. *Id.* at 2298 (Kennedy, J., dissenting).

154. *Id.* at 2299.

155. *Curcio v. United States*, 354 U.S. 118 (1957).

156. See *supra* notes 44-48 and accompanying text.

157. *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting).

We confront the same Fifth Amendment claim here. The majority is able to distinguish *Curcio* [from *Braswell* by] reading *Curcio* to stand for the proposition that the Constitution treats oral testimony differently than it does other forms of assertion. There is no basis in . . . the Fifth Amendment for such a distinction. The self-incrimination clause . . . appl[ies] to testimony in all its forms. . . .

The distinction established by *Curcio* is not, of course, between oral and other forms of testimony; rather it is between a subpoena which compels a person to "disclose the contents of his own mind," through words or actions, and one which does not.¹⁵⁸

The dissent concluded that a custodian who is incriminated only by contents of documents he is forced to produce has not been compelled to "disclose the contents of his own mind." Nevertheless, "[a] custodian who is incriminated by the personal knowledge he communicates in locating and selecting the document demanded . . . has been compelled to testify in the most elemental, constitutional sense."¹⁵⁹ According to the dissent, in cases similar to *Braswell*, where the act of production discloses incriminating personal knowledge, production may not be compelled without violating the custodian's fifth amendment privilege.¹⁶⁰

3. Law Enforcement Concerns

The dissent found no authority in the Fifth Amendment for disregarding an individual's self-incrimination privilege for the benefit of law enforcement, and argued that even if such exceptions were proper, "the dangers prophesied by the majority are overstated."¹⁶¹ First, the dissent observed, the number of cases in which the custodial privilege will arise is small. Second, to the extent the privilege is available, statutory use immunity may be granted.

The dissent noted that the right to claim the custodial privilege will be absent in many cases because the act of production will have insufficient testimonial value.¹⁶² The act of production required in *Fisher*, for example, did not involve testimonial self-incrimination because the existence and location of the documents were known to the Government and were "a foregone conclusion." The act of production is not subject to the privilege when it adds little to the Government's information.¹⁶³ In *Braswell's* case, the Government conceded that his act of producing the

158. *Id.*

159. *Id.*

160. *Id.*

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

162. *Id.* (citing *Fisher*, 425 U.S. at 411).

163. *Id.* The compelled act of production had no testimonial significance because the existence of the subpoenaed records was a "foregone conclusion." *Fisher*, 425 U.S. at 411. In other words, the testimonial value was minimal because the information to be learned from the act was already known or obtainable from another source.

subpoenaed documents would furnish incriminating testimony. "Whether a particular act is testimonial and self-incriminating is largely a factual issue to be decided in each case. . . . The existence of a privilege . . . is not an automatic result."¹⁶⁴

In addition, the dissent contended that "to the extent testimonial assertions are being compelled, use immunity can be granted without impeding the investigation."¹⁶⁵ The scope of the immunity could be limited to one custodian. The immunity would apply only to evidence derived from the act of production as used against the custodian. The contents of the records could be used against everyone, and evidence derived from the act of production itself could be used against everyone except the immunized custodian.¹⁶⁶ "In appropriate cases the Government will be able to establish authenticity, possession, and control by means other than compelling assertions about them from a suspect."¹⁶⁷

4. *Attributed Act*

The dissent disagreed with the majority's use of the agency rationale, arguing that "the Government does not see Braswell as a mere agent at all"¹⁶⁸ The Government explained that it would choose a specific target for its subpoena whenever it wanted to make that individual comply with the terms of the subpoena.¹⁶⁹ "This is not the language of agency. By issuing a subpoena [to a specific individual], [the Government] has forfeited any claim that it is simply making a demand on a corporation"¹⁷⁰

The dissent also found the majority's attributed act theory¹⁷¹ was undercut by the Court's reasoning in *Curcio*.¹⁷² In *Curcio* the Government argued unsuccessfully that because the custodian was acting in a representative capacity, incriminating testimony could be lawfully compelled. The dissent considered the Government's reasoning equivalent to the *Braswell* majority's attributive act theory. The *Curcio* Court had rejected the Government's argument, finding that testimony could not be alienated from the person who speaks it and attributed to the union. Here, as in *Curcio*, Braswell's act of production required disclosure of personal knowledge "which cannot be dismissed by labeling him a mere

164. *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting) (citing *Doe v. United States*, 108 S. Ct. 2341, 2350 (1988)).

165. *Id.*

166. *Id.* See *supra* notes 130-132.

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

168. *Id.* at 2300.

169. *Id.*

170. *Id.* (citations omitted).

171. See *supra* text accompanying notes 137-142.

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

agent.”¹⁷³ Because Braswell’s act of production could not be “alienated” from the person who performed it, the act was entitled to the same privilege accorded Curcio’s oral testimony.

Furthermore, argued the dissent, the majority undermined its own analysis by prohibiting the Government from making any evidentiary use of the individual’s act of production against the individual.¹⁷⁴ To recognize this limited protection is to admit that “the Fifth Amendment protects [a custodian] without regard to his status as a corporate employee”¹⁷⁵ The dissent found no authority cited for this limited protection.¹⁷⁶

The dissent characterized this limited evidentiary use protection as equivalent to the constructive use immunity that the Court had declined to adopt in *Doe*.¹⁷⁷ In *Doe* the Court held that immunity may be granted only in compliance with statutory requirements.¹⁷⁸ The *Braswell* dissent disapproved of judicially creating rules of evidence to avoid constitutionally intolerable results, concluding instead that precedent required the Government to grant statutory use immunity, the only sanctioned means to compel privileged testimony.¹⁷⁹

5. Agency and Implied Waiver

The dissent claimed that the majority’s agency rationale suggested Braswell had waived his fifth amendment privilege.¹⁸⁰ The dissent acknowledged that Braswell was not a “sympathetic” case because he was

173. *Id.*

174. *Id.*

175. Justice Kennedy argued that the Court

impinges upon its own analysis by concluding that, while the Government may compel a named individual to produce records, in any later proceeding against the person it cannot divulge that he performed the act. But if that is so, it is because the Fifth Amendment protects the person without regard to his status as a corporate employee; and once this be admitted, the necessary support for the majority’s case has collapsed.

Id.

176. The dissent concluded the Fifth Amendment could not provide authority for the evidentiary use limitation because the fifth amendment self-incrimination clause “does not permit balancing the convenience of the Government against the rights of a witness, and the majority has in any case determined that the Fifth Amendment is inapplicable. . . . [T]here are no grounds of which I am aware for declaring the information inadmissible, unless it be the Fifth Amendment.” *Id.*

177. *Id.* at 2300-01; see *United States v. Doe*, 465 U.S. 605, 616 (1984) (“We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.”).

178. *Doe*, 465 U.S. at 616 (The decision to grant immunity involves careful balancing of the Government’s need for information against the difficulty in prosecuting specific individuals. The decision to grant immunity has been reserved to the Justice Department through the use of statutory use immunity.)

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

180. *Id.*

the sole shareholder of the corporation and operated it himself. Braswell chose the corporate form for his business, and “[p]erhaps that is why the Court suggests he waived his Fifth Amendment self-incrimination rights”¹⁸¹

The dissent was troubled by this implied waiver theory.

[Not every employee has] the choice of his or her employer, much less the choice of the business enterprise through which the employer conducts its business. . . . [N]othing in Fifth Amendment jurisprudence indicates that the acceptance of employment should be deemed a waiver of a specific protection that is as basic a part of our constitutional heritage as is the privilege against self-incrimination.¹⁸²

III. Case Analysis

A. Attributed Act and Its Evidentiary Limitation

The traditional agency theory underlying the collective entity doctrine was one of waiver. That is, an individual, by voluntarily assuming the duties of custodian, assumes a duty to fulfill all of the obligations of the artificial entity, thereby waiving his personal privilege to refuse production of incriminating documents.¹⁸³ The *Braswell* Court introduced a new wrinkle to this agency rationale through the attributed act theory. Because acts of production by a corporate custodian are not personal acts, the Court explained, evidence of his individual act of production may not be used against him.¹⁸⁴ It is as if someone else produced the documents.¹⁸⁵

The majority explained that this evidentiary use limitation was simply a consequence of the agency rationale undergirding the collective en-

181. *Id.*

182. *Id.*

183. *See supra* note 38 and accompanying text.

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

185. *Id.* (“[T]he jury may, just as it would *had someone else* produced the documents, reasonably infer that he had possession of the documents” (emphasis added)).

This attribution raises the question whether this theory also applies to custodians of sole proprietorships. *See The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 179 (1988) [hereinafter *Leading Cases*] (“No stranger metaphysical maneuver is involved in attributing this act of production to [an individual] than was involved in attributing Braswell’s act of production to the corporation.”). It is unlikely the Court would extend the theory this far, preferring instead to treat it merely as part of the collective entity doctrine and not as an extension to the law of agency. Were the Court to recognize such an extension, an agent could resist a subpoena for production of another individual’s documents on the grounds that the agent’s attributed act would incriminate the other individual. This would reverse the well established rule (excepting the attorney-client privilege, *Fisher v. United States*, 425 U.S. at 405) that a person can be compelled to produce another person’s documents they hold in a representative capacity. *Couch v. United States*, 409 U.S. 322, 329 (1973); *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

tity doctrine. On the other hand, Justice Kennedy claimed it was identical to the constructive use immunity which had been rejected in *Doe*.¹⁸⁶ The *Doe* Court explained: "Under [constructive use immunity], the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures have not been followed."¹⁸⁷

If there is any distinction between the Court's evidentiary use limitation and constructive use immunity, it would be only with respect to derivative use. Under constructive use immunity, the Government cannot use any evidence obtained either directly or derivatively from the immunized act.¹⁸⁸ Under the *Braswell* Court's evidentiary use limitation, the Government "may make no evidentiary use of the 'individual act' against the individual."¹⁸⁹ The language certainly suggests that direct and derivative use is prohibited. If so, what distinction can be made between the *Braswell* evidentiary use limitation and constructive use immunity? It appears, as the dissent suggested, that the Court has indulged in a bit of judicial rule making to avoid an "intolerable" constitutional result.¹⁹⁰

The majority recognized that the attributed act fiction was not sufficient to "immunize" all corporate custodians. In cases where a jury will "inevitably conclude that [the custodian] produced the records[.]" it remains an "open question whether the agency rationale supports compelling [the] custodian to produce corporate records . . ."¹⁹¹

The Court suggested that a custodian who "is the sole employee and officer of the corporation" might qualify for this exception.¹⁹² The district court concluded that *Braswell* operated his incorporated business in a manner as close to a sole proprietorship as could be imagined.¹⁹³ *Braswell* alone held authority to represent the business, and he alone possessed knowledge sufficient to produce the corporate records sought by the Government.¹⁹⁴ If this case went to trial, a jury very likely would "inevitably" conclude that *Braswell* personally produced the subpoenaed

186. See *supra* note 177 and accompanying text.

187. *United States v. Doe*, 465 U.S. 605, 616 (1984).

188. Under statutory use immunity, the Government cannot make direct or derivative use of the immunized act. 18 U.S.C. § 6002 (1985). The *Doe* Court recognized no difference in effect between statutory and constructive use immunity; therefore both direct and derivative use restrictions should also apply to constructive use immunity.

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

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

191. *Id.* at 2295 n.11.

192. *Id.*

193. See *supra* note 73.

194. See *supra* notes 72-73; *Braswell*, 108 S. Ct. at 2300 (Kennedy, J., dissenting) (The Government admitted it wanted to compel Randy *Braswell* personally to produce the corporate records (citing the Transcript of Oral Argument at 43)).

records.¹⁹⁵ Why was Braswell not given the opportunity to make this showing? The Court provided no answer.

The Court may have believed a jury would not inevitably conclude Braswell produced the records because he was not the only corporate employee.¹⁹⁶ Given the facts of Braswell's total control of corporate affairs, however, such a conclusion flies in the face of reality. Furthermore, if anyone other than Braswell could have produced the subpoenaed records, this would undermine the Court's argument against use of a subpoena addressed to the corporation, thereby allowing the corporation to select the individual to produce the records.¹⁹⁷

B. Oral Testimony Exception

The Court's use of the attributed act theory raises a nagging inconsistency. As noted by the majority, *Curcio v. United States*¹⁹⁸ recognized that a custodian may be compelled to produce subpoenaed documents, but cannot be compelled to give oral testimony about those documents unless granted immunity.¹⁹⁹ Under the attributed act theory, this distinction no longer makes sense. If an individual's act of production may be attributed to the corporation, then an individual's oral testimony might be as well.²⁰⁰

In light of the attributed act theory, there is no longer a need to recognize a special exception for oral testimony. Oral testimony by a collective entity agent may be deemed an act of the entity rather than an act of the agent. Such testimony can be compelled, even if it threatens the agent with self-incrimination, because acts of the entity have no privilege against compelled self-incrimination.

195. From the record the majority recognized that Braswell as "the corporate custodian is likely the only person with knowledge about the demanded documents" and, therefore, his help would be required to assure production of the subpoenaed documents. *Braswell*, 108 S. Ct. at 2294. A jury surely would reach the same conclusion.

196. See *supra* note 72 and accompanying text.

197. See *supra* text accompanying notes 128-129.

198. 354 U.S. 118 (1957).

199. The dissent criticized the majority's interpretation of *Curcio* as distinguishing oral from other forms of testimony. *Braswell*, 108 S. Ct. at 2299 (Kennedy, J., dissenting). The real distinction, Justice Kennedy explained, was whether compelled testimony, oral or otherwise, would disclose the contents of one's mind. *Id.* Contrary to Justice Kennedy's assertion, the *Curcio* Court plainly distinguished the availability of the privilege for oral testimony from the act of production. *Curcio*, 354 U.S. at 124 ("Of course all oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." (quoting *Shapiro v. United States*, 335 U.S. 1, 27 (1947)) (emphasis in original)). See *supra* notes 44-48 & 114-116 and accompanying text.

200. *Leading Cases, supra* note 185, at 178 n.60 ("*Curcio* [involved] grand jury testimony. It would have been possible to conceal at trial the fact that the defendant was the actual source of grand jury evidence." Hence, the agency fiction could have been preserved, "[y]et the [*Curcio*] Court refused to allow the testimony to be compelled.").

The attributed act theory, therefore, casts a veil of uncertainty over the *Curcio* oral testimony exception. "If taken seriously, *Braswell's* 'attributive' agency theory calls for a reconsideration of the previously established limits of the collective entity doctrine."²⁰¹

C. Law Enforcement

The center of the struggle between the *Braswell* majority and dissent was the issue of effective law enforcement.²⁰² The majority saw white-collar crime as "the most serious and all-pervasive crime problem in America today,"²⁰³ and contended that recognizing a fifth amendment privilege for collective entity custodians would seriously hamper efforts to prosecute white-collar crime.²⁰⁴ The dissent argued that the "dangers" of hampering prosecution efforts are "overstated."²⁰⁵

The principle point of dispute was the efficacy of statutory use immunity.²⁰⁶ As the dissent insisted, the need to grant immunity is rare and the scope of the immunity is narrow.²⁰⁷ Most evidence is not subject to immunity because it is not a testimonial communication,²⁰⁸ not sufficiently testimonial,²⁰⁹ not compelled,²¹⁰ not incriminating,²¹¹ or not subject to any individual privilege.²¹² Under the compelled testimony

201. *Id.* at 178.

202. For a more thorough discussion of the effects recognizing a custodian's personal privilege can have upon law enforcement, see *Organizational Papers*, *supra* note 37, at 650-52.

203. *Braswell*, 108 S. Ct. at 2294 n.9 (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

204. *Id.* at 2294.

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

206. The dissent did not comment on *Braswell's* suggestion that the Government address the subpoena to the corporation, allowing it to appoint a surrogate custodian. The majority summarily dismissed the suggestion when *Braswell* also contended that the privilege must cover whatever he had to communicate to assist the surrogate custodian. See *supra* text accompanying notes 126-129. The majority did not discuss the viability of this alternative when a surrogate custodian is capable of producing the subpoenaed documents.

207. *Braswell*, 108 S.Ct. at 2301 (Kennedy, J. dissenting); see *United States v. Doe*, 465 U.S. 605, 617 n.17 (1984) (White, J., concurring) (The extent of immunity is only as broad as the self-incrimination privilege) (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 107 (1964)).

208. See *supra* note 25.

209. *Fisher v. United States*, 425 U.S. at 411 ("Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial").

210. Note, *supra* note 22, at 1551 (Testimony in response to a subpoena is compelled. Because a subpoena *duces tecum* does not require a person to restate or affirm the truth of the contents of voluntarily created documents, however, the contents of subpoenaed documents are not compelled.). See also *supra* note 23.

211. See *supra* note 24; *Doe*, 465 U.S. at 614 n.13 (The person asserting the privilege must show that the risk of incrimination is substantial and real, not trifling or imaginary) (citing *Marchetti v. United States*, 390 U.S. 39, 53 (1968)).

212. See *supra* text accompanying notes 26-28.

standard, immunity attaches only to what can be learned from the act of production, and even then only for the individual who performed the act.²¹³

On the other hand, whenever immunity is granted, it can have “serious consequences” if the Government wishes to prosecute the custodian. In such a case, the Government could be required to prove a legitimate independent source for all evidence it proposed to use against the custodian, even if it did not use any evidence acquired from the immunized act.²¹⁴ Further, prosecution can be hampered when, but for the act of production, the existence of a document is unknown,²¹⁵ or when the Government must prove the custodian knew a document’s contents to establish requisite intent.²¹⁶

The fundamental issue was whether the Fifth Amendment, in the name of law enforcement, permits the Government to violate a corporate custodian’s individual self-incrimination privilege without granting immunity.²¹⁷ The majority answered that it would, subject to the evidentiary limitation inherent in the custodian’s acting in a representative rather than a personal capacity. The relevant inquiry concerns the practical distinctions between this evidentiary limitation and statutory use immunity.

The attributed act theory and statutory use immunity share certain common features. Both require the custodian to produce the documents. Both permit direct and derivative evidentiary use of document contents against everyone including the custodian. Both permit direct and derivative evidentiary use of the act of production against everyone other than the custodian. Both prohibit direct evidentiary use of the act against the

213. *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting) (The fifth amendment privilege does not apply to document contents, but only to the testimonial aspect of the act of production.). See also *Organizational Papers*, *supra* note 37, at 651 (The derivative use of a document’s contents should not be barred. Contents are derived from the act of production, but not the act of production testimony.).

214. *Braswell*, 108 S. Ct. at 2295 (“And ‘[o]ne raising a claim under [the federal immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.’ [Kastigar v. United States, 406 U.S. at 461-62].”).

215. *Mosteller*, *supra* note 32, at 40. With respect to the authentication and possession components of the act of production, problems are manageable. With respect to existence (when the Government would be ignorant of the document but for the act of production), the impact of immunity is broad and far-reaching. *Id.* It will, in many cases, effectively immunize the witness against any use of its contents. *Id.* at 43.

216. *Organizational Papers*, *supra* note 37, at 650 n.68.

217. *Braswell*, 108 S. Ct. at 2301 (Kennedy, J., dissenting) (“[T]he Fifth Amendment does not authorize exceptions premised on” concern for “the Government’s power to investigate corporations . . . and prosecute white collar crimes . . .”). See also *Organizational Papers*, *supra* note 37, at 648 (The fifth amendment privilege is concerned with integrity of the law enforcement process, not its success. The effect upon prosecution efficiency should not be important.).

custodian, yet both allow the jury to infer from other evidence that the custodian produced the documents. Statutory use immunity prohibits derivative evidentiary use of the act against the custodian. Apparently the evidentiary use limitation does as well.²¹⁸

The difference between the two is that only statutory immunity places a burden of proof upon the Government to show all evidence it proposes to use was obtained from legitimate independent sources.²¹⁹ Of course, even this difference is meaningless unless the Government takes the case to trial and chooses to prosecute the custodian individually. In this case, Randy Braswell was denied very little, and the Government was given the unquantifiable benefit of not having to prove the source of all its evidence if it proceeds to trial, and if it chooses to prosecute Braswell.

Conclusion

The arguments proffered by the *Braswell* majority and dissent epitomize the issues which had split the lower courts. The conflict between the collective entity doctrine and the compelled testimony standard was ultimately a struggle between the promotion of effective law enforcement and the preservation of individual rights. The competing rationales were agency, attended by a waiver of individual rights, against a claim that those rights were not waived.

If that were all, *Braswell* would be a simple case. Indeed, the practical effects of the Court's decision are quite humble. Had the Court decided in Braswell's favor, the benefits of statutory use immunity that Randy Braswell might have enjoyed differ very little from those he did receive from the Court's evidentiary use limitation.

Unfortunately, *Braswell* is not a simple case. By introducing its attributed act theory, the Court has prolonged the conflict by raising new issues. What is the authority for the evidentiary use limitation? Does it proscribe derivative as well as direct evidentiary use of the act of production? Can the act of production by an agent of a sole proprietorship be attributed to the sole proprietor? If so, this would effectively create a heretofore unknown third party privilege. And finally, what is the significance of the possible exception mentioned in the majority's footnote? If Braswell did not qualify for this exception, who could?

218. See *supra* text accompanying notes 189-190. Assuming for the purpose of argument that the attributive act theory permits derivative use, the difference between the Court's evidentiary use limitation and statutory use immunity would be any evidence that could be derived from the fictional corporate act as opposed to the individual's act. The custodian's act is deemed one of the corporation, and is not considered a personal act.

219. See *supra* text accompanying notes 135-136.

The compelled testimony standard in *Fisher* opened a door of possibility for collective entity custodians. *Braswell* attempted to close that door, but instead left it ajar.

*By David N. Lathrop**

* B.S., University of Illinois, Urbana, 1969; M.S., New York University, 1972; Member, Third Year Class.

