All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999

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ALL QUIET ON THE PAPER FRONT: ASSERTING A FIFTH AMENDMENT PRIVILEGE TO AVOID PRODUCTION OF CORPORATE DOCUMENTS IN IN RE THREE GRAND JURY SUBPOENAS DUCES TECUM DATED JANUARY 29, 1999

I. Introduction

Crime on America's streets is at its lowest level in years.1 Meanwhile, crime in America's corporate suites is rising.2 White-collar crime is now the most pervasive challenge confronting law enforcement agencies.3


This upsurge in white-collar crime poses a serious threat to America’s economic and social fabric. Moreover, white-collar crime violates the public...
trust, lowers social morale and produces large-scale social disorganization.\(^5\) Despite its profound effects, white-collar crime has not received as much popular or scholarly attention as street crime.\(^6\) As a result, outside of the white-collar bar, white-collar criminal procedures go unscrutinized.\(^7\)

One such white-collar criminal procedure vexing the United States Supreme Court has been whether the Fifth Amendment privilege against self-incrimination encompasses corporate documents.\(^8\) The Court has

check fraud, counterfeiting and mortgage fraud costs $12.5 billion); Webster, supra note 2, at B6 (declaring that federal government estimates that fraud costs $23 billion a year).


6. See Eckelbecker, supra note 3, at E1 (noting that white-collar crime does not receive attention lavished on violent crime). One reason for this lack of popular and scholarly reporting is that white-collar crime litigation is often concerned with pre-indictment communications, which have been traditionally ignored in academic and judicial writings. See Jed S. Rakoff, Four Postulates of White-Collar Practice, N.Y. L.J., Nov. 12, 1993, at 3 (stating that pre-indictment stage of white-collar crime is largely ignored in most writings); see also John R. Wing & Harris J. Yale, Grand Jury Practice, in 1 WHITE-COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 8.01 (Otto G. Obermaier & Robert G. Morvillo eds., 1990) (implying that lack of reporting on white-collar crime stems from fact that white-collar litigation occurs at grand jury stage). But see Gilbert Geis & Colin Goff, Introduction to WHITE-COLLAR CRIME, supra note 3, at x (arguing that inadequate attention has been paid to white-collar crime because of close relationship between white-collar offenders and those traditionally calling attention to crime, such as newspapers and judges).

7. See Geis & Goff, supra note 6, at x (arguing that white-collar practice and procedures are not scrutinized). For a notable exception to the proposition that white-collar crime issues are not adequately scrutinized, see generally American Criminal Law Review’s annual “Survey of White Collar Crime,” currently in its 15th edition.

8. See U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself. . . .”). For general discussions of the Fifth Amendment, see 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2263 (1st ed. 1904-05); Michael Nordvedt & Wesley D. Bizzell, Fifth Amendment at Trial, 88 GEO. L.J. 1427 (2000); William J. Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227, 1228 (1988).

The primary purpose of the Fifth Amendment privilege against self-incrimination is to avoid confronting a witness “with the ‘cruel trilemma’ of self-accusation, perjury or contempt.” Martin-Trigona v. Belford, 732 F.2d 170, 174 (2d Cir. 1984) (quoting Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964)). The Supreme Court has also said that the privilege is rooted in the protection of personal privacy. See, e.g., Fisher v. United States, 425 U.S. 991, 416 (1976) (Brennan, J., con-
held that because a corporation is not a natural person, it has no Fifth Amendment privilege to refuse to comply with a subpoena _duces tecum._

Over time, scholars have labeled this holding the "collective entity doctrine." The Court has had greater difficulty determining whether the collective entity doctrine extends to a corporate custodian and thus prevents the custodian from asserting a Fifth Amendment privilege.

Although this case involved non-corporate documents, _Fisher_ established "the act-of-production doctrine," which holds that the act of producing evidence in response to a subpoena has communicative aspects separate from the document's contents. The Court examined whether the act-of-production doctrine shields a custodian from a subpoena for corporate documents in _Braswell v. United States._ The _Bras_
well Court held that the collective entity doctrine barred a corporate custodian from asserting a Fifth Amendment privilege, even if the act of production would be personally incriminating.\(^{15}\)

Following Braswell, lower courts generally applied the collective entity doctrine to all subpoenas for corporate documents.\(^{16}\) This trend was curtailed by In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999.\(^{17}\) This recent decision by the United States Court of Appeals for the Second Circuit held that a former employee could successfully assert a Fifth Amendment act-of-production privilege to avoid producing corporate documents.\(^{18}\)

This Note explores the decision of the Three Grand Jury Subpoenas court. Part II examines the leading Supreme Court case law on the collective entity and act-of-production doctrines and lower court case law on whether a former employee may assert a Fifth Amendment privilege.\(^{19}\) Part III sets out the facts and history of the Three Grand Jury Subpoenas case.\(^{20}\) Part IV provides an in-depth analysis of the reasoning employed by the Three Grand Jury Subpoenas court.\(^{21}\) Part V takes a critical look at the Second Circuit's conclusions based on its application of the law to the facts of the Three Grand Jury Subpoenas case.\(^{22}\) Part VI focuses on the possible impact Three Grand Jury Subpoenas will have on the government, corporations and the courts, because the decision constructed a loophole through which custodians may evade the collective entity doctrine.\(^{23}\)

\(^{15}\) For a further discussion of the Court's holding in Braswell, see infra notes 70-80 and accompanying text.

\(^{16}\) See Peter J. Henning, Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?, 54 U. Pitt. L. Rev. 405, 429-27 (1992) (stating that, following Braswell, courts applied collective entity doctrine to subpoenas for corporate documents). For a further discussion of lower court decisions following Braswell, see infra notes 81-94 and accompanying text.

\(^{17}\) 191 F.3d 173 (2d Cir. 1999).

\(^{18}\) See Three Grand Jury Subpoenas, 191 F.3d at 183-84 ("[W]e conclude that [Doe I, Doe II and Doe III] may claim a Fifth Amendment act of production privilege with respect to the documents called for in the 1999 subpoenas."). For a further discussion of the Second Circuit's holding in Three Grand Jury Subpoenas, see infra notes 118-34 and accompanying text.

\(^{19}\) For a further discussion of this background information, see infra notes 24-94 and accompanying text.

\(^{20}\) For a further discussion of the facts of Three Grand Jury Subpoenas, see infra notes 95-117 and accompanying text.

\(^{21}\) For a further discussion of the Three Grand Jury Subpoenas court's reasoning, see infra notes 118-34 and accompanying text.

\(^{22}\) For a further discussion of the Three Grand Jury Subpoenas court's reasoning, see infra notes 135-208 and accompanying text.

\(^{23}\) For a further discussion of the possible impact of Three Grand Jury Subpoenas, see infra notes 209-28 and accompanying text.
Two trends dominate the Supreme Court's decisions on whether a custodian may assert a Fifth Amendment privilege to avoid producing corporate documents. First, the Court has made certain that its decisions do not detrimentally impact law enforcement. Second, the Court has generally expanded the collective entity doctrine.

A. The Early Years: Applying the Fifth Amendment to Subpoenaed Documents

Legal scholars generally agree that Boyd v. United States began the Supreme Court's ad hoc application of the Fifth Amendment privilege to documentary evidence. The controversy in Boyd arose when the federal

24. For a further discussion of the Court's treatment of corporate custodians asserting Fifth Amendment privilege, see infra notes 37-80 and accompanying text.

25. For a further discussion of the Court's concern with aiding law enforcement, see infra notes 37-77 and accompanying text.

26. For a further discussion of the expansion of the collective entity doctrine, see infra notes 37-61 and accompanying text.

27. 116 U.S. 616 (1886).


Nagareda argues that United States v. Reyburn, 31 U.S. (6 Pet.) 352 (1832), should be the beginning of a constitutional account of the Court's treatment of self-incriminatory documents. See Nagareda, supra, at 1584 (beginning analysis with Reyburn). The Court in Reyburn was presented with the narrow question of whether the Government had made an adequate showing of its inability to obtain the original copy of a commission. See Reyburn, 31 U.S. (6 Pet.) at 365 (stating issue). The Court found that the Government had done all it reasonably could to obtain the original, so the trial court did not err when it allowed the Government to use secondary evidence of the commission's contents. See id. at 366 (upholding trial court). Nevertheless, the Court said in dicta that had the person thought to have received the original commission from the defendant been required to appear as a witness, he "could not have been compelled to produce the commission, and thereby furnish evidence against himself." Id. at 366-67.

The Supreme Court has described its application of the Fifth Amendment privilege to business documents as being ad hoc in several decisions. See, e.g., Braswell v. United States, 487 U.S. 99, 121 (1988) (Kennedy, J., dissenting) (noting that "Boyd generated nearly a century of doctrinal ambiguity"); Fisher v. United States, 425 U.S. 391, 434 (1976) (Marshall, J., concurring) (stating that Court's application of Fifth Amendment privilege to documentary evidence is "somewhat ad hoc");
government charged E.A. Boyd & Sons with using false invoices to avoid paying duties on glass. In order to establish the quantity and value of properly imported glass, the Government requested, and the trial court ordered, E.A. Boyd to produce an invoice.

The Supreme Court concluded that the trial court violated the Fourth and Fifth Amendments when it ordered Boyd to produce the invoice. In reaching its decision, the Court relied on privacy principles and common law property notions. Following property notions, the Court said that because the defendant had superior property rights in the disputed in-

see also Henning, supra note 16, at 415 (saying that issue of production of business documents has "tortured history").


30. See id. at 618 (stating that court order directed defendants to produce invoices of twenty-nine cases of previously imported glass); see also Fisher, 425 U.S. at 406-07 (discussing Boyd). After Boyd produced this document, the jury found for the United States and condemned the seized glass. See Boyd, 116 U.S. at 618 (discussing lower court proceedings).

31. See Boyd, 116 U.S. at 630 ("[A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of" the Fourth and Fifth Amendments); see also Nagareda, supra note 28, at 1578 (stating Court in Boyd held that Fifth Amendment, among other constitutional provisions, bars government from compelling persons suspected of crime to turn over self-incriminating documents).

Although the Court steeped its decision in both Fourth Amendment and Fifth Amendment parlance, the Boyd decision is, for practical purposes, a decision on the proper scope of a subpoena duces tecum. See Rothman, supra note 28, at 391-92 (asserting that although Boyd is devoted to law of search and seizure, Boyd is really Fifth Amendment case); cf. Nagareda, supra note 28, at 1586 (stating that Boyd's notion that order to produce invoices is tantamount to Fourth Amendment seizure stemmed from legislative history of statute at issue in Boyd). Since the decision in Boyd, the Supreme Court has expressly disavowed the view that the Fourth Amendment applies in an analysis of whether the Fifth Amendment self-incrimination clause should bar production of documents. See Braswell, 487 U.S. at 121 (Kennedy, J., dissenting) (complaining that Boyd's reasoning is inconsistent with Court's present understanding of Fourth Amendment); Fisher, 425 U.S. at 407 (holding that subsequent decisions limited application of Fourth Amendment to subpoenas after Boyd); id. at 421 n.5 (Brennan, J., concurring) (claiming that proposition that Boyd's holding ultimately rested on Fourth Amendment "could not be more incorrect"); Adams v. New York, 192 U.S. 585, 597 (1904) ("The court held in [Boyd] . . . that such procedure was in violation of both the Fourth and Fifth Amendments; . . . [nevertheless,] the compulsory production of such documents did not come within the terms of the Fourth Amendment as an unreasonable search or seizure . . . "); cf. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-19.00 (1999) (stating that subpoena is not search warrant and does not implicate Fourth Amendment).

32. See Steven M. Harris & David F. Axelrod, New Fifth Amendment Frontier: Compelled "Consent" to Production of Foreign Bank Records, in WHITE-COLLAR CRIME 1989: REPRESENTING CORPORATIONS, FINANCIAL INSTITUTIONS AND THEIR DIRECTORS, OFFICERS AND EMPLOYEES 217 (1989) (saying Boyd's "touchstone" was zone of privacy guaranteed by Constitution); Rothman, supra note 28, at 392 (arguing that Boyd's basic concern was privacy rights). For a general discussion of Boyd's contribution to the law of privacy, see generally Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945 (1977).
voice, the trial court's production demand was improper.\textsuperscript{33} Moreover, the Court focused on Boyd's privacy rights by describing the invoice as a "private" document belonging to the E.A. Boyd & Sons partnership.\textsuperscript{34} Thus, the Court concluded that the Government could not seize the invoice simply through a court-ordered subpoena.\textsuperscript{35} In speaking for the first time on the applicability of the Fifth Amendment to a subpoena for documents, the Court gave full-scale protection to a defendant who was directed to produce self-incriminating documents.\textsuperscript{36}

B. The Bull Court: The Collective Entity Doctrine Takes Stock

Twenty years after \textit{Boyd}, in a radically altered economic and political landscape, the Court in \textit{Hale v. Henkel}\textsuperscript{37} confronted the question of whether a corporation could invoke the Fifth Amendment privilege through a testifying agent.\textsuperscript{38} The Hale Court thus faced a dilemma; the

\textsuperscript{33} See Boyd, 116 U.S. at 624 (differentiating between Government's attempt to extort private books and papers from defendant and hypothetical case of stolen or excisable articles); see also Henning, supra note 16, at 416 (stating that Boyd used property law concept to define private enclave guarded by intertwined Fourth and Fifth Amendments); Nagareda, supra note 28, at 1587-88 (maintaining that Court stressed defendant's property rights in disputed invoices above claims of all others).

\textsuperscript{34} See Boyd, 116 U.S. at 624 (describing invoice as private document).

\textsuperscript{35} See id. (asserting that court tried to extort from party his private books and papers to make him liable for penalty); id. at 631-32 ("[A]ny compulsory discovery by . . . compelling the production of his private books and papers, to convict him of crime . . . is contrary to the principles of a free government."); see also Rothman, supra note 28, at 392 (arguing that when Court described invoices as "private" it meant documents were partnership records that government had no right to seize under privacy law).

\textsuperscript{36} See Nagareda, supra note 28, at 1575 (stating that Boyd extended constitutional protection for self-incriminating documents to its fullest scale); Jack W. Campbell IV, Note, Revoking the "Fishing License": Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records, 49 Vand. L. Rev. 395, 398 (1996) (claiming that Boyd represents "'highwater mark' of . . . protection against enforcement of all subpoenas"). Because of Boyd, lower courts began to allow corporations receiving subpoenas to assert a Fifth Amendment privilege to avoid production. See, e.g., Cent. Stock & Grain Exch. v. Bd. of Trade, 63 N.E. 740, 744 (Ill. 1902) (per curiam) (allowing corporate party to decline producing documents "on the claim of constitutional privilege"); Davies v. Lincoln Nat'l Bank, 4 N.Y.S. 373, 374 (Sup. Ct. 1888) (finding examination of corporate officer is examination of corporation and thus it is impermissible to obtain that which will subject corporate bank to penalty or forfeiture).

\textsuperscript{37} 201 U.S. 43 (1906), overruled in part by Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

\textsuperscript{38} See Rothman, supra note 28, at 398-99 (discussing change in America from 1897 to 1904). Following Boyd, America's economy experienced an explosion of corporate consolidation that created corporations with total assets of six-billion dollars and corporations that produced three-fourths of America's industrial output. See id. (discussing economic expansion). Reacting to America's exponential corporate growth in the early 1900s, Progressives challenged the solidification of power in corporate America. See Richard Hofstadter, The \textit{Age of Reform} 231 (1955) (discussing Progressive movement). For a general analysis of how the Su-
Court’s language in Boyd had led lower courts to hold that every recipient of a subpoena for documents, even recipients holding ordinary business documents, could assert a Fifth Amendment privilege.\textsuperscript{39}

To resolve this dilemma, the Court held that a corporation could not assert a Fifth Amendment privilege.\textsuperscript{40} In doing so, Hale established the collective entity doctrine and thus ensured that the application of the Fifth Amendment privilege to corporations that followed Boyd was short-lived.\textsuperscript{41} In order to distinguish Hale from Boyd, which had made repeated references to “private papers,” the Court contrasted the rights of natural persons with those of corporations.\textsuperscript{42} Differentiating between a person and a corporation, the Court concluded that the Fifth Amendment applies only

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40. See Hale, 201 U.S. at 76-77 (stating holding).

41. See John Fabian Witt, Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903, 77 Tex. L. Rev. 825, 902 (1999) (arguing that application of Fifth Amendment privilege to corporations was short-lived following Hale).

42. For a further discussion of the language the Court used in Boyd, see supra notes 27-36 and accompanying text. The Court considered natural persons as owing no duty to the state, as their power to contract proceeded the state’s formation. See Hale, 201 U.S. at 74 (stating that natural person is “entitled to carry on his private business in his own way . . . since he receives nothing therefrom, beyond the protection of his life and property”); see also Rothman, supra note 28, at 394-95 (discussing Court’s characterization of natural person). Meanwhile, the Court characterized the corporation in a diametrically opposite way, stating that a corporation exists only through the state’s permission. See Hale, 201 U.S. at 74-75 (finding corporation is creature of state and “[i]ts rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation”); see also Henning, supra note 38, at 796-98 (discussing distinctions Hale made between natural person and corporation); David Graver, Comment, Personal Bodies: A Corporeal Theory of Corporate Personhood, 6 U. Chi. L. Sch. Roundtable 235, 238 (1999) (discussing Court’s treatment of corporations as artificial entity existing only in contemplation of law). Therefore, the Court found a reserved right in the legislature to investigate corporations. See Hale, 201 U.S. at 75 (stating that legislature possesses reserved right to investigate corporation to determine if it has exceeded its state-bestowed power).
to natural persons and does not allow a corporation to refuse to comply with a subpoena *duces tecum*.43

Although *Hale* receded the high-water mark of the Court’s Fifth Amendment protection, the decision failed to extinguish questions concerning whether a corporate custodian could resist a subpoena for corporate documents by invoking his own Fifth Amendment privilege.44 The Court answered that a corporate custodian may not personally invoke the Fifth Amendment in *Wilson v. United States*.45 In *Wilson*, the Court

43. See *Hale*, 201 U.S. at 74 ("[W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State."); see also *United States v. White*, 322 U.S. 694, 699 (1944) (discussing holding of *Hale* as establishing privilege against self-incrimination as "purely personal one" that cannot be asserted "by or on behalf of any organization, such as a corporation"); Henning, *supra* note 38, at 885 (arguing that *Hale* established corporations do not have all criminal constitutional rights granted to people); Witt, *supra* note 41, at 902 n.10 (stating that *Hale* held corporations were unable to claim Fifth Amendment privilege because privilege was personal to testifying witness); Scott A. Trainor, *Note, A Comparative Analysis of a Corporation’s Right Against Self-Incrimination*, 18 FORDHAM INT’L L.J. 2139, 2140 (1995) (asserting that *Hale* established right of self-incrimination to protect only natural persons). *Hale*’s reasoning that there is a distinction between natural persons and corporations was by no means a settled issue in 1906. See Wigmore, *supra* note 8, § 2259 (stating unambiguously that corporations were covered by Fifth Amendment privilege against personal incrimination); see also *United States v. N.W. Express Stage & Transp. Co.*, 164 U.S. 686, 692-93 (1897) (holding that natural person, like corporation, is citizen); *McKinley v. Wheeler*, 130 U.S. 630, 635 (1889) (same); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809) (holding corporations are citizens in order to determine whether they meet requirements for federal jurisdiction), overruled in part by *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844).

44. See *United States v. Braswell*, 487 U.S. 99, 105 (1988) (finding *Hale* settled that corporation has no Fifth Amendment privilege, but not addressing whether corporate officer could resist subpoena for corporate documents by invoking his personal privilege). *Hale* had not addressed this question because the custodian complying with the subpoena had been protected by immunity. See *Hale*, 201 U.S. at 67-70 (stating custodian protected by immunity); see also *Braswell*, 487 U.S. at 105 (stating that custodian in *Hale* had immunity). For a further discussion of the Fifth Amendment privilege asserted in *Hale*, see *supra* notes 37-43 and accompanying text.

45. 221 U.S. 361 (1911). The situation in *Wilson* arose when a subpoena was served on a corporation requesting that it produce corporate documents. See *Wilson*, 221 U.S. at 368-71 (stating facts); see also *Braswell*, 487 U.S. at 106 (giving facts of *Wilson*). Wilson and four accomplices were under investigation for mail fraud and conspiracy for their allegedly illegal sale of shares of United Wireless Telegraph Company. See Rothman, *supra* note 28, at 410-11 (providing facts). As part of this investigation, the Government served subpoenas *duces tecum* on the United Wireless Telegraph Company, demanding production of the company’s “letter press copy books.” See *Wilson*, 221 U.S. at 368 (describing subpoena); see also Rothman, *supra* note 28, at 411 (same). Wilson himself, as president of the company, answered the subpoena served on the company. See *Wilson*, 221 U.S. at 368 (describing capacity in which Wilson appeared before grand jury). Wilson then asserted his personal privilege on the ground that producing the documents would incriminate him. See *id.* at 368-69 (quoting written statement Wilson provided to grand jury).
reasoned that the nature of the records as corporate, and the visitatorial powers of the state to investigate corporations, required that the custodian produce corporate documents. Moreover, relying on what scholars have since deemed the "white-collar rationale," the Court cautioned that allowing the exercise of a Fifth Amendment privilege would defeat the state's investigative and oversight authority.

46. See Wilson, 221 U.S. at 378-86 (providing reasoning of Court). First, the Court reasoned that the nature of the documents as corporate should be the focus of the Court's inquiry. See id. at 382 ("[B]y virtue of their character . . . the books and papers are held subject to examination by the demanding authority, [so] the custodian has no privilege to refuse production although their contents tend to criminate him."); see also Rothman, supra note 28, at 415 (stating that Wilson relied on corporate ownership of subpoenaed documents). The Court concluded that Wilson held the documents pursuant to the corporation's authority and accepted the "incident obligation to permit inspection." See Wilson, 221 U.S. at 382 (discussing capacity of custodian). As a result, the obligation to allow inspection attached to the records and bound Wilson. See id. at 382, 384-85 (holding that custodian must comply with subpoena).

The Court also relied on the state's reserved power of visitation over corporations to deny the custodian's Fifth Amendment claim. See Wilson, 221 U.S. at 384-85 (discussing reserved state power of visitation); see also Rothman, supra note 28, at 412-13 (discussing role of chartering state's reserved power of visitation). Finally, the Court concluded that corporate documents lack the requisite element of privacy essential for the privilege to attach. See Bellis v. United States, 417 U.S. 85, 92 (1974) (stating that Wilson can be understood as recognizing corporate documents do not contain requisite element of privacy essential for Fifth Amendment privilege against incrimination to attach); cf. Rothman, supra note 28, at 417-18 (discussing diminished expectation of privacy that attaches to corporate documents following Wilson).

47. See Wilson, 221 U.S. at 384-85 (discussing how visitatorial power of state would be thwarted if Court recognized defendant's claim of Fifth Amendment privilege). In reaching the conclusion that the state's visitatorial powers would be diminished, the Court said:

The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. It would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy . . . . But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian.

Id.

Despite its strongly worded defense of the reserved visitatorial powers, the Court never adequately explained why this power could defeat the Fifth Amendment. See Rothman, supra note 28, at 416-18 (stating that Court failed to explain why visitatorial powers trumped Fifth Amendment). The answer may be that the Court was concerned with the expansion of corporate America and was sensitive to the fact that something had to be done to combat corporate crime. See id. (noting that what was left unsaid in Wilson was that Court was concerned with impact of corporate crime and need to control growing corporate power).

The term "white collar rationale" is often employed by Peter J. Henning in his authoritative reviews of white-collar procedures. See, e.g., Henning, supra note 16, at 415 (employing white-collar rationale). Henning defines the white-collar rationale as the notion that the rules of non-white-collar crime cases involving the Fifth Amendment should not apply to complex economic crimes. See id. at 412 (defin-
The Wilson Court thus expanded Hale and the collective entity doctrine.\(^48\)

In the early and mid-twentieth century, the Court further expanded the collective entity doctrine through three cases.\(^49\) First, the Court in *Wheeler v. United States*\(^50\) expanded the collective entity doctrine to encompass corporate documents of a dissolved corporation.\(^51\) Thirty years later, the Court expanded the collective entity doctrine in *United States v. White*.\(^52\) In this case, the Court applied the collective entity doctrine to a

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\(^48\) See Henning, *supra* note 16, at 417 (stating that Wilson expanded Hale). In *Dreier v. United States*, 221 U.S. 394 (1911), a companion case to Wilson, the Court expanded on its rulings in Hale and Wilson by finding that a corporate officer could not invoke the Fifth Amendment even when a grand jury subpoena had been directed to him, rather than to the corporation. See Dreier, 221 U.S. at 400 (stating holding of court); see also Braswell, 487 U.S. at 106-07 (giving holding in Dreier). In denying the custodian’s claim of privilege, the Court in Dreier held that the custodian possessed no privilege with respect to the corporate books and that it was his duty to comply with the subpoena. See Dreier, 221 U.S. at 400 (finding custodian had no privilege and was under duty to produce corporate documents).

\(^49\) For a further discussion of the expansion of the collective entity doctrine, see *infra* notes 50-61 and accompanying text.

\(^50\) 226 U.S. 478 (1913). Wheeler stemmed from an investigation into whether two associates of Shaw, Inc. used the U.S. mail in a fraud scheme. See Wheeler, 226 U.S. at 482-83 (providing facts). The Government served subpoenas *duces tecum* on Warren B. Wheeler, as treasurer, and Stillman Shaw, as president. See id. at 482 (stating facts). The corporation was dissolved at the time these subpoenas were served. See id. Wheeler and Shaw appeared before the grand jury without the documents and orally asserted their Fifth Amendment privilege. See id. at 483-85 (providing Wheeler’s statement before grand jury).

\(^51\) See id. at 487 (providing holding of district court). Finding the corporation’s dissolution immaterial, the Court held that the collective entity doctrine required the production of the corporation’s documents, as the essential character of the documents remained corporate. See id. at 488-90 (holding that it was immaterial that corporation no longer existed, as essential character of documents did not change).

Fourteen days after Wheeler, the Court further expanded the collective entity doctrine in *Grant v. United States*, 227 U.S. 74 (1913). In this case, the Court applied the collective entity doctrine to a defunct company, holding that although the corporation stopped doing business, the essential character of the documents remained corporate. See id. at 79-80 (stating holding).

\(^52\) 322 U.S. 694 (1944). The Court in White was required to determine whether the collective entity doctrine applied to Local 542, of the International Union of Operating Engineers. See id. at 695 (giving facts). A subpoena *duces te-
labor union. In doing so, the Court freed the collective entity doctrine from its traditional moorings, as the doctrine had previously been applied only to corporations. Furthermore, the White Court signaled greater sensitivity towards the white-collar rationale.

The expansion of the collective entity doctrine culminated in *Bellis v. United States*. In *Bellis*, the Court considered whether a partner in a dissolved, three-member law firm could resist a subpoena *duces tecum* ordering him to produce the firm's documents. The Court concluded that *cum* demanding its constitution, by-laws and documents showing the collection of work-permit fees, was served on the union related to a kickback scheme in public work projects. See id. (stating facts); see also *Braswell*, 487 U.S. at 107 (providing facts of *White*); Henning, supra note 38, at 827 (noting investigation regarded kickback scheme).

53. See *White*, 322 U.S. at 700-01 (applying collective entity to union). The test the *White Court* formulated to determine whether the collective entity doctrine applied to a subpoenaed organization is the "fairly impersonal test." See Henning, supra note 16, at 418-19 (describing *White test*). The test asks: *whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.*

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

54. See *White*, 322 U.S. at 700-01 (recognizing that before *White* collective entity doctrine applied only to corporations). The impact of *White's* expansion of the collective entity doctrine was evident in circuit court decisions concluding that *White's* analysis required the rejection of privilege claims asserted by large corporations. See, e.g., *In re Mal Bros. Contracting Co.*, 444 F.2d 615, 618-19 (3d Cir. 1971) (conducting *White* analysis and concluding that defendants had all aspects of corporate enterprise); *United States v. Silverstein*, 314 F.2d 789, 790-92 (2d Cir. 1963) (applying *White* to limited liability partnership to determine that subpoena was enforceable); *United States v. Wernes*, 157 F.2d 797, 800 (7th Cir. 1946) (stating that *White* analysis required production of documents from limited partnership); *United States v. Onassis*, 125 F. Supp. 190, 209-10 (D.D.C. 1954) (employing *White* analysis to determine that ship broker could not assert Fifth Amendment privilege); *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 420 (N.D. Cal. 1948) (applying *White* to partnership).


55. See *White*, 322 U.S. at 700 (emphasizing importance of effective law enforcement). The Court in its oft-quoted support of the white-collar rationale said: "Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible." Id. (citations omitted).


57. See *Bellis*, 417 U.S. at 85-87 (stating facts). The Court considered the firm's dissolution irrelevant in its Fifth Amendment analysis. See id. at 97 (finding dissolution not pertinent in Fifth Amendment analysis).
the firm's dissolution did not give the partner greater Fifth Amendment rights.\textsuperscript{58} Moreover, the Court found that the partner acted in a representative capacity for the firm because he had possession of its documents.\textsuperscript{59} Finally, in \textit{Bellis}, the Court relied on the white-collar rationale to buttress its holding.\textsuperscript{60} As a result, the Court surmised that given the \textit{Hale} line of cases, which had all expanded the collective entity doctrine, it was "well settled that no privilege can be claimed by the custodian of corporate records."\textsuperscript{61}

\section*{C. The Bear Court: Hard Times for the Collective Entity Doctrine}

Despite the Court's belief that the Fifth Amendment issue was "well settled," the collective entity doctrine was called into question in \textit{Fisher}.\textsuperscript{62}

58. See id. at 88-89 (asserting dissolution does not give custodian of corporate documents greater claim of Fifth Amendment privilege).

59. See id. at 97 (stating that partner holding subpoenaed partnership documents held documents in representative capacity).

60. See id. at 90 ("In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege . . . would . . . largely frustrate legitimate governmental regulation of such organizations.").

61. Id. at 100 (citations omitted).

62. See Braswell v. United States, 487 U.S. 99, 109 (1988) ("\textit{Fisher} . . . embarked upon a new course of Fifth Amendment analysis."). Legal scholars also concur that \textit{Fisher} had an impact on traditional Fifth Amendment analysis. See Nagareda, supra note 28, at 1593 (stating that \textit{Fisher} "gutted Boyd's holding that the Fifth Amendment flatly bars the compelled production of documents if their contents will incriminate the producing person"); Neville S. Hedley, Comment, \textit{Who Will Produce Corporate Documents? Case Comment of In re John Doe}, 30 New Eng. L. Rev. 141, 155 (1995) (arguing \textit{Fisher} signaled new standard); Scott Jennings, Annotation, \textit{Availability of Sole Shareholder's Fifth Amendment Privilege Against Self-Incrimination to Resist Production of Corporation's Books and Records—Modern Status}, 87 A.L.R. Fed. 177, 180 (1988) (stating that until \textit{Fisher}, it had been uniformly held that custodian's personal privilege against self-incrimination could never be asserted to avoid production of corporate documents).

The \textit{Fisher} case stemmed from an Internal Revenue Service ("IRS") subpoena served on two attorneys directing them to produce their respective clients' financial documents. See \textit{Fisher}, 425 U.S. at 393-95 (providing facts). The two taxpayers obtained papers from their accountants days after the IRS interviewed them and transferred these documents to their attorneys. See id. at 394 (discussing transfer of documents). The IRS learned of this transfer and thereafter served summons on the attorneys. See id. (stating that IRS served attorneys). The United States Court of Appeals for the Third Circuit heard the appeal of one of the taxpayers and held that the taxpayers never acquired a possessory interest in the documents and that the attorney-client privilege did not apply. See United States v. Fisher, 500 F.2d 683, 691-93 (3d Cir. 1974) (en banc) (stating holding), aff'd, 425 U.S. 391 (1976).

In a factually identical appeal, the United States Court of Appeals for the Fifth Circuit reached a contrary decision. See United States v. Kasimir, 499 F.2d 444, 447 (5th Cir. 1974) (considering taxpayers' Fifth Amendment claim to quash IRS subpoena), overruled by \textit{Fisher v. United States}, 425 U.S. 391 (1976). The Fifth Circuit concluded that the financial documents were privileged, and because of the attorney-client privilege, the taxpayer retained a legitimate expectation of privacy in the documents. See Kasimir, 499 F.2d at 454-55 (giving holding); see also \textit{Fisher}, 425 U.S.
In a novel analysis, the Court considered whether the act of producing non-corporate documents would trigger the Fifth Amendment privilege, regardless of the document's contents. The Court concluded that the physical act of producing such documents could convey information about the document's existence, possession and authenticity, which could be considered testimonial.

The Court consequently shifted the traditional Fifth Amendment privilege analysis from a document's contents to the act of production.


Because the summonses were directed to the attorneys in Fisher, the taxpayers asserted the attorney-client privilege to avoid complying with the IRS summons. See Nagareda, supra note 28, at 1592 (discussing assertion of attorney-client privilege). In order to circumvent the attorney-client privilege claim, the Court reasoned that the attorney-client privilege would protect the documents only to the extent that the documents would have been protected if they remained in the taxpayers' hands. See id. (analyzing Court's circumvention of attorney-client privilege claim). For a general discussion of the attorney-client privilege issues raised in Fisher and the impact Fisher had on the development of the attorney-client privilege, see Brian Sheppard, Annotation, Views of United States Supreme Court As to Attorney-Client Privilege, 159 A.L.R. 2d 243, 255-58, 260-62 (2000).

After dismissing the attorney-client privilege claims, the Court examined whether the subpoena would compel the taxpayers to make a testimonial and incriminating communication. See Fisher, 425 U.S. at 403-05 (reasoning that attorney-client privilege did not apply). The Court held that the subpoena would not compel a testimonial and incriminating communication, because the subpoena demanding production of the accountant's workpapers would not involve the taxpayer's own testimonial communications. See id. at 408 (stating that Fifth Amendment applies only when accused is personally compelled to make testimonial communication that is incriminating). Given that the taxpayers did not prepare the documents sought through the IRS summons, the Court concluded the privilege against self-incrimination was not applicable. See id. at 409 (finding accountant's preparation of documents precluded taxpayers' personal privilege claim).

For a further discussion of whether the act of producing documents could trigger Fifth Amendment privilege, see infra notes 64-69 and accompanying text.

See Fisher, 425 U.S. at 410 (stating that act of production in response to subpoena has communicative aspects separate from document's contents); see also Henning, supra note 13, at 49-50 (discussing Fisher's act-of-production analysis).

65. See Fisher, 425 U.S. at 431 (Marshall, J., concurring) ("The Fifth Amendment basis for resisting production of a document pursuant to subpoena, the Court tells us today, lies not in the document's contents, as we previously have suggested, but in the tacit verification inherent in the act of production . . . ."); Harris & Axelrod, supra note 32, at 218 (stating that Fisher shifted emphasis from character of records sought to act-of-production). But see Alito, supra note 28, at 45-46 (arguing that act-of-production doctrine was not first conceived in Fisher, as doctrine was first advanced in scholarly commentary on Boyd).

Following Fisher's departure from the Court's traditional examination of the document's contents, scholars questioned the utility of the act-of-production doctrine. See, e.g., Henning, supra note 16, at 421-22 (criticizing Fisher as unnecessarily complicated and irrelevant to real focus of grand jury investigations). Other scholars also criticized the act-of-production doctrine for straying from the original text and intent of the Fifth Amendment. See, e.g., Nagareda, supra note 28, at 1597-1624 (arguing that Fisher misconceives nature of constitutional inquiry).
Nevertheless, the majority, and Justice Brennan's concurring opinion, stated that privacy considerations guided the Court's act-of-production analysis. The Court thus said that the act of production would be considered incriminating only if the subpoenaed documents were within the Fifth Amendment's zone of privacy. Nevertheless, Fisher cast doubt on the collective entity doctrine because a custodian's act of producing corporate documents could involve the custodian's personal and potentially incriminating testimony. In Fisher's wake, lower courts split as to whether the collective entity doctrine had survived.

D. The Second Coming: The Collective Entity Doctrine Is Born Again

In light of the split in the lower courts regarding the vitality of the collective entity doctrine, the Supreme Court in Braswell considered whether a corporate president could claim the act-of-production doctrine shielded him from a subpoena demanding corporate documents.

66. See Fisher, 425 U.S. at 424 (Brennan, J., concurring) (stating that precedent required expected of privacy be considered). The Court established in Couch v. United States, 409 U.S. 322, 328-29 (1973), that the Fifth Amendment protected against the compelled production of testimonial evidence only if the person resisting production had a reasonable expectation of privacy regarding the requested evidence. See Fisher, 425 U.S. at 425 (Brennan, J., concurring) (arguing that Couch established consideration of degree to which paper holder has sought to hold documents as private).

67. See Fisher, 425 U.S. at 401 n.6 ("We hold . . . no . . . Fifth Amendment claim can prevail where . . . there exists no legitimate expectation of privacy . . . ." (quoting Couch, 409 U.S. at 336)). Eight years after Fisher, the Court further expanded the collective entity doctrine in United States v. Doe, 465 U.S. 605 (1984), where the Court applied the act-of-production doctrine to quash a subpoena directed to a sole proprietorship. See Doe, 465 U.S. at 617 (concluding that act of producing documents was privileged).


70. See Braswell v. United States, 487 U.S. 99, 100 (1988) (stating issue). Randy Braswell tried to quash a subpoena served on two corporations that he oper-
considering this claim, the Court surveyed the *Hale* line of cases and concluded that the collective entity doctrine remained valid despite *Fisher.*\(^7\) In fact, the Court in *Braswell* did not try to reconcile the two converging doctrines, but instead elevated the collective entity doctrine above the act-of-production doctrine in cases where a subpoena demands corporate documents.\(^7\)

In addition to resuscitating the collective entity doctrine, the Court clarified to whom the collective entity doctrine applied.\(^7\) Employing a fictional "agency theory" unique to the Fifth Amendment, the *Braswell* Court determined that a person producing corporate documents acts as a corporation’s agent, rather than in a personal capacity.\(^7\) As a result, the

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\(^7\) See *Braswell*, 487 U.S. at 102, 109, 111-12 (noting that *Fisher* cited collective entity decisions with approval and act-of-production privilege did not affect collective entity cases); see also *Hedley*, supra note 62, at 158 (stating that *Braswell* made clear that collective entity doctrine remained good law). The dissent in *Braswell* also agreed that the collective entity doctrine did not flounder after *Fisher*. See *Braswell*, 487 U.S. at 124-25 (Kennedy, J., dissenting) (arguing that collective entity rule established in *Hale* and extended in *White* and *Bellis* remained valid).

In holding that the act-of-production doctrine did not affect the collective entity doctrine, the Court limited *Doe's* holding allowing a sole proprietor to assert the act of production privilege to only those business organizations. See *Henning*, supra note 16, at 425 (stating that Court in *Braswell* limited *Doe* to its facts). One possible justification for the limit placed on *Doe* is that a sole proprietor has a greater expectation of privacy regarding documents. See *Fisher*, 425 U.S. at 425 (Brennan, J., concurring) (saying expectation of privacy is consideration in Fifth Amendment privilege claim). The implication of *Braswell's* confining the act-of-production doctrine to a sole proprietor is that a person owning two businesses—one a corporation and the other a sole proprietorship—will be able to assert the privilege to avoid producing one set of documents, but will be forced to produce the other set. See *Henning*, supra note 16, at 425 (explaining dichotomy created by *Braswell*).

72. See *Henning*, supra note 16, at 423 (stating that Court elevated collective entity doctrine above act-of-production doctrine privilege for documents of business entities).

73. For a further discussion regarding to whom the collective entity doctrine applies, see infra notes 74-75 and accompanying text.

74. See *Braswell*, 487 U.S. at 115 n.7 (holding, for Fifth Amendment purposes, corporate custodian acts in representative capacity when producing corporate documents); cf. David S. Rudolf & Thomas K. Maher, Column, *Behind Closed Doors: Former Employees May Assert Personal Fifth Amendment Right in Response to Subpoena Seeking Corporate Documents*, 23 CHAMPION 71, 71 (1999) (stating that Braswell em-
Court required all custodians to produce corporate documents without resorting to the Fifth Amendment.\textsuperscript{75} The Braswell Court also relied on the white-collar rationale to support its decision.\textsuperscript{76} Sensitive to the pervasive problem of white-collar crime, the Court reasoned that allowing a custodian to rely on the act-of-production doctrine in order to avoid complying with a subpoena would have a detrimental impact on the government's investigative efforts.\textsuperscript{77}

Braswell thus resurrected the collective entity doctrine.\textsuperscript{78} In doing so, the Court concluded that a corporate custodian could not quash a subpoena demanding corporate documents.\textsuperscript{79} Once again, the Court believed it had settled the Fifth Amendment privilege issue.\textsuperscript{80}

\textsuperscript{75} See Braswell, 487 U.S. at 109-10 ("[T]he custodian of corporate or entity records holds those documents in a representative rather than a personal capacity."); see also Hedley, supra note 62, at 158 (stating that Braswell extended reach of representative capacity); Henning, supra note 16, at 425 (arguing that Braswell adopted rule requiring all custodians of corporate documents to produce documents without resort to Fifth Amendment privilege). \textsuperscript{76} For a further discussion of the weight the Court accorded the white-collar rationale, see infra note 77 and accompanying text. \textsuperscript{77} See Braswell, 487 U.S. at 115 ("[R]ecognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime'. . . ."); see also Henning, supra note 16, at 410 (arguing that white-collar rationale motivated Braswell decision). But see Braswell, 487 U.S. at 129 (Kennedy, J., dissenting) (contending majority's belief that white-collar crime is most serious crime problem is "overstated"). \textsuperscript{78} For a further discussion of Braswell's holding that the collective entity doctrine remained valid, see supra notes 71-72 and accompanying text. \textsuperscript{79} See Braswell, 487 U.S. at 128 (Kennedy, J., dissenting) (stating that Braswell majority held Fifth Amendment is inapplicable to custodian's effort to quash subpoena for corporate documents). \textsuperscript{80} See id. at 111 (claiming it is "well settled" that custodian of corporate documents cannot claim privilege (quoting Bellis \textit{v. United States}, 417 U.S. 85, 100 (1947))). At the time of the Braswell decision, commentators viewed it as an attempt to influence the independent counsel's investigation of the Iran-Contra affair, as the independent counsel had been involved in litigation with an indicted arms dealer resisting a subpoena for corporate records. See Al Kamen, Justices Bulwark Fight on White-Collar Crime; Suspects Required to Yield Some Records, \textit{WASH. POST},
E. **Lower Courts’ Treatment of Whether the Collective Entity Doctrine Applies to Former Employees**

Following *Braswell*, lower courts generally applied the collective entity doctrine to all subpoenas for corporate documents. For example, in *In re Sealed Case*, a former government employee asserted the act-of-production privilege when trying to avoid producing self-incriminating government documents. Then-Circuit Judge Ruth Bader Ginsburg, writing for the unanimous United States Court of Appeals for the District of Columbia, found that *Braswell* applied to a former employee's privilege claims. Moreover, the court highlighted the Fifth Amendment agency analysis provided in *Braswell*, finding that by holding entity documents, a custodian acts in a representative capacity.

Similarly, the United States Court of Appeals for the Eleventh Circuit held that the collective entity doctrine required a former employee to produce corporate documents in *In re Grand Jury Subpoena Dated November 12, 1991*. The former employee in this case argued that the United States Court of Appeals for the Second Circuit's decision in *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983* ("Saxon Industries"), should guide the Eleventh Circuit's decision. In *Saxon Industries*, June 23, 1988, at A13 (claiming *Braswell* might aid Iran-Contra investigation); Stuart Taylor, Jr., *Supreme Court Roundup; Rulings Curb Protection in White-Collar Crimes*, N.Y. Times, June 23, 1988, at A18 (same).

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82. 950 F.2d 736 (D.C. Cir. 1991).

83. See *In re Sealed Case*, 950 F.2d at 737-38 (providing facts). Although the documents subpoenaed in *In re Sealed Case* were government documents, the court reasoned that the precedent set in the context of corporate documents applied by analogy. See *Id.* at 740 (analogizing between corporate and government documents). Therefore, the court employed the collective entity doctrine to consider the custodian's claim. See *Id.* at 739-41 (applying collective entity doctrine).

84. See *Id.* at 740 (finding *Braswell* applies to former employees).

85. See *Id.* (maintaining that corporate documents belong to corporation and custodian holds documents only in agency capacity).

86. 957 F.2d 807 (11th Cir. 1992) (per curiam). This case arose when a custodian of bank documents, who had removed documents from the bank’s premises, resisted a subpoena on self-incrimination grounds. See *In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d at 809 (stating facts). The district court denied the custodian’s privilege claim pursuant to *Braswell*. See *Id.* at 808 (discussing procedural history). The United States Court of Appeals for the Eleventh Circuit affirmed this ruling, reasoning that a formalistic view that *Braswell* applied only to current employees would severely undermine *Braswell*. See *Id.* at 809-10 (explaining that formalistic view would undermine *Braswell*). Moreover, the court relied on the “agency” rationale that a custodian implicitly holds corporate documents in a representative capacity, in order to deny the former employee a Fifth Amendment privilege. See *Id.* at 810 (finding *Braswell* emphasized that corporate documents are necessarily held in representative capacity).

87. 722 F.2d 981 (2d Cir. 1983).

88. See *Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d at 811 (stating that defendant relied heavily on *Saxon Industries*).
Industries, the Second Circuit held that a former employee could assert a Fifth Amendment act-of-production privilege to avoid producing corporate documents. Nevertheless, the Eleventh Circuit distinguished its case from Saxon Industries on the grounds that the defendant in Saxon Industries stole copies of corporate documents and that the Second Circuit's decision predated Braswell.

On the other hand, after Braswell, two circuits suggested that a former employee might assert the act-of-production privilege. The United States Court of Appeals for the Ninth Circuit took this position in Mora v. United States, when it issued an order containing no reasoning. The United States Court of Appeals for the Third Circuit hinted in dicta that it too would apply the act-of-production privilege to former employees in United States v. McLaughlin.

III. FACTS: THE EVENTS GIVING RISE TO IN RE THREE GRAND JURY SUBPOENAS DUCES TECUM DATED JANUARY 29, 1999

In June, September and October of 1996, a grand jury, empanelled in the United States District Court for the Southern District of New York, issued subpoenas duces tecum to a corporation under criminal investiga-

89. See Saxon Indus., 722 F.2d at 986-87 (holding former employee acts in individual capacity and may assert act-of-production privilege); see also Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d at 811 (providing holding of Saxon Industries).
90. See Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d at 811-12 (distinguishing between Saxon Industries and case before court).
91. For a further discussion of circuits allowing former employees to assert a Fifth Amendment privilege, see infra notes 92-94 and accompanying text.
92. 71 F.3d 723 (9th Cir. 1995).
93. See Appellant's Petition for Panel Rehearing & Rehearing En Banc at 12 n.*, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (discussing Mora). In Mora, a motions panel of the Ninth Circuit followed Saxon Industries in a brief order containing no reasoning or analysis. See Mora, 71 F.3d at 724 (following Saxon Industries and issuing order).
94. 126 F.3d 130 (3d Cir. 1997). The court in McLaughlin was primarily concerned with the Braswell evidentiary rule, which precluded the Government from making evidentiary use of a custodian's act-of-production against the custodian at trial. See McLaughlin, 126 F.3d at 133 (discussing issue before court); Appellant's Petition at 12 n.* (discussing issue in McLaughlin). Although the act of production was not at issue, the court said a former employee "who produces purloined corporate documents is obviously not within the scope of the Braswell rule." McLaughlin, 126 F.3d at 133 n.2. Nevertheless, it is not clear that the Third Circuit would conclude that a former employee can assert an act-of-production privilege given then Judge Becker's well reasoned concurrence in McLaughlin. See id. at 140-43 (Becker, J., concurring) (concurring in judgment). Then Judge Becker stated that he would not follow traditional agency principles and would determine that a former employee could not assert a Fifth Amendment privilege. See id. at 143 (Becker, J., concurring) ("I am willing to accept such a stretch [of hornbook agency law] because the alternative is to undermine either Braswell or Fifth Amendment jurisprudence .... "). For a further discussion of whether traditional agency principles should be applied in determining a former employee's Fifth Amendment privilege, see infra notes 141-63 and accompanying text.
tion. After these subpoenas were issued, the corporation pled guilty and agreed to cooperate in the Government's investigation.

The Government subsequently discovered that a former corporate employee failed to produce corporate documents within the scope of the three 1996 subpoenas. As a result, in January, 1999, the Government served subpoenas on twelve former employees whom it believed did not fully comply with the prior subpoenas. All but three of the twelve former corporate employees produced responsive documents. Doe I, Doe II and Doe III (collectively, the "Does") asserted a Fifth Amendment privilege rather than produce any documents.

The Does were employed with the corporation when the illegal activities occurred. Moreover, Doe I and Doe II were corporate officers when the subpoenas were served on the corporation and when the corpora

95. See Three Grand Jury Subpoenas, 191 F.3d at 174 (stating that grand jury was investigating allegations of falsification of corporation's records and misapplication of corporate funds between 1993 and 1996). The June subpoena demanded limited production of documents, whereas the September subpoena demanded production of documents covering all matters under investigation. See id. at 175 (comparing subpoenas). The October subpoena supplemented the September subpoena. See id. at 175 (describing scope of subpoenas); see also Appellant's Petition at 3 (same).

96. See Three Grand Jury Subpoenas, 191 F.3d at 174 (saying corporation pled guilty in spring of 1999 to making false entries in corporation's documents and agreed to cooperate with ongoing investigation).

97. See id. at 175 (describing how government learned former corporate employee withheld incriminating corporate documents that were responsive to 1996 subpoenas).

98. See id. (stating that government issued subpoenas to twelve former corporate employees who government believed withheld documents responsive to 1996 subpoenas); see also Appellant's Petition at 4 (saying that after learning former employee failed to produce responsive documents government served subpoenas on former employees). The subpoenas specifically demanded, "[a]ny and all records, documents, instructions, memoranda, notes and papers (whether in computerized or other form) in your care, custody, possession or control, that were created during the course of, or in connection with, your employment at [the corporation]." Three Grand Jury Subpoenas, 191 F.3d at 175.

99. See Three Grand Jury Subpoenas, 191 F.3d at 175 (asserting that nine of former employees who received subpoena produced documents); see also Appellant's Petition at 4 (noting that most of former employees fully complied with subpoenas).

100. See Three Grand Jury Subpoenas, 191 F.3d at 175 (declaring that appellees were only former corporate employees asserting Fifth Amendment privilege). Between the time that the court decided this appeal on September 7, 1999 and the Government's Petition for Rehearing & Rehearing En Banc filed on November 22, 1999, Doe II produced the subpoenaed documents to the corporation, and the corporation then produced the documents to the Government. See Appellant's Petition at 3, n.** (stating that Doe II produced documents). Doe II did so in exchange for the corporation's agreeing to resume payments under his severance agreement; these payments had been withheld when he refused to comply with the Government's January, 1999 subpoena. See id. (noting Doe II had severance agreement reinstated).

101. See Three Grand Jury Subpoenas, 191 F.3d at 174 (noting facts); see also Appellant's Petition at 3 (same).
ration responded to them. Doe I did not leave the corporation's employ until five months after the Government served its last subpoena on the corporation. When Doe II resigned, about a year following the last subpoena, he signed a severance agreement binding him to cooperate with the corporation in the ongoing investigation and "any investigation to follow." Doe III resigned shortly after the June, 1996 subpoena had been served on the corporation. Similar to Doe II, Doe III promised in a severance agreement to cooperate with "any investigation."

When the Does refused to produce documents responsive to the January, 1999 subpoena, the Government filed a sealed motion in district court to compel production. The Government argued that the responsive documents were corporate documents and that the Does remained corporate custodians after having left the corporation's employ. Accordingly, it argued that the Does could not successfully invoke the Fifth Amendment because of Braswell. The Does countered that, under Fisher, their act of production would be compelled, testimonial and incriminating. Thus, the Does argued, if the court required them to comply with the subpoena, it would mandate the equivalent of forced testimony as to the existence, unlawful possession or authenticity of the documents.

102. See Three Grand Jury Subpoenas, 191 F.3d at 175 (discussing 1996 subpoenas). In addition to being employed by the corporation when it was served with the 1996 subpoenas, Doe I and Doe II received actual notice of the subpoenas and assisted in the corporation's subpoena compliance. See id. (discussing facts). For example, an affidavit from the corporation's attorney suggests that he met with Doe I and Doe II and asked them to produce some responsive documents; Doe I and Doe II produced some documents following this request. See id. (discussing limited production of documents); see also Appellant's Petition at 3-4 (describing Doe I's production of some subpoenaed documents).

103. See Three Grand Jury Subpoenas, 191 F.3d at 175 (stating that Doe I left employment with corporation in March of 1997); see also Appellant's Petition at 3 (same).

104. See Three Grand Jury Subpoenas, 191 F.3d at 175 (discussing Doe II's severance agreement); see also Appellant's Petition at 3 (stating that Doe II produced responsive documents in exchange for corporation's resumption of his severance payments).

105. See Three Grand Jury Subpoenas, 191 F.3d at 175, 180 n.3 (saying Doe III resigned from corporation in mid-July, 1996); Appellant's Petition at 3 (stating that Doe III resigned "shortly after" first subpoena was served on corporation).

106. See Three Grand Jury Subpoenas, 191 F.3d at 175 (describing Doe III's severance agreement); see also Appellant's Petition at 3 (stating that Doe III agreed in severance agreement to cooperate with corporation "in any criminal investigation").

107. See Three Grand Jury Subpoenas, 191 F.3d at 176 (outlining Government action to compel production); see also Appellant's Petition at 3 (same).


109. See id. (outlining Government's argument that Braswell precluded Does' Fifth Amendment privilege claim); see also Appellant's Petition at 4 (same).

110. See Three Grand Jury Subpoenas, 191 F.3d at 176 (providing Does' opposing arguments).

111. See id. (outlining Does' arguments).
In response, the district court denied the Government’s motion to compel the Does to produce any corporate documents. In reaching this decision, the district court first relied on the Second Circuit’s Saxon Industries decision. Next, the district court relied on the Fifth Amendment act-of-production doctrine. Finally, the district court stated that regardless of Saxon Industries, the Fifth Amendment is entitled to heightened deference whenever a former employee is required to produce corporate documents. Thus, the district court held that the three former corporate employees had a Fifth Amendment act-of-production privilege. The Second Circuit affirmed this ruling that a former employee of a corporation may assert a Fifth Amendment privilege and thus may quash a subpoena demanding corporate documents.

IV. NARRATIVE ANALYSIS

A. Majority Opinion

In affirming the district court’s decision, the Second Circuit began by reviewing Supreme Court precedent on both the collective entity and act-of-production doctrines. Next, the court addressed the Government’s argument that Doe II’s and Doe III’s severance agreements created a continuing agency relationship between them and the corporation. The

112. See id. (stating Judge Sprizzo denied Government’s motion).
113. See id. (citing Saxon Industries). For a further discussion of the district court’s decision in Saxon Industries, see supra note 89 and accompanying text.
114. See Three Grand Jury Subpoenas, 191 F.3d at 176 (relying on Fisher and Doe). For a further discussion of the act-of-production doctrine, see supra note 13 and accompanying text.
115. See Three Grand Jury Subpoenas, 191 F.3d at 176 (stating that Fifth Amendment is at its height when former employee is served with subpoena for corporate documents). In reaching his ruling, which was issued from the bench, Judge Sprizzo said that he would have ruled as he did even if Saxon Industries “were not even on the books.” Id. Judge Sprizzo thus said, “the question of testimonial incrimination is at its height when [the document] is produced by a person who is no longer employed by the corporation, because there is an inference that [he] may have stolen [it].” Id. Judge Sprizzo further stated that “the act of testimonial [production] on behalf of a person who is no longer with the corporation is self-incrimination in its classic sense of the word, and the Constitution does not permit it.” Id.
116. See id. (providing district court’s holding); see also Appellant’s Petition at 4 (same).
117. See Three Grand Jury Subpoenas, 191 F.3d at 174 (holding Fifth Amendment shields former employees from subpoena for corporate documents); see also Appellant’s Petition at 4-5 (stating Second Circuit’s holding). According to the Second Circuit’s Office of the Clerk, the court denied the Government’s Petition for Panel Rehearing and Rehearing En Banc on February 4, 2000.
118. See Three Grand Jury Subpoenas, 191 F.3d at 177-79 (reviewing Supreme Court precedent).
119. See id. at 180 (outlining Government’s argument that agency relationship continued because of severance agreements). For a further discussion of agency principles in Three Grand Jury Subpoenas, see Self-Incrimination: Act of Production Privilege Extends to Former Employees, 68 U.S.L.W. 1164 (Sept. 28, 1999).
court, however, found no legal basis for interpreting the severance agreements as giving rise to such a relationship.\textsuperscript{120}

Then the Second Circuit addressed the Government's contention that \textit{Saxon Industries} no longer remained good law following \textit{Braswell}.\textsuperscript{121} The Three Grand Jury Subpoenas court concluded that \textit{Braswell} was limited to current employees, and therefore, did not implicate \textit{Saxon Industries}.\textsuperscript{122} Furthermore, the court noted the factual framework underlying \textit{Braswell} was not present, as the corporate custodian in \textit{Braswell} had held the documents in a representative capacity.\textsuperscript{123} As a result, the Second Circuit found that the Does acted in their personal capacities when possessing the documents.\textsuperscript{124}

The Three Grand Jury Subpoenas court also found the Government “overstate[d]” its argument that adhering to \textit{Saxon Industries} would undermine effective law enforcement.\textsuperscript{125} The court reasoned that this concern was misplaced because the Government could have obtained the documents by personally serving the Does before they left the corporation's employ.\textsuperscript{126} Moreover, the court concluded that the Government could still get the documents through a search warrant or by granting the Does

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\item 120. See Three Grand Jury Subpoenas, 191 F.3d at 180 (saying there is no basis in law to interpret severance agreement as continuing agency relationship between former employees and former employer). The court further found that although the agreements required Doe II and Doe III to cooperate with “any future investigation,” Doe II and Doe III did not waive their Fifth Amendment rights. See id. at 180 (finding Doe II and Doe III did not waive Fifth Amendment rights through severance agreements).

\item 121. See id. (discussing Government’s argument that \textit{Saxon Industries} was no longer good law).

\item 122. See id. at 181 (stating that \textit{Braswell} does not affect Second Circuit’s holding in \textit{Saxon Industries}). For a further discussion of \textit{Saxon Industries}, see supra notes 84-87 and accompanying text. The Government argued that \textit{Saxon Industries} was no longer valid law following \textit{Braswell} because: (1) \textit{Braswell} held that the collective entity doctrine overcomes the act-of-production doctrine whenever the Government subpoenaed corporate documents; (2) \textit{Braswell} relied on \textit{Bellis} and \textit{Wheeler} so that \textit{Braswell}’s holding logically extends to former employees; and (3) the evidentiary privilege created in \textit{Braswell} protects a former employee from the personal consequences of producing corporate documents. See id. at 180-81 (outlining Government’s arguments). See generally Appellant’s Petition for Panel Rehearing & Rehearing En Banc at 7-11, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (arguing that \textit{Braswell} precludes former employee from asserting Fifth Amendment privilege to avoid producing corporate documents).

\item 123. See Three Grand Jury Subpoenas, 191 F.3d at 181 (“The rule in \textit{Braswell} was predicated on the rationale that corporate custodians hold and produce documents only in a representational capacity . . . . In the absence of . . . an agency relationship, the foundation upon which \textit{Braswell} rests . . . is removed.”).

\item 124. See id. (stating that when former employee produces documents “he cannot be acting in anything other than his personal capacity”).

\item 125. See id. at 182 (claiming Government overstated argument that decision could undermine effective law enforcement).

\item 126. See id. at 182 n.4 (asserting that Government should have served Does while they were active employees).
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The court thus concluded that *Saxon Industries* supported its holding that the Does could quash the subpoena.\(^{128}\) Finally, the court stated that the Government's concern that this would create an incentive for corporate custodians to partake in obstructionist behavior, was a "policy consideration[ ]," not relevant in a Fifth Amendment analysis.\(^{129}\) Furthermore, the court stated that the burden placed on law enforcement efforts was inherent in the Fifth Amendment privilege against self-incrimination.\(^{130}\)

B. Dissent

In a vigorous dissent, Judge Cabranes first chastised the majority for adhering to *Saxon Industries* despite the Supreme Court's *Braswell* decision.\(^{131}\) Second, the dissent argued that, even if *Braswell* did not overrule *Saxon Industries*, the Does' Fifth Amendment claim was factually different than *Saxon Industries*.\(^{132}\) Third, the dissent criticized the majority's application of traditional agency theories to determine whether the Does fell outside of the collective entity doctrine.\(^{133}\) Finally, the dissent invoked the white-collar rationale, arguing that the court's decision would allow a custodian possessing corporate documents to engage in obstructionist behavior.\(^{134}\)

V. Critical Analysis

The court's reasoning in *Three Grand Jury Subpoenas* was problematic in five respects.\(^{135}\) First, the court overemphasized traditional notions of agency law when determining that the Does acted in a representative capacity.\(^{136}\) Second, the court should have relied on *Braswell*, rather than on *Saxon Industries*.\(^{137}\) Third, the court strayed from Supreme Court precedent in rejecting the white-collar rationale as a mere "policy consideration[ ]."

\(^{127}\) See id. at 182-83 (discussing grant of statutory immunity and use of search warrant to get documents).

\(^{128}\) See id. (comparing analysis in *Saxon Industries* to Fifth Amendment privilege Does asserted).

\(^{129}\) See id. at 183 (finding greater burden on law enforcement is "policy consideration[ ]").

\(^{130}\) See id. (concluding that greater burden on law enforcement is inherent in Fifth Amendment privilege).

\(^{131}\) See id. at 186 (Cabranes, J., dissenting) (criticizing majority for not following Supreme Court precedent).

\(^{132}\) See id. (differentiating *Saxon Industries* and *Three Grand Jury Subpoenas*).

\(^{133}\) See id. at 186 n.4 (finding traditional agency principles not applicable).

\(^{134}\) See id. at 187 (discussing impact of majority opinion on effective law enforcement).

\(^{135}\) For a further discussion of ways the *Three Grand Jury Subpoenas* court erred, see infra notes 136-208 and accompanying text.

\(^{136}\) For a further discussion of how the court mistakenly applied traditional agency law, see infra notes 141-63 and accompanying text.

\(^{137}\) For a further discussion of why the court should not have relied on *Saxon Industries*, see infra notes 164-78 and accompanying text.
tion[ ]."138 Fourth, the court overlooked the fact that expectation of privacy principles suggest that the Does should have produced the documents.139 Finally, the court gave too much weight to its belief that the Government could have obtained the documents through other means.140

A. Applying Traditional Agency Law

The Second Circuit relied on traditional notions of agency law to determine that, because the Does were former employees, they no longer acted in a representative capacity when possessing corporate documents.141 This reliance on traditional agency law is contrary to Supreme Court precedent and the Fifth Amendment agency rule enunciated in Braswell.142

Braswell and the other collective entity line of cases suggest that the Second Circuit should have denied the Does' Fifth Amendment claims.143 In Wheeler, for instance, former employees of a dissolved corporation asserted a Fifth Amendment privilege claim in order to avoid producing corporate documents.144 The Court held that the corporation’s dissolution was immaterial; thus, the defendants, although technically former officers, were still required to comply with a subpoena for corporate documents.145 The court should have followed Wheeler to preclude the Does from asserting a Fifth Amendment privilege because the Braswell Court found that the collective entity line of cases remained valid.146

The court overlooked not only Wheeler, but also Bellis, another Supreme Court decision that precluded former employees from asserting a

138. For a further discussion of the court’s mischaracterization of the white-collar rationale, see infra notes 179-84 and accompanying text.
139. For a further discussion of how the court applied expectation of privacy principles, see infra notes 185-94 and accompanying text.
140. For a further discussion of why the remaining remedies are inadequate, see infra notes 195-208 and accompanying text.
141. See Three Grand Jury Subpoenas, 191 F.3d 173, 179-80 (2d Cir. 1999) (applying traditional agency law). For a further discussion of the court’s use of traditional agency law, see supra notes 119-24 and accompanying text.
142. For a further discussion of how the court’s use of traditional agency law was contrary to Supreme Court precedent, see infra notes 143-63 and accompanying text.
143. For a further discussion of why Braswell and other collective entity cases suggest the Does should have been denied a Fifth Amendment privilege, see infra notes 144-63 and accompanying text.
144. See Wheeler v. United States, 226 U.S. 478, 482-83 (1913) (stating facts).
145. See id. at 488 (holding “dissolution . . . is immaterial”). For a further discussion of Wheeler, see supra notes 50-51 and accompanying text.
146. See Three Grand Jury Subpoenas, 191 F.3d at 185-86 n.2 (Cabranes, J., dissenting) (arguing Wheeler remains valid and is applicable to former employees’ privilege claims); cf. Braswell v. United States, 487 U.S. 99, 109 (1988) (stating Fisher did not make collective entity doctrine “obsolete”). But see Three Grand Jury Subpoenas, 191 F.3d at 181-82 (finding Wheeler inapplicable as it was decided before Court “jettisoned reliance on the visitorial powers of the State over corporations” (quoting Braswell, 487 U.S. at 108)).
Fifth Amendment privilege. The court should have relied on *Bellis* to
determine the Does had no Fifth Amendment privilege because *Braswell*
relied heavily on *Bellis* to deny Braswell’s privilege claim. The *Braswell*
Court’s reliance on *Bellis* also indicates that *Braswell’s* reasoning was not
limited to current employees. Despite the Supreme Court case law
weighing against the Does, only Judge Cabranes, in his dissent, found it
“obvious[ ]” that the court “must apply Supreme Court precedent.”

The court also contravened the Fifth Amendment agency rule develop-
ed in *Braswell*. In *Braswell*, the Court developed an agency formula
that stretched hornbook law when it found a person producing corporate
documents acts as a corporation’s agent, rather than in a personal capac-
ity. In his *Braswell* dissent, Justice Kennedy chided the Court for misap-
plying traditional agency law to reach this conclusion. Yet, the *Braswell*
Court stretched traditional agency law because not doing so would have
undermined Fifth Amendment jurisprudence and the entire collective en-
tity doctrine. The contrast between the *Braswell* majority’s expansion of
agency principles and the dissent’s refusal to do so is evident in the termi-
ology used by each side. For example, the *Braswell* majority spoke of

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147. *See* Three Grand Jury Subpoenas, 191 F.3d at 184 n.1, 185-86 n.2 (Cabranes, J., dissenting) (finding *Bellis* was dispositive of former employees’ privilege claims).

148. *See* Braswell, 487 U.S. at 102, 108, 111 n.4, 112-13 (citing *Bellis* with approval); *see also* Henning, supra note 16, at 423 (arguing *Braswell* relied on *Bellis* to elevate collective entity doctrine above act-of-production doctrine).

149. *See generally* Appellant’s Petition for Panel Rehearing & Rehearing En Banc at 7, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (arguing that Court’s reliance on *Bellis* indicates *Braswell* not confined to current employees). For a further discussion of the facts of *Bellis*, *see supra* notes 56-60 and accompanying text.


151. For a further discussion of the agency rule adopted in *Braswell*, *see supra* notes 74-75 and accompanying text.

152. *Cf.* United States v. McLaughlin, 126 F.3d 130, 141 (3d Cir. 1997) (Becker, J., concurring) (“To conclude that [the corporate custodian] acted within his agency (as I ultimately do), we must therefore look beyond hornbook agency law.”). *But see* Three Grand Jury Subpoenas, 191 F.3d at 180-81, 183 (relying on traditional agency principles to assess former employees’ privilege claims). In a concurring opinion in *McLaughlin*, then-Judge Becker provided a thoughtful and provocative analysis as to why traditional agency principles should not be applied to a custodian’s Fifth Amendment privilege claim after *Braswell*. *See generally* McLaughlin, 126 F.3d at 140-43 (Becker, J., concurring) (discussing implications of applying traditional agency principles to custodian’s privilege claim).

153. *See* Braswell, 487 U.S. at 128 (Kennedy, J., dissenting) (“The majority gives the corporate agent fiction a weight it simply cannot bear.”); *see also* Three Grand Jury Subpoenas, 191 F.3d at 186 n.4 (Cabranes, J., dissenting) (asserting that Justice Kennedy criticized *Braswell* majority for “allegedly misapplying common law principles of agency”).

154. *See* McLaughlin, 126 F.3d at 143 (Becker, J., concurring) (explaining that not stretching traditional agency law will undermine *Braswell* or Fifth Amendment jurisprudence).

155. For a further discussion of the majority and dissent’s terminology in *Braswell*, *see infra* notes 156-57 and accompanying text.
whether “individuals” and “custodians” holding corporate documents could assert a Fifth Amendment act-of-production privilege. On the other hand, only Justice Kennedy’s dissent makes repeated reference to “employees.”

Nevertheless, the Three Grand Jury Subpoenas court resorted to traditional agency theory and restricted the scope of Braswell to current “employees.” The Three Grand Jury Subpoenas court should have followed the majority’s formula in Braswell and addressed whether the Does were “individuals” who were “custodians” possessing corporate documents. Under this analysis, the court would likely have denied the Does a Fifth Amendment privilege. Instead, the court adopted Justice Kennedy’s traditional agency approach and focused on the Does as “employees.”

In conclusion, the Three Grand Jury Subpoenas court failed to adhere to Braswell.

156. See Braswell, 487 U.S. at 100 (“This case presents the question whether the custodian of corporate records may resist a subpoena . . . .” (emphasis added)); id. at 108-09 (stating that “[t]he plain mandate . . . is that . . . the individual in his capacity as a custodian [and] a corporate custodian such as [Braswell] may not resist a subpoena for corporate records . . . .” (emphasis added)); id. at 109-10 (“[T]he Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity.” (emphasis added)); id. at 111 n.4 (“[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity . . . .” (quoting Bellis v. United States, 417 U.S. 85, 88 (1974) (emphasis added)); id. at 113 (“[O]ne in control of the records of an artificial organization undertakes an obligation with respect to those records foreseeing any exercise of his privilege” (citing Fisher v. United States, 425 U.S. 391, 429-30 (1976) (Brennan, J., concurring))).

157. See Braswell, 487 U.S. at 119 (Kennedy, J., dissenting) (“The Court today denies an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself.” (emphasis added)); id. at 120 (Kennedy, J., dissenting) (“The majority’s apparent reasoning is that collective entities have no privilege and so their employees must have none either.” (emphasis added)); id. at 130 (Kennedy, J., dissenting) (“[T]he Court employs the fiction that personal incrimination of the employee is neither sought by the Government nor cognizable by the law.” (emphasis added)).

158. See Three Grand Jury Subpoenas, 191 F.3d at 178-79 (“In Braswell, the Court addressed the question of whether a current corporate employee could claim a Fifth Amendment act of production privilege . . . . The question presented by this appeal, however, is different from that presented in Braswell. It is whether former employees . . . may claim an act of production privilege . . . .”).

159. For a further discussion of the reasoning and terminology the Braswell majority employed, see supra notes 71-77 and accompanying text.

160. Cf. Three Grand Jury Subpoenas, 191 F.3d at 186 n.4 (Cabranes, J., dissenting) (arguing that analysis is whether individual acts in representative capacity when holding and producing corporate documents); United States v. McLaughlin, 126 F.3d 130, 143 (3d Cir. 1997) (Becker, J., concurring) (rejecting traditional agency approach and finding custodian may not resist subpoena); In re Sealed Case, 950 F.2d 736, 740 (D.C. Cir. 1991) (finding former custodian may not assert act-of-production privilege because custodian acts in agency capacity when holding corporate documents).

161. For a further discussion of how the Three Grand Jury Subpoenas court adopted the reasoning of Justice Kennedy’s Braswell dissent, see supra note 158 and accompanying text.
well's holding that traditional agency principles do not determine a custodian's Fifth Amendment privilege claim.162 Thus, the court bucked principles of American jurisprudence by following Justice Kennedy's Braswell dissent rather than the majority's holding.163

B. Following Saxon Industries

The Three Grand Jury Subpoenas court overemphasized that Saxon Industries remained valid law following Braswell and that Saxon Industries was factually on point.164 Saxon Industries was decided against the "uncertain backdrop" of whether the collective entity doctrine survived Fisher.165 Because Braswell had yet to elevate the collective entity doctrine above the act-of-production analysis when a subpoena demands corporate documents, the Saxon Industries court had applied the act-of-production doctrine to a former employee's privilege claim.166 Following the Second Circuit's decision in Saxon Industries, however, Braswell held that the collective entity doctrine remained valid.167 The Three Grand Jury Subpoenas court should have recognized that Braswell implicitly overruled Saxon Industries by determining that Fisher's act-of-production analysis was inapplicable to a subpoena demanding corporate documents.168

162. Compare Braswell, 487 U.S. at 115 n.7 (finding agency principle unique to Fifth Amendment precludes employee from asserting act-of-production privilege), with Three Grand Jury Subpoenas, 191 F.3d at 179-80 (employing traditional agency law and determining that former employee may assert privilege because former employee is no longer corporate agent).

163. Cf. Three Grand Jury Subpoenas, 191 F.3d at 186 (Cabranes, J., dissenting) ("[W]e obviously must apply Supreme Court precedent, even when it conflicts with our own, earlier authority . . . .").

164. For a further discussion of how the court erred in relying on Saxon Industries, see infra notes 165-78 and accompanying text.

165. See In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983 ("Saxon Industries"), 722 F.2d 981, 986 (2d Cir. 1985) (stating that court is deciding whether act-of-production privilege applies to former employee against "uncertain backdrop"); cf. Hedley, supra note 62, at 158 (arguing that courts were uncertain as to collective entity doctrine's vitality because of Fisher). Thus, before Braswell, circuits were split as to whether current employees could invoke the act-of-production privilege. Compare In re Grand Jury Proceedings, 771 F.2d 143, 147-48 (6th Cir. 1985) (en banc) (refusing to recognize act-of-production privilege with respect to corporate documents), with United States v. Sancetta, 788 F.2d 67, 69 (2d Cir. 1986) (recognizing representative of collective entity may successfully assert act of production is incriminating).

166. See Saxon Industries, 722 F.2d at 987 (holding former employee may assert act-of-production privilege). For a further discussion of how Braswell elevated the collective entity doctrine above the act-of-production doctrine, see supra note 72 and accompanying text.

167. For a further discussion of Braswell's holding that the collective entity doctrine remained valid despite Fisher, see supra note 71 and accompanying text.

168. See Three Grand Jury Subpoenas, 191 F.3d at 186 (Cabranes, J., dissenting) (stating that Braswell overruled Saxon Industries); see also Appellant's Petition for Panel Rehearing & Rehearing En Banc at 12-13, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (arguing Braswell cast doubt on whether Saxon Industries remained good law).
Even though the court concluded that *Saxon Industries* survived, the court should still have factually distinguished *Three Grand Jury Subpoenas* from *Saxon Industries*. First, the former employee in *Saxon Industries* had dissociated himself from the corporation more than a year before the corporation was served with a subpoena demanding production of corporate documents. The Does, however, left the corporation's employ after the corporation had been served.

Second, the *Saxon Industries* court was primarily concerned that the former officer's act of producing corporate documents would establish that he misappropriated documents because he knew of their incriminating contents. This concern should not be applied to the Does, as Braswell alleviated it by establishing an evidentiary privilege that would have precluded the Government from making evidentiary use of the Does' act of production.

Finally, *Saxon Industries* arose when the Government demanded a former employee, who absconded with copies of corporate documents, produce those copies although the Government already possessed the originals. The Government, therefore, sought to discover what documents the former employee believed to be "smoking gun" evidence of his guilt. Thus, the *Saxon Industries* court could not have relied on the white-collar rationale, as concern about the impact of the court's decision on the Government's prosecutorial authority would have been misplaced. Notwithstanding, the white-collar rationale would be applicable in *Three Grand Jury Subpoenas*. Here, the issue was not whether the


170. See *Saxon Industries*, 722 F.2d at 982 (stating that former employee left corporation about one year before Government served subpoena on corporation).

171. See *Three Grand Jury Subpoenas*, 191 F.3d at 175 (noting that Does were employed with corporation at time Government served 1996 subpoenas).

172. See *Saxon Industries*, 722 F.2d at 987 (stating that Government would use former employee's act-of-production to argue employee removed documents because they were evidence of guilt); see also *Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d at 811-12 (explaining court's concern in *Saxon Industries* was that former employee's act of production would establish that he misappropriated documents).


174. See *Saxon Industries*, 722 F.2d at 983 (explaining that former employee held duplicates of corporate documents that Government already possessed).

175. Cf. *id.* at 987 (discussing former employee's argument that Government already had documents and that act-of-production would reveal "smoking-gun" evidence).


177. See *In re Three Grand Jury Subpoenas*, 191 F.3d 173, 184 (2d Cir. 1999) (Cabrera, J., dissenting) (arguing that majority ignored Supreme Court prece-
Government could be guided to copies of documents that the Government already possessed, but rather whether the Government could access the documents at all.\(^{178}\)

\textbf{C. The White-Collar Rationale}

The Supreme Court has recognized the primacy of the white-collar rationale in its collective entity analysis.\(^{179}\) Thus, \textit{Three Grand Jury Subpoenas} inappropriately deemed the white-collar rationale a "policy consideration[ ]."\(^{180}\) In so characterizing the white-collar rationale, the \textit{Three Grand Jury Subpoenas} court ignored the very policy undergirding the collective entity doctrine.\(^{181}\) In 1911, the Wilson Court stated that the white-collar rationale must be taken into account, otherwise the government's power to compel production of corporate documents "would seriously be embarrassed, if not wholly defeated."\(^{182}\) Moreover, the Court has adhered to the white-collar rationale from Wilson to Braswell.\(^{183}\) Therefore, the \textit{Three Grand Jury Subpoenas} court ignored Supreme Court acceptance of the white-collar rationale by relegating it to a mere policy consideration.\(^{184}\)

\[^{178}\text{Cf. Three Grand Jury Subpoenas, 191 F.3d at 187 (Cabranes, J., dissenting) (stating that court denied Government access to corporate documents).}\]

\[^{179}\text{For a further discussion of the weight the Court has accorded the white-collar rationale, see supra notes 47-60 and accompanying text and supra notes 76-77 and accompanying text.}\]

\[^{180}\text{See Three Grand Jury Subpoenas, 191 F.3d at 183 (classifying greater burden court's decision will place on law enforcement as "policy consideration[ ]").}\]

\[^{181}\text{See Appellant's Petition at 14 (arguing that court failed to properly take into account white-collar rationale).}\]

\[^{182}\text{Wilson v. United States, 221 U.S. 361, 384-85 (1911).}\]


Outside of the collective entity doctrine, the Supreme Court has also demonstrated its willingness to sacrifice an individual's protection against self-incrimination when the Court perceives a substantial threat to law enforcement efforts. See Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 557 (1990) (holding legal custodian of child could not invoke Fifth Amendment to resist court order to produce child for physical exam); Lionel E. Pashkoff, \textit{The Fifth Amendment and Immunity in Securities \\& Exchange Commission Investigations}, 88 A.B.A. J. 503, 503 (1998) (describing Court's willingness to sacrifice individual protections).

\[^{184}\text{For a further discussion of the court's mischaracterization of the white-collar rationale as a policy concern, see supra notes 180-85 and accompanying text.}\]
D. Expectation of Privacy Principles

Although the *Three Grand Jury Subpoenas* court should not have turned to the act-of-production doctrine, by doing so, the court erred in its application.185 Expectation of privacy principles are not normally applied to the Fifth Amendment.186 Nevertheless, both the majority and Justice Brennan's concurrence in *Fisher* concluded that privacy considerations guide an act-of-production analysis.187 Thus, an act of production may be incriminating only if the documents are within a zone of privacy.188

The Does, however, did not hold the documents within such a recognized zone of privacy.189 First, as the *Saxon Industries* court stated, corporate documents are not converted into personal property merely because a custodian is no longer employed with a corporation.190 Thus, the Does held corporate property when holding the documents.191 Second, Doe II and Doe III could not have established a reasonable expectation of privacy given that both agreed to cooperate in future investigations.192 Finally, the Does could not assert a heightened privacy simply because the Does moved the documents from the corporation to their homes; before *Three Grand Jury Subpoenas*, the Second Circuit had held that such an act does not increase privacy expectations.193 Thus, the court misapplied *Fisher's*

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185. For a further discussion of how the court misapplied the act-of-production doctrine, see infra notes 186-94 and accompanying text.

186. See *Fisher v. United States*, 425 U.S. 391, 408 (1976) (stating that Fifth Amendment "applies only when the accused is compelled to make a testimonial communication that is incriminating" (emphasis added)); see also Michael Mello & Paul Perkins, *Ted Kaczynski’s Diary*, 22 Vt. L. Rev. 83, 93 (1997) (arguing that modern Fifth Amendment jurisprudence focuses on compulsion and not on privacy); Daniel E. Will, Note, "Dear Diary—Can You Be Used Against Me?": The Fifth Amendment and Diaries, 35 B.C. L. Rev. 965, 968 (1994) (asserting that *Fisher* and *Doe* limited Fifth Amendment protection of privacy).

187. For a further discussion of the role privacy considerations played in *Fisher*, see supra notes 64-67 and accompanying text.

188. See *Fisher*, 425 U.S. at 423 (Brennan, J., concurring) ("Unless those materials are such as to come within the zone of privacy recognized by the [Fifth] Amendment, the privilege against compulsory self-incrimination does not protect against their production.").

189. For a further discussion of how the Does held the documents outside the zone of privacy, see infra notes 190-94 and accompanying text.

190. See *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983* ("Saxon Industries"), 722 F.2d 981, 986 (2d Cir. 1983) (dismissing as "frivolous" former custodian's claim that documents became personal papers because he dissociated himself from corporation).


192. See id. at 186 (Cabranes, J., dissenting) (arguing that Does continued to act on corporation's behalf because of severance agreements).

193. See United States v. Sancetta, 788 F.2d 67, 75 (2d Cir. 1986) (holding that moving corporate documents from home does not translate into heightened privacy).
act-of-production analysis by not concluding that the subpoenaed documents were outside the zone of privacy.  

E. Leaving the Government Without an Adequate Remedy

The *Three Grand Jury Subpoenas* court misapplied the remedies that it believed would allow the Government to obtain the documents. The court mistakenly concluded that the Government could rely on a search warrant to get the documents. In order to obtain a search warrant, however, the Government must meet the Fourth Amendment’s particularity requirement. The court, therefore, had to presuppose that the Government was both aware of the documents’ existence and knew where the documents could be found. The Government will not likely have such knowledge in most white-collar investigations, as corporate documents often are maintained in many forms and locations. Moreover, the court assumed that the Government could establish the probable cause necessary to obtain a search warrant.

Furthermore, the court mistakenly concluded that the Government could have granted the Does statutory immunity for their act-of-production. This remedy is contrary to *Braswell*, which concluded statutory im-

194. For a further discussion of court’s misapplication of zone of privacy principles, see supra notes 185-93 and accompanying text.

195. For a further discussion of why the court left the Government with ineffective remedies, see infra notes 196-208 and accompanying text.

196. See *Three Grand Jury Subpoenas*, 191 F.3d at 183 (finding Government could compel production through search warrant). For a further discussion of why the Government could not obtain a search warrant, see infra notes 197-200 and accompanying text.

197. See U.S. CONST. amend. IV (“Warrants shall . . . particularly describ[e] the place to be searched, and the persons or things to be seized.”). For examples of Supreme Court and Second Circuit case law interpreting the particularity requirement, see *Coolidge v. N.H.*, 403 U.S. 443, 467 (1971); *Marron v. United States*, 275 U.S. 192, 196 (1927); *United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000); *United States v. Bianco*, 988 F.2d 1112, 1115-16 (2d Cir. 1993); *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992); and *United States v. Buck*, 813 F.2d 588, 592-93 (2d Cir. 1987). For a further discussion of the Fourth Amendment, see 68 AM.JUR. 2D Searches and Seizures § 16 (2000).


200. See U.S. CONST. amend. IV (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .); see also *Carroll v. United States*, 267 U.S. 132, 162 (1925) (stating that to conduct search police need probable cause, which exists when "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that suspect is engaged in criminal activity).

201. For a further discussion of why the court wrongly decided that the Government could grant the Does statutory immunity, see infra note 202 and accompanying text.
munity was an unrealistic alternative because the Government would need to show that any evidence it might use at trial was not the direct or derivative product of the immunity.\textsuperscript{202} Moreover, granting statutory immunity is less of an option now than when Braswell was decided, given the Court's decision in United States v. Hubbell,\textsuperscript{203} which established an exceptionally broad interpretation of statutory immunity.\textsuperscript{204}

Moreover, the court incorrectly suggested that the Government simply could have prevented the Does from asserting a Fifth Amendment privilege if the Government had separately served both the corporation and the Does while they were still employees.\textsuperscript{205} The Supreme Court has repeatedly said that when the Government serves a subpoena on either a corporation or an employee, both are bound to comply.\textsuperscript{206} Furthermore, the court suggested this remedy even though Doe I and Doe II received actual notice of the 1996 subpoenas while still employed.\textsuperscript{207} This fact is highly relevant because no legal basis before the Three Grand Jury Subpoenas decision distinguished between a corporate custodian personally served and a corporate custodian receiving actual notice of a subpoena.\textsuperscript{208}

VI. IMPACT

The Three Grand Jury Subpoenas decision has the potential to alter the landscape of the investigation and prosecution of white-collar crime.\textsuperscript{209} This decision is the first major opinion that confines Braswell to current

\textsuperscript{202} See Braswell v. United States, 487 U.S. 99, 116-17 (1988) (finding Government cannot obtain documents through grant of statutory immunity because it would impose "heavy burden" on Government to show that any evidence was not direct or derivative product of immunity); see also Appellant's Petition at 13 n.** (criticizing court for determining Government could grant statutory immunity).

\textsuperscript{203} 120 S. Ct. 2037 (2000).


\textsuperscript{205} For a further discussion of why the court erred in concluding that the Does should have been personally served, see infra notes 206-08 and accompanying text.

\textsuperscript{206} See Braswell, 487 U.S. at 108-09 ("The plain mandate of [past Supreme Court] decisions is that without regard to whether the subpoena is addressed to the corporation, or... to the individual in his capacity as a custodian... a corporate custodian... may not resist a subpoena for corporate records on Fifth Amendment grounds.").

\textsuperscript{207} See In re Three Grand Jury Subpoenas, 191 F.3d 173, 175 (2d Cir. 1999) (stating that Does received actual notice of subpoenas).

\textsuperscript{208} See Appellant's Petition for Panel Rehearing & Rehearing En Banc at 10, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (arguing there was absence of legal basis for drawing distinction between corporate custodian personally served and corporate custodian receiving actual notice of subpoena).

\textsuperscript{209} For a further discussion of the potential impact of the Three Grand Jury Subpoenas decision, see infra notes 210-28 and accompanying text.
employees. Moreover, the court signaled its reluctance to apply the white-collar rationale to a former employee’s Fifth Amendment privilege claim, thus leaving the collective entity doctrine little room to expand. The court effectively allowed a corporate custodian, required by law to produce documents while employed, to unilaterally create a constitutional privilege through the simple act of walking out of the corporation’s door, with corporate documents in hand. By allowing a corporate custodian to permanently leave employment and assert a Fifth Amendment privilege, the court created a substantial and dangerous loophole for corporate custodians to evade the collective entity doctrine.

Despite the court’s belief that cases of custodians absconding with corporate documents would not change following its decision, such cases may increase because of the court-created loophole. Any such increase will have a profound impact on the Justice Department’s overall ability to prosecute white-collar criminals, given that more white-collar crimes are prosecuted in New York than anywhere in America. Furthermore, the decision has already had an impact beyond the Second Circuit because corporate custodians elsewhere are trying to escape document production by relying on this decision.

Significantly, the Three Grand Jury Subpoenas decision will have practical consequences for the government, corporations and the courts. The government will now likely serve subpoenas on all employees, in addition to serving a corporation, because the court said that the Does would have been precluded from asserting a Fifth Amendment privilege if they


211. Cf. Appellant’s Petition at 14 (discussing impact of court’s decision on white-collar rationale).

212. See id. at 2, 9 (stating that corporate custodians may unilaterally create constitutional privilege by leaving corporation’s employ and taking documents).

213. See In re Three Grand Jury Subpoenas, 191 F.3d 173, 187 (2d Cir. 1999) (Cabrones, J., dissenting) (arguing that court created “an obvious haven for those who seek to frustrate the legitimate demands for the production of relevant corporate records . . . .” (quoting In re Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d 807, 810 (11th Cir. 1992))).

214. Cf. id. (stating that obstructionist behavior will rise as “direct result” of court’s holding).

215. Cf. Carlson & Finn, supra note 4, at 4 (stating that two of five judicial districts with greatest number of white-collar prosecutions are in New York).


217. For a further discussion of the practical impact of Three Grand Jury Subpoenas, see infra notes 218-26 and accompanying text.
had been personally served while still employees.218 Thus, at least in the Second Circuit, the Fifth Amendment now hinges on wasteful and duplicative subpoena practice.219 The government will also likely begin to place greater pressure on corporations to regain possession of documents, at a time when white-collar criminal defense attorneys already criticize the government for the high-pressure tactics it employs.220

Meanwhile, corporations will need to take measures to ensure that departing employees do not take critical documents with them, as corporations are under a legal duty, under penalty of contempt, to produce subpoenaed documents.221 Moreover, the courts will likely be confronted with more replevin actions, as corporations try to regain possession of corporate documents when threatened with contempt.222 Furthermore, the courts will also be forced to handle more motions challenging subpoenas because of the government's duplicative subpoena practice.223

Finally, the Three Grand Jury Subpoenas decision will have a profound impact because it has further chiseled a split among the circuits.224 Following the court's decision, employees in New York can leave their employment with evidence of corporate wrongdoing without fear of a grand jury subpoena.225 Meanwhile, former employees of the same corporation in Washington, D.C. may be required to comply with a subpoena.226 Corporate custodians will therefore not find equal protection under the Fifth Amendment now hinges on wasteful and duplicative subpoena practice.219

218. See Three Grand Jury Subpoenas, 191 F.3d at 182 n.4 (finding former employee may not assert Fifth Amendment privilege if personally served with subpoena while employed).
219. See Appellant's Petition for Panel Rehearing & Rehearing En Banc at 11 n.*, Three Grand Jury Subpoenas, 191 F.3d 173 (2d Cir. 1999) (No. 99-1143) (arguing that impact of Three Grand Jury Subpoenas is that Fifth Amendment will turn on formalistic distinctions and duplicate subpoena process).
220. See Rudolf & Maher, supra note 72, at 73 (stating that after Three Grand Jury Subpoenas government will place more pressure on corporations). For an authoritative discussion of "high-pressure" tactics the Government uses in white-collar investigations, see Mark F. Pomerantz, Prosecuting Corporations: Applying the New Department of Justice Guidelines, N.Y. L.J., July 10, 2000, at 9.
221. See Rudolf & Maher, supra note 72, at 73 (arguing that corporation will face contempt sanctions if it fails to produce subpoenaed documents).
222. See Three Grand Jury Subpoenas, 191 F.3d at 182-83 (stating that corporation can recover documents through replevin actions).
223. For a further discussion on why the government will engage in duplicate subpoena practice, see supra note 218 and accompanying text.
224. Compare Three Grand Jury Subpoenas, 191 F.3d at 183 (recognizing that former employee may assert act-of-production privilege), and Mora v. United States, 71 F.3d 723, 724 (9th Cir. 1995) (same), with In re Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d 807, 813 (11th Cir. 1992) (per curiam) (holding former employee may not assert act-of-production privilege), and In re Sealed Case, 950 F.2d 736, 740 (D.C. Cir. 1991) (same).
226. See id. (comparing employees in Washington, D.C., who cannot assert privilege, with New York employees who can).
Amendment privilege.\textsuperscript{227} As a result, the Second Circuit's decision ensures that the ad hoc application of the Fifth Amendment privilege to documentary evidence will continue.\textsuperscript{228}

\textit{Thomas J. Koffer}

\textsuperscript{227} For a further discussion of the impact that the circuit split will have on custodians asserting the Fifth Amendment privilege, see \textit{supra} notes 224-26 and accompanying text.

\textsuperscript{228} For a further discussion of the \textit{ad hoc} application of the Fifth Amendment privilege to documentary evidence, see \textit{supra} note 28 and accompanying text.