Corporate Record-Keepers and the Right Against Self-Incrimination: An Equitable Approach to Fifth Amendment Analysis

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CORPORATE RECORD-KEEPERS AND THE RIGHT AGAINST SELF-INCrimINATION: AN EQUITABLE APPROACH TO FIFTH AMENDMENT ANALYSIS

The privilege against self-incrimination reflects many of our most noble aspirations: our unwillingness to subject those accused of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . ; our respect for . . . the right of each individual "to a private enclave where he may lead a private life."¹

I. INTRODUCTION

It has long been established that the fifth amendment² right against compulsory self-incrimination protects an individual from both compelled production of his personal papers and compelled oral testimony.³ However, fifth amendment protection has traditionally been denied to individuals who are employed by corporations as custodians of corporate records. The theory that individuals waive their fifth amendment rights with respect to corporate employment results in inconsistent treatment of similarly situated individuals.

Consider, for example, a situation in which there are two small retail appliance stores. Each store is operated solely by its owner,
who also prepares the store’s accounting records. The only difference between the stores is that one is a sole proprietorship,\(^4\) while the other is a corporation\(^5\) with its owner serving as corporate president. A grand jury investigating each store issues a subpoena to each owner ordering the surrender of certain accounting records. Under traditional law, the sole proprietor is entitled to avoid producing the records by claiming the surrender of such documents would personally incriminate him. The corporate president, however, may not invoke his personal right against self-incrimination because he is acting as an agent of the corporation, which has no fifth amendment rights.

This hypothetical demonstrates the conflict between the government’s interest in regulating economic entities (such as corporations) and the constitutional rights of the individuals who operate those entities.\(^6\) This conflict has resulted in two prevailing approaches for determining whether or not the right against self-incrimination may be invoked in the business context. The traditional collective entity approach\(^7\) denies fifth amendment protection based on an individual’s status as a corporate record-keeper. In contrast, the testimonial communications approach\(^8\) looks to the potentially incriminating im-

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4. A sole proprietorship is a form of business which is owned by one person. The sole owner has full authority and responsibility for all business decisions, owns all property as an individual, assumes unlimited liability for all debts of the business, and is taxed as an individual. Z. Cavitch, BUSINESS ORGANIZATIONS § 1.01 (1984).

5. A corporation is a legal entity, created by law, for carrying on a business separate and distinct from its owners or investors. The corporate form allows the owners to limit their individual liability to their investment in the enterprise. 1 CORPORATE EXPLANATION 1102 (Prentiss Hall) (1985). Corporations are legal persons capable of conducting business in the same manner as “natural” persons: they can own assets, enter contracts, incur liabilities, sue and be sued. The four distinguishing characteristics of corporations are continuity of life, separation of ownership and control, limited liability, and free transferability of interest. Trustees of Dartmouth College v. Woodward, 4 U.S. (4 Wheat.) 636 (1819). See 1 Z. Cavitch, supra note 4, at § 1.01.

6. A corporate crime investigation may place the custodian of subpoenaed documents and the corporation in an adversarial position. Corporate crime typically involves concerted action of corporate officials, and the corporation may benefit from cooperating with the prosecution, to the detriment of corporate employees. Wilson v. United States, 221 U.S. 361 (1911). In Wilson, a corporate president was personally subpoenaed to surrender corporate documents that would incriminate him. The president had been charged with a crime which was evidenced by the subpoenaed records. The corporation was willing to surrender the records and the president attempted to invoke his personal fifth amendment rights. Id. at 385 (McKenna, J., dissenting).


8. See infra text accompanying notes 88-120.
pact that a compelled disclosure could have on the individual who is subject to compulsion. Consequently, the fifth amendment rights of records custodians have been inconsistently interpreted by the courts. This comment examines the fifth amendment treatment of individuals acting as record-keepers of various business entities, and proposes that fifth amendment protection be equally available to all business record custodians.

II. THE RIGHT AGAINST SELF-INCRIMINATION

The privilege against self-incrimination requires the government to prove a criminal case against the defendant without forcing the accused to act as a witness against himself. The privilege protects only communications, and may be invoked by any witness who is asked to produce information against his will, whether the proceeding is a trial, a grand jury hearing, or a hearing before an investigative body.

The language of the fifth amendment defines the scope of its application. The right against self-incrimination may be asserted only when a person is compelled to incriminate himself. Each of these elements must be present in order to assert the privilege. This section describes the elements which trigger fifth amendment protection and discusses the exceptions to the right to assert the privilege against self-incrimination.

A. Fifth Amendment Elements

1. A Person

The right against self-incrimination has historically been viewed as a purely personal one which adheres to the individual, not to the documents requested or their allegedly incriminating contents. The privilege is available only to "natural" individuals and

9. Wilson, 221 U.S. at 385; White, 322 U.S. at 698.
10. See, e.g., Boyd, 116 U.S. at 634-35 (which held that the fifth amendment protects the contents of documents, if the contents are private. Boyd has never been expressly overruled); Holt v. United States, 218 U.S. 245, 252-53 (1910) (forcing a prisoner to try on a shirt did not constitute physical or moral compulsion to extort communications — the fifth amendment does not protect the accused's body when it may be material evidence).
12. See supra note 2.
does not protect "legal persons." Judicial determination of whether a business entity is a natural rather than legal person is critical to the availability of fifth amendment rights.

Courts have generally classified sole proprietorships as natural persons with the right to assert fifth amendment protection, but have held that other business entities such as partnerships and corporations are not entitled to invoke the privilege against self-incrimination. This classification is supported by the theory that a sole proprietorship is so personal in nature as to embody the purely private interests of its owner. In contrast, legal persons have a recognizable legal existence apart from that of their individual members; thus the entity itself cannot claim the right against self-incrimination. The effect of this theory is that an individual acting in his capacity as business officer, employee or record-keeper of a legal entity, cannot assert the privilege to protect either the entity, himself, or a fellow employee from compelled incrimination.

would force him to testify to his private thoughts); Johnson v. United States, 228 U.S. 457, 458 (1913) (production of documents by a third person in a different context did not compel the accused to be a witness against himself); White, 322 U.S. at 699 ("the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely private capacity").

15. A natural person is a human being. A legal person may be a corporation, labor organization, partnership, or association, which by statute is treated as having many of the same rights as a natural person. BLACK'S LAW DICTIONARY 1028 (rev. 5th ed. 1979). See White, 322 U.S. at 699-700; Bellis, 417 U.S. at 88. See also Wilson, 221 U.S. at 377 (a corporate officer cannot rely on the fifth amendment to justify refusal to produce subpoenaed records); Dreier v. United States, 221 U.S. 394 (1911) (subpoena directed at individual corporate officer to produce corporate records upheld); Boyd, 116 U.S. at 630, 638 (privilege applies to business records of a sole proprietor and to personal documents containing more intimate information about the individual's private life).

17. Boyd, 116 U.S. at 617, 630; Couch, 409 U.S. at 322; Bellis, 417 U.S. at 88.
18. A partnership is an association between two or more persons to carry on, as co-owners, a business for profit. The two outstanding features of a general partnership are unlimited liability of each member for all debts of the business and implied authority of each member to bind the firm as to outsiders by any act within the normal scope of the particular business. Partnerships are not subject to taxation. Partnership income, gains and losses are reported by the partners on their personal tax returns. UNIFORM PARTNERSHIP ACT §§ 6(1), 9(1), 15 (1914).
19. See supra note 5.
20. The fifth amendment protects only natural persons. See supra note 15.
22. White, 322 U.S. at 701.
23. Hale, 201 U.S. at 57-58, 69-70 (Secretary-Treasurer of a corporation was subpoenaed to testify and produce corporate records in a grand jury antitrust hearing); Couch, 409 U.S. at 328; Johnson, 228 U.S. at 458 ("A party is privileged from producing evidence but not from its production."); Fisher v. United States, 425 U.S. 391, 400 (1976).
2. Compulsion

The creation or surrender of incriminating documents must be effected by some type of compulsion;24 the fifth amendment does not protect the voluntary creation or surrender of such records.25 Typically, compulsion results from the government's regulatory or law enforcement interests. Governmental compulsion may take the form of a subpoena duces tecum,26 a search warrant,27 or an administrative summons.28 Compulsion may be directed at parties to civil or criminal litigation, non-party witnesses who are deposed or asked to testify in such cases, and parties in possession of documents pertaining to a grand jury inquiry.29

Only a person who is compelled to be a witness against himself,


26. A subpoena duces tecum commands “the person to whom it is directed to produce the books, papers, documents or other objects [identified] therein.” FED. R. CRIM. P. 17(c). Although probable cause is not a prerequisite for obtaining a subpoena, the items to be produced must be described with particularity in order for a subpoena to issue. Id. For a detailed discussion of the subpoena duces tecum, see Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States, 95 HARV. L. REV. 683 (1982).

27. A search warrant is a written order authorizing the search and seizure of any property that constitutes evidence of a crime. FED. R. CRIM. P. 41(c)(1). “No warrants shall issue but upon probable cause supported by oath, affirmation, and particularity describing the place to be searched and the persons or things to be seized.” U.S. CONST. amend. IV. See Andresen, 427 U.S. at 473-74, which addressed the issue of whether a search warrant could be used to reach business records which are immune from subpoena due to the fifth amendment. The Supreme Court stated that although compliance with a subpoena may constitute a compulsory authentication of incriminating information which warrants fifth amendment protection, “a seizure of the same material by law enforcement officers differs in a crucial respect — the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.” Id.


or to perform some assertive act, can claim the privilege.\textsuperscript{30} A person who is potentially incriminated by the disclosure of requested information cannot assert the privilege on the basis of compulsion directed at a party who has possession of the documents. The fifth amendment privilege is only available when compulsion threatens to cause self-incrimination.

3. Self-Incrimination

Self-incrimination results when the subpoenant is compelled to produce evidence which could lead to the discovery of his own criminal conduct.\textsuperscript{31} Consequently, production of such evidence by anyone other than the subpoenant does not constitute self-incrimination and cannot be used to invoke fifth amendment protection.\textsuperscript{32} Evidence incriminates a person if it is direct proof of his criminal conduct or provides a link in the chain of evidence needed to establish his crime.\textsuperscript{33} Incriminating evidence may take the form of either oral statements or physical evidence such as documents.\textsuperscript{34} A person is entitled to assert the fifth amendment in order to avoid production of requested evidence if a mere threat of self-incrimination exists.\textsuperscript{35}

The standard for determining if the production of evidence has sufficient incriminating potential to justify a fifth amendment claim was established in \textit{Hoffman v. United States}.\textsuperscript{36} In that case, the Supreme Court held that the fifth amendment may be invoked if there is "reasonable cause to apprehend danger" of self-incrimination from

\begin{itemize}
\item \textsuperscript{30} See supra note 24. Assertive conduct is an act intended as a substitute for oral or written verbal expression. See Arenella, \textit{Schmerber and the Privilege Against Self-Incrimination: A Reappraisal}, 20 AM. CRIM. L. REV. 31, 42-43 (1982).
\item \textsuperscript{31} Id., supra note 29, at 477.
\item \textsuperscript{32} See supra note 23. For present purposes, this comment will generally refer to the subject of any government compulsion as "the subpoenant."
\item \textsuperscript{33} Id. See also \textit{Hoffman v. United States}, 341 U.S. 479, 486 (1951) (petitioner charged with being a known underworld character and racketeer with a 20 year police record refused to answer questions about his present occupation, connections and knowledge of the whereabouts of a fugitive witness).
\item \textsuperscript{34} \textit{Boyd}, 116 U.S. at 633. The \textit{Boyd} Court extended the fifth amendment privilege against compulsory self-incrimination to protect the individual from compelled production of documents as well as from compelled oral testimony. See \textit{Heidt}, supra note 29, at 477.
\end{itemize}
compliance with the government's request for evidence. The question of whether providing the requested information could incriminate a witness must be decided by the court.

Courts have difficulty assessing the incriminating impact of compelled disclosures because the judge is often unfamiliar with the status of an investigation and the nature of the evidence accumulated by the prosecution. For example, in private civil cases, the court must decide if requested information is potentially incriminating because the government may subsequently bring a criminal action against the parties. In criminal cases, the court must evaluate possible incrimination when the prosecution does not know what documents the subpoenaant is suppressing.

Consequently, the court has no knowledge of the incriminating impact of the witness' compelled statement or action. "Even if the government [could identify the documents in existence], the investigation is likely to be at such an early stage that the prosecutors will not know which offenses may be prosecuted or whether . . . evidence subsequently discovered will render [presently incriminating information] a 'foregone conclusion.' " However, this lack of infor-

37. See supra notes 33 & 36. The test is not whether the witness will be prosecuted, but whether he could be prosecuted. Pillsbury v. Conboy, 459 U.S. 248 (1983).
38. The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself — his [assertion] does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if "it clearly appears" to the court that he is mistaken. Hoffman, 341 U.S. at 486 (citations omitted). See generally Glanzer, supra note 36, at 909-11.
40. Pillsbury, 459 U.S. at 261. In Pillsbury, the Court held that a witness who testified before a grand jury under a grant of use immunity could invoke the fifth amendment at a subsequent civil deposition to avoid responding to questions taken from the transcript of his prior immunized testimony. The witness was entitled to protection against: 1) repeating his prior testimony or adopting his immunized answer; 2) affirming the accuracy of the transcript of his prior immunized testimony; 3) recalling additional information responsive to the question but not disclosed in his immunized testimony; or 4) disclosing information not responsive to the question. Id. See also Heidt, supra note 29, at 482.
41. Pillsbury, 459 U.S. at 261. See, e.g., Glanzer, supra note 36, at 908 n.126. Prosecutors frequently issue broad subpoenas in the hope of obtaining evidence which is not known to exist. "The most plausible inference to be drawn from . . . broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the [accused] to become, in effect, the primary informant against himself." In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327, 335 (3d Cir. 1982), aff'd on this point sub nom., United States v. Doe, 465 U.S. 605, 613 (1984).
42. Glanzer, supra note 36, at 912.
mation may be remedied by either an in camera hearing,\(^\text{44}\) where the witness must explain his basis for asserting the privilege, or through a grant of "use immunity."\(^\text{45}\)

B. Exceptions to Fifth Amendment Protection

1. Use Immunity

Use immunity removes the threat of incrimination by forbidding the government's use of immunized testimony and related evidence against the witness in a subsequent criminal proceeding.\(^\text{46}\) "[M]any offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."\(^\text{47}\) Use immunity allows the state to compel the production of evidence from one participant in a criminal activity in order to convict his accomplices.\(^\text{48}\) Immunity must be granted only where the potential witness has a legitimate fifth amendment claim,\(^\text{49}\) and need not be granted if production of the required evidence does not threaten to incriminate the witness. Although immunized information cannot be used against the witness, prosecution is not completely barred.\(^\text{50}\)

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44. Glanzer, supra note 36, at 912. An issue is heard in camera either when the hearing is before the judge in his private chambers or when all spectators are excluded from the courtroom. BLACK'S LAW DICTIONARY, supra note 15, at 684. The judge assesses the potential for incrimination and orders production of the evidence if no real threat of self-incrimination exists. United States v. Schlansky, 709 F.2d 1079, 1081 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984).

45. See, e.g., Curcio, 354 U.S. at 124. An individual "cannot be lawfully compelled, in absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." Id. Use immunity was intended to immunize and exclude from a subsequent criminal trial only that information to which the government has expressly surrendered future use. Pillsbury, 459 U.S. at 260.

46. Note, U.S. v. Doe, supra note 24, at 1034 n.93. Protection from prosecution must be commensurate with the privilege against self-incrimination, but it need not be any greater. Thus, a witness is entitled only to protection from prosecution based on the use and derivative use of his testimony; he is not constitutionally entitled to protection from prosecution for offenses arising from the illegal transaction which his testimony concerns. See Pillsbury, 459 U.S. at 254-55; Kastigar, 406 U.S. at 462.

47. Kastigar, 406 U.S. at 446. Offenses which may not be proved practically without immunity include political bribery, extortion, consumer fraud, commercial larceny and various forms of racketeering. Id. at 447 n.15.

48. Note, supra note 13, at 372. The purpose of 18 U.S.C. § 6002 was to limit the scope of immunity to the level that is constitutionally required, as well as to limit immunity to those cases in which the Attorney General, or officials designated by him, determine that gaining the witness' testimony outweighs the opportunity for criminal prosecution of that witness. Pillsbury, 459 U.S. at 254. See infra note 53 for text of section 6002.


50. Note, supra note 13, at 372-73. This is in contrast to a state's grant of transactional immunity, which accords full immunity from prosecution for the offense to which the com-
can still proceed against the individual who was granted immunity if the prosecutor can establish his case using evidence completely independent of the immunized information.81

Since prosecution of a witness who is compelled to produce evidence may be prevented, the court may grant use immunity only with the prosecutor's approval.82 The federal immunity statutes58 provide that a prosecuting United States Attorney may request an order compelling testimony or the surrender of evidence if an indi-

53. 18 U.S.C. § 6002 provides:

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

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

(2) an agency of the United States, or

(3) either House of Congress, or a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates an order issued under this part [18 U.S.C. §§ 6001-03], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003 provides:

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

(b) A United States attorney may, with the approval of the Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest, and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.
individual refuses to provide such information based upon his right against self-incrimination. The prosecutor is entitled to request an order to compel when he believes the testimony or information may be necessary to the public interest. When an order to compel is issued, the witness must surrender the required evidence. Information compelled under the order may not be used against the witness in any criminal case, except a prosecution for perjury. Thus, use immunity resolves policy conflicts between the fifth amendment and the government's duty to protect public interests.

2. The Required Records Exception

As with use immunity, the required records exception enables the government to obtain evidence despite a valid fifth amendment claim. The required records rule allows the government to compel a person to submit records he was statutorily required to keep. The fifth amendment may not be invoked when the requested documents: 1) are required to be kept for regulatory purposes; 2) are of a type normally kept by the witness; and 3) are of a type customarily kept by the general public. This exception has given rise to the concern that the government might be allowed to exercise its regulatory power to nullify an individual's fifth amendment protection merely

55. Id. at § 6003(b)(1). Societal interests which may conflict with the fifth amendment include the need to prosecute criminals, to protect the civil interests of the victims, to enforce public laws and to collect tax revenues. See Note, supra note 13, at 372-73; Couch, 409 U.S. at 336.
57. Shapiro v. United States, 335 U.S. 1 (1948). Petitioner, a produce wholesaler, was subpoenaed to produce sale and inventory records prepared under the Price Control Act. Creation of the records was for regulatory purposes, and petitioner was not entitled to invoke his fifth amendment privilege. See also United States v. Schlansky, 709 F.2d 1079 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984). In Schlansky, a taxpayer was directed by an IRS summons to produce financial records. After inspecting the records in camera, the magistrate found that the taxpayer had no fifth amendment privilege because the requested records were voluntarily created. The fact that the content of such pre-existing documents might be incriminating did not create the privilege to withhold them. Id.
58. Grosso v. United States, 390 U.S. 62 (1968); L. TAYLOR, supra note 21, at 106. See, e.g., Mackey v. United States, 401 U.S. 667 (1971) (at petitioner's trial for tax evasion, the government used monthly waging tax forms filed by petitioner pursuant to statute); In re Doe, 711 F.2d 1187, 1191 (2d Cir. 1983) (employer's W-2 and Form 1099 are required documents for tax purposes); United States v. McCoy, 492 F. Supp. 540, 544 (M.D. Fla. 1980) (records required to be kept by licensed customshouse broker for public regulatory purposes are exempt for fifth amendment purposes); United States v. Le Page, 441 F. Supp. 824, 826-27 (N.D.N.Y. 1977) (regulations regarding cattle sales records aid public interests by helping control disease among domestic animals).
by requiring records to be kept. However, there are limits to governmental regulatory powers. The government may not impose documentation requirements unless the required records relate to public activities in which the state has a valid regulatory interest.

III. THEORIES OF FIFTH AMENDMENT PROTECTION

Although the policies reflected by the fifth amendment have remained constant since the amendment's adoption, the elements of a fifth amendment claim have been defined by changing social needs. The interpretation of these elements is presently in a state of transition. This section traces the evolution and application of modern theories of fifth amendment protection in the business context.

A. The Private Content Rule

Application of the right against self-incrimination in the context of business documents was first considered in Boyd v. United States. The Boyd Court held that the fifth amendment is violated if the government intrudes on personal privacy by compelling a person to testify or surrender private papers for use as evidence to convict him of a crime. "[I]t is the invasion of [a person's] indefeasible right of personal security, personal liberty, and private property" that constitutes the essence of the offense which violates the right against self-incrimination. Thus, under the Boyd test, the availability of fifth amendment protection turns on whether or not the contents of requested documents are private.

The Boyd "content rule" has been extended to afford fifth amendment protection in the business context. Two dominant theories of fifth amendment protection have evolved with respect to business documents: 1) the traditional "collective entity" theory which provides that record-keepers may not assert their personal fifth amendment rights to shield the documents of collective entities,

59. Shapiro, 335 U.S. at 53-54 (Frankfurter, J., dissenting).
60. See supra note 55. See also Note, In re Doe, supra note 3, at 1027.
61. 116 U.S. 630 (1886). Boyd involved a civil forfeiture proceeding by the government against two partners for fraudulently attempting to import glass without paying the prescribed import duty. The government obtained a court order directing the partners to produce a partnership invoice for a prior shipment.
62. Id. at 634-35. See generally Note, In re Doe, supra note 3, at 1022 n.11; Note, Mixed Purpose Documents, supra note 3, at 333.
64. See supra note 7. See infra text accompanying notes 66-70.
and 2) the more recently developed "testimonial communications" theory that a records custodian may invoke the fifth amendment if production of the requested evidence constitutes a testimonial communication which tends to incriminate him.

B. The Collective Entity Rule

1. Collective Entity Rationale

Under the collective entity rule, the question of whether fifth amendment protection may be invoked depends upon the type of entity involved. The collective entity rule denies fifth amendment protection to entities created by law, but affords protection to individuals and non-collective entities. The rationale for this treatment is twofold. First, since legal entities exist by virtue of state law and affect public interests, the state retains power to investigate the activities of these statutory entities to ensure they are operating within the law. The state government has a duty to regulate legal organizations to protect public interests. Secondly, and more importantly, the primary purpose of the fifth amendment is to preserve the personal privacy interests of individuals. The guarantee against compulsory self-disclosure is aimed primarily at protecting civil liberties and is not intended to protect economic interests so as to nullify government regulation of such interests.

The collective entity rationale was reaffirmed in Bellis v. United States. The Bellis Court explained that most evidence of wrongdoing by a collective entity or its representatives is usually found in the official records and documents of that organization. Extending fifth amendment protection to these impersonal records would make effective enforcement of legitimate government regulations impossible because an artificial entity can act only through its

65. See infra text accompanying notes 88-120.
66. See supra notes 14-23 and accompanying text.
67. Id. For example, natural persons or sole proprietorships are entitled to fifth amendment protection under the collective entity rule.
68. Wilson, 221 U.S. at 382-85.
69. Id.; Boyd, 116 U.S. at 630; Couch, 409 U.S. at 333.
71. 417 U.S. 85 (1974). Bellis held that a partner of a subsequently dissolved law firm could not invoke the fifth amendment in refusing to produce the partnership's financial records because the partnership had an institutional identity and the petitioner held the records in a representative, not a personal, capacity. The Bellis opinion reiterated Boyd's holding that the privilege protects the personal and business papers of the individual. Id. at 87-89.
72. Id. at 91 (citing Wilson, 221 U.S. at 384-85).
73. 417 U.S. at 91.
agents. Consequently, the only way to prevent the entity from shielding its records is to prevent its individual representatives from invoking their personal fifth amendment rights with respect to those records. Allowing a records custodian to assert fifth amendment protection would extend the privilege to the organization and shield the collective entity from governmental scrutiny.

2. The Rights of Collective Entity Record-Keepers

The Bellis Court reasoned that the privilege against self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." The Court noted that "individuals, when acting as representatives of a collective group, cannot be said to be exercising their purely personal privileges." Instead, "individuals, assume the rights, privileges, duties and obligations of the artificial entity or association of which they are agents or officers."

Accordingly, an individual forfeits his personal rights with respect to his employment as a collective entity agent. The general rule is that an individual cannot assert the privilege to avoid production of an organization's records if he is acting as a representative of the entity. This restriction is based upon the strong privacy theme underlying the collective entity rule. Since "[c]orporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach," neither the corporation nor the entity's record-keeper can invoke the fifth amendment to avoid producing requested documents. Moreover, a corporate representative must surrender subpoenaed corporate documents in his custody, even if he is a sole practitioner and the records contain information which would incriminate him personally.

The custodian does, however, retain a personal fifth amendment rights.

74. Id. at 90 (citing White, 322 U.S. at 699).
75. 417 U.S. at 90.
76. Id. (citing White, 322 U.S. at 701).
77. 417 U.S. at 90 (quoting White, 322 U.S. at 699).
78. 417 U.S. at 90.
79. Id.
80. White, 322 U.S. at 699-700.
81. Bellis, 417 U.S. at 92. See supra notes 61-63 and accompanying text.
82. White, 322 U.S. at 699-700; Bellis, 417 U.S. at 89-90.
83. Bellis, 417 U.S. at 100-01. The privilege applies only to the papers of an individual or the business records of a sole proprietor. Id. at 87-88.
privilege to refuse to orally authenticate subpoenaed documents or testify about the reasons for non-production of corporate records. A custodian “cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.” By accepting custodianship of records he forfeits his claim of privilege only with respect to the production of the records.

Thus, under the collective entity rule, the question of fifth amendment protection turns on the form of entity and the nature of evidence requested, without regard to the personal rights of the entity’s employees. In contrast, the testimonial communications rule disregards the form of entity and nature of evidence and focuses on the impact that the order to compel will have on an individual employee.

C. The Testimonial Communications Rule

1. The Assertion Requirement

The testimonial communications theory of fifth amendment protection has its roots in the landmark case of Schmerber v. California. The Schmerber Court held that the privilege “protects an accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.” Under the Schmerber test, a records custodian may assert the fifth amendment privilege on the basis of the communicative nature of the allegedly incriminating disclosure sought to be

84. Id. at 87. In situations where authentication is required, the Federal Rules of Evidence indicate that the requirement can be satisfied by the submission of “sufficient evidence supporting a finding that the matter in question is what the proponent claims.” Fed. R. Evid. 901(a).
85. Curcio, 354 U.S. at 123-25. Curcio held that the act of producing evidence in response to a subpoena constitutes compulsion because compliance with a subpoena tacitly concedes the existence of the papers demanded, their possession, and that the records surrendered were those requested. Id. at 125. Disclosing the reasons for non-production would have the same effect as compliance with the subpoena. Thus, the record-keeper is entitled to invoke fifth amendment protection.
86. Id. at 124.
87. Id. at 124-25. See Wilson, 221 U.S. at 380.
88. 384 U.S. 757 (1966). Schmerber involved the analysis of petitioner's blood sample, which was drawn over his objection, after his arrest for driving under the influence of alcohol. The Court declined to extend protection of the privilege to the taking of the blood sample, stating that the blood test “although an incriminating act of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing” and thus was not privileged. Id. at 765.
89. Id. at 761.
compelled.\textsuperscript{90} The privilege against self-incrimination reaches the accused's communications whatever form they take.\textsuperscript{91} Such communications may consist of assertive conduct as well as oral or written verbal statements.\textsuperscript{92}

The Court distinguished compelled assertive conduct from "compulsion which makes a suspect or accused the source of 'real or physical evidence,'"\textsuperscript{93} which does not violate the right against self-incrimination. For example, the Court has held that compelled production of blood samples,\textsuperscript{94} handwriting,\textsuperscript{95} voice exemplars\textsuperscript{96} or participation in a line-up\textsuperscript{97} are merely presentations of evidence for identification which do not warrant fifth amendment protection. In these cases, production of evidence does not require the accused to act and therefore does not constitute assertive conduct.

The \textit{Schmerber} Court's recognition that assertive statements or conduct in compliance with a subpoena may be testimonial in nature has expanded the definition of incriminating testimony for fifth amendment purposes.\textsuperscript{98} Therefore, it was inevitable that courts would reconsider earlier doctrines such as the \textit{Boyd} content rule.\textsuperscript{99} That reconsideration occurred in \textit{Fisher v. United States}.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{90} \textit{In re Grand Jury Matter (Brown)}, 768 F.2d 525, 528 (3d Cir. 1985) (en banc).
\item \textsuperscript{91} \textit{Schmerber}, 384 U.S. at 763-64.
\item \textsuperscript{92} For example, some nonverbal conduct, such as pointing to identify a suspect in a lineup is the equivalent of words, assertive in nature, and is considered a statement. Conduct that is intended as an assertion is treated as a statement. Advisory Committee's Note on FED. R. EVID. 801(a), \textit{reprinted} in \textit{J. Kaplan \& J. Waltz, Evidence A-88 \& A-89} (5th ed. 1984). \textit{See also Couch}, 409 U.S. at 328 (Marshall, J., dissenting) (the person complying with the subpoena "implicitly testifies that the evidence he brings forth is in fact the evidence demanded").
\item \textsuperscript{93} \textit{Schmerber}, 384 U.S. at 764.
\item \textsuperscript{94} \textit{See supra} note 88.
\item \textsuperscript{95} \textit{United States v. Dionisio}, 410 U.S. 1, 5-7 (1973).
\item \textsuperscript{96} \textit{United States v. Wade}, 388 U.S. 218, 222-23 (1967).
\item \textsuperscript{97} \textit{Gilbert v. California}, 388 U.S. 263, 265-67 (1967).
\item \textsuperscript{98} \textit{See supra} notes 88-92 and accompanying text.
\item \textsuperscript{99} \textit{In re Grand Jury Matter (Brown)}, 768 F.2d at 526-27. \textit{See also} \textit{U.S. v. Doe}, \textit{supra} note 24, at 1028-30.
\item \textsuperscript{100} 425 U.S. 391 (1976). \textit{Fisher} involved proceedings for enforcement of an IRS summons directed at the taxpayer's attorneys for production of accountant's records which had been transferred to the attorneys in connection with an IRS investigation. The Court held that compelled production of documents from the taxpayer's attorneys did not implicate the taxpayer's personal fifth amendment rights. \textit{Id.} at 398-401.
\end{itemize}
2. The Testimonial Aspects of Surrendering Documents

In *Fisher*, the Court expressly shifted the focus of the fifth amendment analysis from the private contents\(^{101}\) of requested documents to the testimonial effects of the act of producing those records.\(^{102}\) The *Fisher* Court found that the act of surrendering evidence in response to a subpoena had communicative aspects of its own, wholly aside from the contents of the papers produced.\(^{103}\) The act of production in compliance with a subpoena may constitute a record-custodian’s personal testimony or implied admission that: 1) the requested documents exist; 2) the custodian has possession or control of the records; or 3) the custodian believes the records surrendered to be the documents described in the subpoena.\(^{104}\)

However, compulsion of these implied admissions alone does not warrant fifth amendment protection with respect to the act of production. "[T]he Fifth Amendment does not independently prescribe compelled production of every sort of incriminating evidence, but applies only when the accused is compelled to make a testimonial communication that is incriminating."\(^{105}\) Thus, the *Fisher* test consists of three elements: 1) compulsion;\(^{106}\) 2) a testimonial communication which may take the form of either oral testimony, authentication of the contents of documents,\(^{107}\) or an assertive act;\(^{108}\) and 3) incrimination, which results when the documents surrendered are an important evidentiary link in the government’s case.\(^{109}\)

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102. 425 U.S. at 409-10. The Court stressed that the fifth amendment “protects against compelled self-incrimination, not the disclosure of private information.” See also *In re Grand Jury Matter (Brown)*, 768 F.2d at 527-28.
103. 425 U.S. at 410.
104. *Id.* at 410, 412. See also *Curcio*, 354 U.S. at 125; *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984), *cert. denied*, 469 U.S. 932 (1984). In *Ghidoni*, the Eleventh Circuit applied the testimonial communications rule as interpreted in *Fisher*. Petitioner was accused of tax evasion and sought to invoke the fifth amendment to avoid production of bank records. The court held that signing a directive authorizing a bank to disclose records was not testimonial as it did not imply that the records existed, but only that if they existed they would be surrendered. *Id.* at 817-18.
106. See *supra* notes 24-30 and accompanying text.
107. 425 U.S. at 408-09.
108. *Id.* See also *supra* note 30, 92.
3. *United States v. Doe: A Departure from the Collective Entity Rule*

Fisher's classification of the act of production as "testimonial" was reaffirmed in *United States v. Doe*,\(^\text{110}\) where the testimonial communications theory was applied to a sole proprietorship.\(^\text{111}\) *Doe* confirmed the Court's departure from the *Boyd* content analysis by finding that the fifth amendment's focus is compelled self-incrimination,\(^\text{112}\) not protection of privacy, which is merely incidental to the fifth amendment privilege.\(^\text{113}\) The Court explained that business records subpoenaed from a sole proprietorship are not privileged per se; rather, it is the incriminating act of production that is privileged.\(^\text{114}\) In *Doe*, the government had conceded that the subpoenaed materials were or might have been incriminating;\(^\text{115}\) therefore, the Court held the proprietorship's record-keeper could not be compelled to produce business records without a grant of statutory use immunity.\(^\text{116}\)

Consequently, the Court's application of the testimonial communications test in *Doe* has called the status of the collective entity rule into question.\(^\text{117}\) Under traditional collective entity analysis, a sole proprietorship would be treated as an individual with the right to assert a fifth amendment claim to avoid producing private, personal documents.\(^\text{118}\) However, the *Doe* Court expressly excluded privacy from fifth amendment protection, thereby eliminating an important element of the collective entity test.\(^\text{119}\) Yet, the *Doe* decision does not expressly state that the collective entity rule is superseded by the testimonial communications rule, and, given the significance of the issue, it may be unreasonable to assume the *Doe* Court implic-
itly intended such a replacement. This uncertainty regarding the scope of the *Doe* decision has resulted in conflicting lower court decisions addressing the question of fifth amendment rights with respect to business records.

IV. RECENT APPLICATIONS OF THE FIFTH AMENDMENT PRIVILEGE

A. The Testimonial Communications Rule is Limited to Sole Proprietorships

The confusion as to when fifth amendment protection may be invoked is reflected in the Sixth Circuit’s sharply divided decision in *In re Grand Jury Proceedings (Morganstern)*. In that case, the majority adopted a strict interpretation of the collective entity rule, while the dissent took the opposite view that the testimonial communications test should apply.

The majority adhered to the view that an individual cannot rely on the fifth amendment privilege to avoid producing a collective entity’s records which he holds in a representative capacity, “even if those records might incriminate him personally.” The court reasoned that since a custodian of corporate or partnership records acts only in a representative capacity, production of the records is not a testimonial act warranting protection by the privilege against self-incrimination. The production communicates nothing more than the fact that the person producing the records is a representative of a business entity. However, “if the government later attempts to implicate [the custodian] on the basis of the act of production, . . .

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120. *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d at 56.
122. 771 F.2d at 145 (quoting *Bellis*, 417 U.S. at 88).
123. 771 F.2d at 147-48.
124. *Id.* at 148. Other courts which have considered the survival of the collective entity rule have reached the same conclusion. In *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir. 1984), *cert. denied*, 469 U.S. 819 (1984), the first post-*Doe* decision, the Tenth Circuit held that an attorney holding files as a client’s representative could not assert a fifth amendment privilege. The court stated that the recent Supreme Court decisions did not extend the privilege to records or other collective entities. *Id.*

Similarly, the Ninth Circuit applied the collective entity rule in *United States v. Malis*, 737 F.2d 1511 (9th Cir. 1984). In *Malis*, petitioner claimed that a partnership existed solely as a tax reporting device for his sole practitioner law practice and attempted to invoke fifth amendment protection to avoid producing partnership records. The court noted that tax treatment is irrelevant for determining fifth amendment availability. Petitioner was acting in his representative capacity and could not assert the fifth amendment to avoid producing the records of a collective entity. *Id.*
such proof would seek to add testimonial value to the otherwise testimony-free act of production." Thus, the majority found there were no testimonial aspects to an agent's compelled disclosure of corporate records.

The majority concluded that despite the shift in emphasis from the privacy interest in the contents of subpoenaed documents to the testimonial act of production, the testimonial communications rule did not extend fifth amendment protection to the production of the records of a corporation or other collective entity. The testimonial communications rule, in the majority's opinion, is a new limit to the fifth amendment protection of natural persons who are compelled to produce non-oral evidence. Under this view, individuals and sole proprietorships may claim the privilege against compelled production of documents only when the act of production is "testimonial." This new prong of fifth amendment analysis does not apply to collective entities or their agents because such entities have no fifth amendment rights. Consequently, the collective entity rule prevents a corporate records custodian from relying on the act of production as a potentially incriminating act which justifies a fifth amendment claim.

In contrast, Judge Jones' dissent viewed the testimonial communications rule as a new additional application of the right against self-incrimination, which the law did not previously recognize as being potentially testimonial. Judge Jones argued the testimonial communications rule established that the compelled act of producing documents may be testimonial and self-incriminating, and is therefore privileged under the fifth amendment. The dissent concluded that "[i]f the act of producing documents involves compelled self-incrimination of the person holding the documents, the government must either grant use immunity to the custodian of the documents or

125. 771 F.2d at 148 (quoting Schlansky, 709 F.2d at 1083).
126. 771 F.2d at 145.
127. Id.
128. Id. at 147-48.
129. Id. at 146 (citing In re Grand Jury Empanelled March 8, 1983, 722 F.2d 294 (6th Cir. 1983), cert. dismissed sub nom. Butcher v. United States, 465 U.S. 1085 (1984)). In that case, appellant was subpoenaed to produce the financial records of eight companies. The district court refused to consider in camera, an affidavit explaining why the act of production would be testimonial and incriminating. The court held that the act of producing the records of an entity merely acknowledges that the subpoenaed believes that the requested corporate documents exist. 771 F.2d at 146.
130. 771 F.2d at 147.
131. Id. at 148-49 (Jones, J., dissenting).
132. Id. at 148.
forego compelling him to produce them." Thus, the dissent looked to a corporate record-keeper’s personal rights, while the Sixth Circuit’s majority focused on the nature of the entity involved, to determine if fifth amendment protection was available.

The Eighth Circuit agreed with the Sixth Circuit’s majority in *In re Grand Jury Subpoena (85-W-71-5).* In that case, an attorney was subpoenaed to surrender corporate records which were given to her by her client, a former corporate officer. The court found that production of corporate records by the officer or his attorney was an action taken in the client’s representative capacity as either a former officer, or trustee, of the now defunct corporation, not as an individual. Accordingly, the court held that the records must be produced because the act of production is not testimonial unless the government attempts to use the surrendered evidence against the corporate officer.

The Eleventh Circuit also followed the Sixth Circuit’s lead in *In re Grand Jury Subpoena Duces Tecum (Ackerman).* That case involved a grand jury investigation of the pharmaceutical corporation of which appellant and his brother were officers and the sole shareholders. Appellant attempted to invoke his right against self-incrimination after being served with a subpoena addressed to the corporate records custodian. The court stated that the *Doe* decision was expressly limited to the business records of a sole proprietorship and held that appellant could not invoke the fifth amendment to withhold the documents of a collective entity which are held in his representative capacity.

Thus, the Sixth, Eighth and Eleventh Circuits cling to the traditional collective entity theory. These courts view the right against self-incrimination as a personal privilege which is unavailable to corporations and individuals acting on behalf of corporations.

### B. Subpoenants Who are Personally Incriminated are Entitled to Fifth Amendment Protection

Similarly, the Second Circuit distinguished the fifth amendment treatment of corporations from that of sole proprietorships in *In re*
Two Grand Jury Subpoenae Duces Tecum. The Second Circuit court’s test for invoking fifth amendment protection depends upon the identity of the subpoenant. In the case where a corporation is the subpoenant, the court reasoned that the record-keeper does not attest to his personal possession of subpoenaed records, but to their existence and possession by the corporation. Conversely, when an individual is personally compelled to produce corporate documents, fifth amendment protection is available if the act of production would result in self-incrimination.

The court noted that neither Fisher nor Doe expressly overruled the collective entity rule, and concluded that “[t]here is simply no situation in which the fifth amendment would prevent a corporation from producing corporate records, for the corporation itself has no fifth amendment privilege.” The corporation has a continuing obligation to comply with a subpoena even if its records custodian would be personally incriminated by producing the requested evidence. However, the court indicated that the custodian need not surrender the documents personally. If the record-keeper would be incriminated by producing the requested documents, the corporation should simply appoint another representative to produce them.

Even if the custodian was entitled to fifth amendment protection, the privilege does not protect the custodian from another employee’s production of the records. Accordingly, the Second Circuit held that the requested documents must be surrendered because the subpoena in In re Two Grand Jury Subpoenae was directed at the corporation and not the record-keeper or another specified individual.

The court examined the application of this test in a prior decision where the government was prevented from compelling a

139. 769 F.2d 52 (2d Cir. 1985) (involved a custodian of subpoenaed documents who was the majority shareholder, sole operating officer, and director of a corporation which had only three shareholders).
140. Id. at 59.
141. Id. at 57.
142. Id.
143. Id. at 57-59.
144. Id. at 57 (quoting United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984)).
145. 769 F.2d at 57.
146. Id.
147. Id.
148. Id. at 59.
149. In re Grand Jury Subpoena Duces Tecum, 722 F.2d 981, 986 (2d Cir. 1983). The former president of a corporation retained certain corporate records after leaving its employment. The former president was the target of a grand jury investigation of alleged fraud in the corporation’s financial statements which were filed under Chapter 11 of the Bankruptcy Reform Act. Id.
former officer from producing corporate records which he had taken without authorization.\textsuperscript{150} In \textit{In re Grand Jury Subpoena Dues Tecum}, the subpoeantar's production of the requested records clearly qualified as testimony incriminating him for having taken those records.\textsuperscript{151} Under the Second Circuit's test, the officer was no longer a corporate representative and only he could produce the records; therefore he was entitled to fifth amendment protection.\textsuperscript{152}

The Second Circuit reaffirmed its view in \textit{In re Grand Jury Subpoenas Issued to Thirteen Corporations},\textsuperscript{153} where the appellee sought to invoke the fifth amendment to avoid producing documents of thirteen corporations which were suspected of issuing fraudulent invoices to the target of a grand jury investigation. The appellee claimed that since the government had little knowledge about the corporations' records, his production of records would be testimonial in nature and could incriminate him.\textsuperscript{154} The appellee further argued that recent dissolution of the corporations had eliminated the option of appointing another agent, who would not be incriminated, to comply with the subpoenas.\textsuperscript{155} However, the subpoenas were directed at the corporations, not the appellee. Therefore, the corporation was required to provide representatives or outside agents to comply with the government’s demands.\textsuperscript{156} Thus, the Second Circuit has consistently held that corporations and their agents are not entitled to fifth amendment protection where compulsion is directed at the corporation.

The Fourth Circuit adopted the Second Circuit's approach in \textit{United States v. Lang}.\textsuperscript{157} In \textit{Lang}, the president of a corporation who was also a 50\% shareholder, was under investigation by the IRS for diverting corporate funds into his personal account. The IRS issued a summons to the corporate president for corporate records, and

\begin{itemize}
\item \textsuperscript{150} 769 F.2d at 59.
\item \textsuperscript{151} \textit{Id}.
\item \textsuperscript{152} \textit{Id}.
\item \textsuperscript{153} 775 F.2d 43 (2d Cir. 1985). Pursuant to a grand jury investigation of possible tax evasion and other offenses, the grand jury issued subpoenas \textit{duces tecum} to thirteen corporations. Petitioner was connected to the corporations through bank records and acted as a representative of several of the corporations. \textit{Id}.
\item \textsuperscript{154} \textit{Id} at 45. \textit{See supra} note 41.
\item \textsuperscript{155} 775 F.2d at 47.
\item \textsuperscript{156} \textit{Id} at 48. The court stated that "[t]he principals involved in these corporations have received the benefits of the corporate form and they must also accept its obligations. . . . A contrary holding would allow a corporation, whose controlling figures had involved it in criminal activity to avoid production of corporate documents by virtue of that criminality. . . ." \textit{Id}.
\item \textsuperscript{157} 792 F.2d 1235 (4th Cir. 1986).
\end{itemize}
the president sought to avoid production by invoking the fifth amendment. The court found that this was not "a case where the custodian [was] automatically incriminated by demonstrating his knowledge or control of the records . . . nor [was] this a case in which the government was clearly subpoenaing the records to have the custodian . . . authenticate them through production." Accordingly, the court held that enforcement of the summons would not violate the president's fifth amendment rights.

The court stated that even in rare circumstances where production of corporate documents amounts to testimonial incrimination, the basic rule of Bellis continues after Doe, and a corporate representative or agent cannot claim a fifth amendment privilege. The individual has a personal fifth amendment privilege, but the corporation must comply with the summons through some other person.

C. The Testimonial Communications Rule Provides Equal Treatment for All Record-Keepers

Only the Third Circuit has found that the Supreme Court decisions afford identical protection to corporate records custodians and other record-keepers for fifth amendment purposes. In In re Grand Jury Matter (Brown), the Third Circuit's majority reconciled its view with the collective entity rationale by reasoning that the collective entity test relates only to the contents of documents. Under this theory, a records custodian is denied fifth amendment protection only with respect to the incriminating contents of an entity's documents. The court explained that prior Supreme Court decisions implementing the collective entity rule did not consider the often communicative and incriminating act of production. Thus, the testimonial act of production theory does not supersede or conflict with the collective entity rule.

The court applied the testimonial communications test in In re Grand Jury Matter (Brown), stating that the government cannot compel a corporate records custodian to produce corporate records if the act of production would personally incriminate him. Accord-

158. Id. at 1241-42.
159. Id. at 1240-41.
161. 768 F.2d 525 (3d Cir. 1985) (the sole shareholder of a professional corporation was subpoenaed to produce corporate records and testify to their authenticity).
162. Id. at 528.
163. Id. at 528 n.2.
164. Id.
ingly, the Third Circuit held that authentication of subpoenaed records could not be compelled because the lower court failed to either allow petitioner to establish that production and authentication would cause self-incrimination, or to grant him statutory use immunity. 168

Judge Becker's concurring opinion rejected the majority's position that collective entity custodians have fifth amendment rights identical to those of non-collective entity custodians. 166 Like the Sixth and Fourth circuits, the concurrence argued that the policy of the collective entity rule, which is against allowing corporate custodians to protect the corporation from disclosure, survives the emergence of the testimonial communications rule. 167 Judge Becker's test for fifth amendment protection is based upon the nature of evidence requested and the entity involved. 168 Under the Becker test, non-collective entity custodians can claim a fifth amendment privilege with respect to both oral testimony and the act of production, but collective entity custodians can claim the privilege only with respect to oral testimony. 169 Thus, in accordance with the traditional collective entity rationale, a corporate records custodian, by accepting his corporate position, is deemed to have waived fifth amendment protection for testimonial incrimination inherent in the act of production. 170

Judge Garth's dissent favors an even more strict interpretation of the traditional collective entity rule. 171 The dissent noted that a long line of cases has established that collective entity custodians are not entitled to any fifth amendment protection with respect to corporate records. 172 Judge Garth stated the real issue was whether a one-man corporation should be treated as a sole proprietorship, or a corporation with respect to fifth amendment rights. 173 The dissent concluded that until the Supreme Court explicitly rules otherwise, a corporation should be treated as a collective entity regardless of its size. 174

The majority view in Brown also prevailed in a subsequent

165. Id. at 529.
166. Id. at 530 (Becker, J., concurring).
167. Id.
168. Id. at 530-31 n.3.
169. Id. at 530.
170. Id. See White, 322 U.S. at 699; Wilson, 221 U.S. at 378-79.
171. 768 F.2d at 532 (Garth, J., dissenting).
172. Id.
173. Id.
174. Id. at 539-40.
case. In re Grand Jury Empanelled 3-23-83\textsuperscript{175} involved a grand jury investigation of a conspiracy to defraud insurance companies by submitting false medical treatment reports in support of insurance claims. Appellant, an attorney, was held in contempt of court for refusing to produce the records of a medical corporation. The court held that “the custodian of corporate records who is subpoenaed to produce them cannot be held in contempt for failure to do so if he demonstrates that such production would in fact tend to incriminate him.”\textsuperscript{176} Thus, the Third Circuit has adopted a liberal view of fifth amendment treatment by extending the right against self-incrimination to records custodians of all business entities.

V. THE NEED FOR CONSISTENT APPLICATION OF THE FIFTH AMENDMENT PRIVILEGE

The foregoing discussion illustrates the lower courts’ search for a convincing rationale for fifth amendment protection with respect to business documents.\textsuperscript{177} The collective entity rule represents the long-standing proposition that the right against self-incrimination should not be extended to individuals so as to allow collective entities, such as corporations, to shield their records from governmental scrutiny. However, the testimonial communications rule protects an individual against compelled self-incrimination despite his status as a corporate agent. The Supreme Court must resolve the tension between these

\textsuperscript{175} 773 F.2d 45 (3d Cir. 1985) (per curiam).

\textsuperscript{176} Id. at 47.

\textsuperscript{177} One lower court interpreted the conflict between the Sixth and Third circuits as follows:

Notwithstanding the apparent disagreement between the Third and Sixth circuits as to whether Doe's “act-of-production” doctrine applies to [a collective entity's record custodian], it is significant that the Sixth Circuit tempered its holding — that no such privilege existed — by noting that [a subsequent governmental attempt to use the act of production against the custodian would make the act testimonial]. . . . Thus, the Sixth and Eighth Circuits, though not requiring a grant of immunity prior to the production of corporate records by an individual custodian, would limit the risk of production with a promise of de facto use immunity in any subsequent criminal prosecution of the custodian.


*See also* In re Grand Jury Subpoena Duces Tecum (Ackerman), 795 F.2d 904 (11th Cir. 1986), where the Eleventh Circuit attempted to distinguish the Third Circuit's decision in *In re* Grand Jury Matter (Brown). The court stated that Ackerman was plainly acting in a representative capacity as a custodian of the corporation's documents, whereas the individual subpoenaed in *Brown* was an accountant who had incorporated his one-man practice. "Whether an individual operating under such a business structure would be considered as holding documents in a personal or representative capacity we need not now decide." Id. at 907.
two policies if fifth amendment protection is to be applied uniformly in the lower courts.

The collective entity rule, as indicated in Figure 1 below, is skewed in favor of the government’s regulatory interests.

COLLECTIVE ENTITY TEST

PRONG 1
WHO IS BEING COMPELLED TO PRODUCE EVIDENCE?

COLLECTIVE ENTITY
CUSTODIAN

INDIVIDUAL

PRONG 2
DOES THE COMPELLED DISCLOSURE INCriminate THE INDIVIDUAL?

NO

YES

NO FIFTH
AMENDMENT
RIGHT

PRONG 3
IS VERBAL DISCLOSURE
COMPelled?

NO

YES

NO FIFTH
AMENDMENT
RIGHT

THE ENTITY MUST
APPOINT ANOTHER
AGENT TO PRODUCE
THE REQUESTED
DOCUMENTS

YES

NO FIFTH
AMENDMENT
RIGHT

THE WITNESS HAS A FIFTH
AMENDMENT RIGHT, BUT MAY
BE COMPELLED TO PRODUCE
THE EVIDENCE IF AN ORDER
FOR STATUTORY IMMUNITY
ISSUES.

FIGURE 1

This approach fails to adequately acknowledge that disclosure of corporate information could jeopardize the personal rights and civil liberties of record-keepers who are compelled to surrender the requested information. The collective entity rule does not consider the possibility that a record-keeper may be personally incriminated by the compelled act of producing evidence, and ignores the fact that compelled disclosure can incriminate a person regardless of his status as a sole proprietor or corporate employee. The rule does, however, recognize a custodian’s personal fifth amendment privilege to refuse

178. Figure 1 (prong 3). See supra notes 71-76 and accompanying text.
to orally authenticate subpoenaed documents if authentication would
result in self-incrimination. Thus, under the collective entity rule,
a record-keeper may assert a fifth amendment claim only if com-
pelled to make a verbal disclosure which would personally incrimi-
nate him.

In contrast, the testimonial communications rule illustrated in
Figure 2 reflects the fact that collective entities consist of individuals
who hold personal constitutional rights.

The testimonial communications test focuses on the impact that dis-
closure will have upon the individual who is compelled to surrender
the requested information. The testimonial communications rule

179. See supra notes 84-87 and accompanying text.
180. Figure 2 (prong 2). See supra text accompanying notes 88-92.
181. See supra notes 89-92 and accompanying text.
differs from the collective entity rule in two important respects: 1) the testimonial communications rule looks beyond business form to the impact that a compelled disclosure will have on the specific employee who must surrender the evidence; and 2) the testimonial communications test includes assertive conduct, such as the act of producing evidence, in the definition of testimony.

The emergence of the testimonial communications test undercuts the proposition that fifth amendment protection turns on the nature of entity involved. In a series of recent decisions, the Supreme Court found the testimonial nature of evidence to be the basis for asserting the privilege against self-incrimination. The Schmerber decision essentially redefined what constitutes testimony for fifth amendment purposes. In Schmerber, the Court expanded the scope of the right against self-disclosure to include any compelled testimonial communication which threatens to incriminate an individual. The Fisher Court then announced that the act of producing subpoenaed documents falls within the definition of a "testimonial communication and is privileged." Finally, Doe represents the Court's first application of the testimonial communications theory in a business setting. These decisions demonstrate the transition to greater recognition of a record-keeper's individual rights.

However, this trend does not mean the testimonial communications approach supersedes the collective entity theory; these two approaches are not mutually exclusive. The fact that a corporation has no fifth amendment rights does not necessarily deprive the entity's employees of their personal fifth amendment rights. The test set forth below combines the beneficial aspects of the collective entity and testimonial communications rules, resulting in a more equitable approach to fifth amendment analysis.

VI. PROPOSAL: EQUAL TREATMENT FOR ALL BUSINESS RECORD CUSTODIANS

The proposed test for fifth amendment protection reflects the
Third Circuit's view\(^\text{190}\) that the testimonial communications analysis is applicable to both collective entity and non-collective entity record-keepers, and incorporates the Second Circuit's distinction between collective entity and non-collective entity subpoenaants.\(^\text{191}\) The right against self-incrimination is a fundamental right which transcends a person's status as a corporate officer or employee. Business form should not be the deciding factor of fifth amendment availability. Rather, fifth amendment protection should be triggered when compelled production of information constitutes a testimonial communication which tends to personally incriminate the subpoenaant.\(^\text{192}\)

As Figure 3 indicates, the first step of the proposed test is identification of the party who is subject to governmental compulsion.\(^\text{193}\)

\(^{190}\) See supra notes 161-65 and accompanying text.
\(^{191}\) See supra notes 139-48 and accompanying text.
\(^{192}\) See supra text accompanying note 164.
\(^{193}\) Figure 3 (prong 1).
This identification is important at the outset of the analysis because a corporate subpoenaant has flexibility to select an employee or agent to act on its behalf, 194 whereas a records custodian who is subpoenaed must personally surrender the requested documents. 195

After identifying the subpoenaant, the court must determine whether that party's surrender of the requested information constitutes a testimonial communication. 196 If the surrender does not involve an assertive statement or assertive conduct, the witness may not invoke the fifth amendment privilege to avoid producing the requested information. Conversely, if production constitutes a testimonial communication, the court must advance to the next prong of the

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194. See supra note 146 and accompanying text.
195. See supra notes 131-33 and accompanying text.
196. Figure 3 (prong 2).
analysis.

The third prong reflects the fact that collective entities have no fifth amendment rights, and provides slightly different treatment depending upon the identity of the subpoenaant. If a corporate records custodian is personally subpoenaed and would be personally incriminated by producing the requested evidence, the government cannot compel production without a grant of statutory use immunity. However, when the corporation is subpoenaed and the records custodian would be personally incriminated by producing subpoenaed documents, the corporation must attempt to appoint another representative to produce the requested information. If no agent or employee of the organization can produce the information without being personally incriminated, the person in possession of the documents may invoke his right against self-incrimination, and the government can only compel production by granting use immunity to that individual.

Use immunity allows the government to obtain records required for regulatory purposes without compelling the records custodian to incriminate himself. Similarly, directing compulsion at the corporation rather than a specific individual allows the entity to appoint an agent, who will not be personally incriminated, to surrender requested information. Thus, the government’s need for regulatory information can be satisfied without invading the record-keeper’s right against self-incrimination.

VII. Conclusion

The right against self-incrimination has historically been denied to business record-keepers acting on behalf of a collective entity. A corporate agent may not withhold records on the grounds that his corporation may be incriminated — the purpose of the fifth amendment is to protect individuals from self-incrimination. Accordingly, early courts were hesitant to recognize the personal rights of corporate agents for fear that such recognition would shield the corporation from regulation. More recent decisions reflect the analytical changes necessary to reconcile this conflict between the right against

197. *Id.* (prong 3).
198. *Id.* See *supra* notes 144-52 and accompanying text.
199. For example, a corporation consisting of a sole practitioner would be compelled to personally produce the requested information.
200. See *supra* notes 48-51 and accompanying text.
201. See *supra* notes 53-56 and accompanying text.
202. See *supra* notes 145-47 and accompanying text.
self-incrimination and the government's regulatory interests. The equitable resolution to this problem is to grant fifth amendment protection to any individual who may be personally incriminated by a compelled disclosure. The testimonial communications rule provides a mechanism whereby the government can execute its regulatory duties without overriding the personal rights of corporate agents.

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