COMMENTS

FIFTH AMENDMENT PROTECTION AND THE PRODUCTION OF CORPORATE DOCUMENTS

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As the power and predominance of corporations and other collective entities has grown over the past one hundred years, courts have struggled to formulate an effective procedure for investigating the crimes of collective entities that will not violate the rights of the individuals acting within those organizations. Although the courts have consistently held that corporations and other collective entities are not considered "persons" for fifth amendment purposes, and therefore are not entitled to the amendment's protections, the individuals acting within the organizations do retain their constitutional rights. In addition, although collective entities are capable of committing crimes and being punished for them, in reality the individuals within those entities are actually committing the crimes. The disparity between the rights of collective entities and the individuals acting within them creates difficulties in formulating proper procedures for the investigation of corporate crime. This difficulty is demonstrated by the current split in opinion

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1 See generally E. HERMAN, CORPORATE CONTROL, CORPORATE POWER (1981) (discussing the centralization of corporate power in the twentieth century and examining conflicts between corporate power and corporate responsibility).

2 See, e.g., Hale v. Henkel, 201 U.S. 43 (1906). In Hale, the Supreme Court recognized that the individuals within a corporation retain their constitutional rights, including the right to refuse to incriminate themselves, but the Court assumed that the act of incorporation prevented a corporation from using individual rights to preclude an investigation of itself. See id. at 74-76.

3 See id. at 75. For a more contemporary formulation of this rule, see Fisher v. United States, 425 U.S. 391, 408 (1976); Bellis v. United States, 417 U.S. 85, 89-90 (1974); In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 56 (2d Cir. 1985); see also Fifth Amendment Limitations on Compelled Production of Evidence, 22 AM. CRIM. L. REV. 559, 560 (1984) [hereinafter Fifth Amendment Limitations] (noting that collective entities cannot claim the privilege against self-incrimination); Comment, United States v. Doe: Fifth Amendment Protection From the Compulsory Production of Documents, 8 AM. J. TRIAL ADVOC. 293, 305-06 (1984) (describing circumstances that preclude the use of the fifth amendment).

4 See generally Coffle, "No Soul to Damn, No Body to Kick": An Unscandalized
between the Second and Third Circuits as to whether the custodian of corporate documents in a one-person corporation can be compelled to produce those documents in response to a subpoena duces tecum. These circuits disagree over how the 1984 United States Supreme Court decision in *United States v. Doe* affects this issue.

In *Doe*, the Supreme Court held that a sole proprietor's act of producing business records is testimonial in nature and therefore can not be compelled without violating the privilege against self-incrimination. By admitting possession of the documents and producing them in response to a subpoena, the defendant essentially would have authenticated the records. Thus, the Court concluded that to compel him to produce the papers would be to compel him to testify and possibly to incriminate himself.

The Second and Third Circuits disagree about whether *Doe's* act of production doctrine extends protection to the document custodian of a one-person corporation. A one-person corporation differs from a sole proprietorship because it has been formally incorporated and therefore enjoys the benefits of incorporation, such as limited liability and perpetual existence. The one-person corporation presents a particularly difficult analytical challenge for courts because the individual and the organization are legally and formally distinct, but the actions of the businessperson and the business are the same. What level of constitutional protection is appropriate when the business is accused of misdeeds that clearly must have been perpetrated by the businessperson?

In *In re Grand Jury Matter (Brown)*, the Third Circuit concluded that, under the act of production doctrine set forth in *Doe*, the fifth amendment protects the custodian of corporate documents in a one-person corporation from compelled production of documents that may be self-incriminating. The Second Circuit analyzed the problem differently in *In re Two Grand Jury Subpoenae Duces Tecum*, holding that *Doe* protects only sole proprietorships. Thus, the Second Cir-

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*Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386 (1981)* (exploring the relationship of the individual acting within the corporation to the organization in the context of corporate crime and punishment).


See id. at 612.

See id. The *Doe* Court's analysis will be hereinafter referred to as the "act of production" doctrine.

Compare *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985) with *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc).

768 F.2d 525 (3d Cir. 1985) (en banc).

See id. at 528.

769 F.2d 52 (2d Cir. 1985).

See id. at 58.
cuit denied the privilege against self-incrimination to the custodian of corporate documents, regardless of the size of the corporation.

These divergent opinions reflect a long-standing confusion about the appropriate way to analyze claims for fifth amendment protection when business documents are subpoenaed. As collective entities have become more powerful and business crime has increased, courts have been forced to struggle to define the boundaries of the privilege against self-incrimination. Certain basic policy concerns influence the analysis: safeguarding privacy, preventing corporations from using the fifth amendment to shield their wrongdoings, and protecting the individuals within collective entities from compelled self-incrimination. The conflicts between these policy interests have contributed to the confusing doctrine in this area.

Part I of this Comment will trace the major lines of analysis that the courts have used when faced with fifth amendment challenges to a subpoena for collective entities' documents. Part II will discuss how these lines of analysis have led to the current confusion and will analyze the circuit courts' conflicting decisions. Part III proposes a model for a more coherent analysis of this problem that would lead to more uniform and realistic results.

I. THE CENTRAL TENSIONS

Over the past century, courts have been unable to resolve the tensions inherent in situations in which the prosecution of corporate wrongdoing may infringe on individual rights. They have not found a consistent way of framing the issue. Rather, the courts have used three major approaches to determine whether fifth amendment protection is available to the custodian of a collective entity's documents.

First, courts have looked to the nature of the document to determine if the document merits protection. Under this content rule, the court examines whether the document contains an individual's intentions and beliefs. The rule springs from a concern about preserving individual privacy. Second, courts have based their decisions on whether the owner of the document is entitled to fifth amendment protection. Because corporations are not entitled to fifth amendment protection, subpoenaed corporate documents must always be produced under this analysis. In this way, corporations are prevented from using

13 See infra notes 21-32 and accompanying text.
14 See infra notes 33-41 and accompanying text.
15 See supra note 3 and accompanying text.
the rights of individuals as a shield from prosecution.\textsuperscript{16} Finally, courts have focused on the testimonial nature of the response to a subpoena.\textsuperscript{17} Under this analysis, the court considers whether the act of producing the document constitutes testimony about the existence, possession, or authenticity of self-incriminating documents.\textsuperscript{18}

To some extent, these three lines of analysis represent an evolution in the law: the content rule developed into an inquiry into ownership of documents, which in turn was replaced by the act of production doctrine.\textsuperscript{19} But the concerns underlying all three analyses remain vital. Courts hint at, without expressly articulating, an interest in protecting individuals' privacy, preventing corporate wrongdoers from using individuals' rights as a shield, and determining whether individuals are implicated by the act of producing corporate documents.\textsuperscript{20} One analysis appears to replace the other, but in effect the lines of analysis are coexistent, not merely chronological. Since their coexistence is not expressly articulated in the opinions, the confusion in this area goes beyond the difficult constitutional question. In sum, the patchwork of concerns that surround the analysis exacerbates the central difficulty of analyzing what constitutional rights apply to individuals acting within organizations.

A. Which Documents Should Be Protected?

In determining which documents should be protected under the fifth amendment, early twentieth century cases focused on the nature of the documents subpoenaed. For example, in \textit{Boyd v. United States},\textsuperscript{21} the Supreme Court based its analysis on a property theory. The Court found that business records could not be subpoenaed because they were the owner's private papers.\textsuperscript{22} The Court held that whenever a subpoena requires the production of a person's private property for use against
her in a criminal case, the fifth amendment is violated. The content rule articulated in Boyd reflected a desire to protect privacy. The Boyd court viewed the compelled production of personal papers as the equivalent of forcing testimony from an individual because the content of the papers was private.

Although Boyd's rationale might have been extended to protect corporate documents, in Hale v. Henkel the Court excluded documents owned by corporations from the constitutional protection accorded the private papers of individuals. Hale refused to produce incriminatory business documents in an antitrust investigation. The Hale Court found that when a group of businesspersons choose to incorporate their organization, they waive certain rights. A corporation is essentially a creature of the state, and part of its grant to exist includes the visitatorial powers of the state that are built into the charter. Thus, the Hale and Boyd decisions created a two-part scheme of analysis, in which corporate documents were clearly precluded from fifth amendment protection, and non-corporate private papers, which included business records owned by individuals, were always accorded fifth amendment protection. The nature of the papers determined whether the privilege against self incrimination applied in a given case.

This analysis was useful in its predictability, but it diluted the notion that the content of the document should determine the applicability of fifth amendment protection. By establishing two discrete types of documents, corporate and private, the Court moved from a situation-sensitive analysis of content to a broad categorization that precluded further examination. Perhaps more importantly, the underlying inquiry shifted to the identity of the owner of the papers. Thus, the implicit rationale emerged that the businessperson's act of incorporation waived fifth amendment rights for corporate documents.

In 1944, the Court further narrowed the scope of fifth amendment

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23 See id. at 638; see also Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States, 95 Harv. L. Rev. 683, 684 (1982) ("Th[e] property oriented view of the fifth amendment [in Boyd] implied that courts were to focus on the nature of the evidence sought, not the process by which it was to be obtained.").
24 See Boyd, 116 U.S. at 633; Comment, supra note 3, at 296.
25 201 U.S. 43 (1906).
26 See id. at 74-75.
27 See Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line, 49 Mo. L. Rev. 439, 449 (1984); see also Grant v. United States, 227 U.S. 74, 80 (1913) (Corporate documents are outside fifth amendment protection.); Wilson v. United States, 221 U.S. 361, 384 (1911) (A corporate custodian may not claim the privilege against self-incrimination when required to produce corporate documents, even though the documents might incriminate her personally.).
28 See Hale, 201 U.S. at 74-75.
protection in *United States v. White.* In *White*, a union official claimed that the privilege against self-incrimination protected him from producing union documents. The Court abandoned the absolute corporate/private categories when it acknowledged that the fear that the privilege would be used to cover up corporate crime was the real motivator behind denying its protection to corporate documents. The *White* Court examined a number of factors to determine whether a collective entity that is not under corporate charter is more like a corporation than an individual doing business. The factors included whether the organization operated under a formal constitution, whether it held itself out to third parties as a separate entity, and whether it kept books that were distinct from the personal records of the members. Using these, the Court concluded that neither labor unions nor their representatives acting in their official capacity could invoke the personal privilege against self-incrimination.

Although the *White* Court considered the nature of the entity claiming the privilege, its underlying approach was similar to that in *Boyd* and *Hale*. The Court examined the nature of the entity primarily as a means of identifying the nature of the document: whether a document was essentially "corporate" or "personal" still determined whether the fifth amendment afforded protection to the custodian of the document. But the *Boyd* content rule essentially had become an inquiry into ownership of the documents, and the issue of what the document contained became subordinate to the question of the nature of the owner.

**B. Who Should Be Protected?**

The second line of analysis courts have employed focuses on

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29 322 U.S. 694 (1944).
30 See id. at 700. The concerns that emerged in *White* continue to trouble courts today and are vital components in the debate over whether the custodian of the corporate documents of a solely owned corporation may invoke the privilege against self-incrimination. See, e.g., *In re Two Grand Jury Subpoenaes Duces Tecum*, 769 F.2d 52, 56-57 (2d Cir. 1985) ("'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.'") (quoting United States v. White, 322 U.S. 694, 700 (1944)); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 529 (3d Cir. 1985) ("The dissent's raising the spectre of two corporations avoiding prosecution . . . by virtue of a 'de facto' corporate privilege is . . . unrealistic . . . ").
31 See *White*, 322 U.S. at 701-02. Additional factors included whether the organization engaged in a broad scope of activities in which it was recognized as an independent entity, and whether the members had the right to inspect the union books and records for their private purposes. See id.
32 See id. at 701.
whether the person seeking fifth amendment protection for business records is entitled to the privilege. The concern with the nature of the owner of the document implicit in White became express doctrine in Bellis v. United States. The Bellis Court established a "bright line" test barring certain types of entities from fifth amendment protection. If an entity fell into this category, it would not be afforded fifth amendment protection whether it was a corporation or not. Thus, the Court required a three-person partnership to produce its business records in response to a subpoena.

The Court, following the White analysis, examined certain qualities of the partnership in order to determine whether it was a collective entity. The partnership held itself out to third parties as a separate entity, kept its books independent from each partner's individual books, and provided all of its members access to the records. Based on these facts, the Court found that the partnership was essentially like a corporation because it had "an established institutional identity independent of its individual partners" and therefore was not entitled to fifth amendment protection.

Unlike the Court in White, the Bellis Court's true concern was with who should be protected by the fifth amendment, not which documents should be protected. The White examination of who owned the documents developed in Bellis into a more explicit concern with who had the right to protection from self-incrimination. The Bellis Court emphasized the absolute bar to corporate fifth amendment rights and stated:

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 with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.

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34 Although the Court was aware of the nature of the documents themselves, see id. at 86 ("petitioner's personal privilege [does] not extend to the partnership's financial books and records") this did not appear to be central to its analysis.
35 See id. at 95.
36 See id. at 96-99.
37 Id. at 95.
38 See id.
39 Id. at 90.
Thus, the Court concluded that the representative cannot be protected if the organization is not protected. The inquiry had shifted from ownership to the identity of the person or entity claiming protection. The partnership in Bellis was not a person, so it was not entitled to fifth amendment protection. The White Court's secondary concern that collective entities must be prevented from using fifth amendment rights to shield their wrongs from investigation crystallized as the central concern in the preclusive Bellis opinion.

The Court's analysis in White and Bellis implies that a spectrum of entities exists: individuals are at one end and large publicly held corporations at the other, with sole proprietorships, partnerships, unions, solely owned corporations, and closely held corporations spanning the difference. By considering the factors that make an entity more or less like a corporation, the Bellis and White opinions create the impression that the Court was attempting to place the organizations involved on that spectrum by using an analysis sensitive to the specific qualities of the particular entity. This impression, however, is inconsistent with an examination of the facts of the two cases. Beyond the general characteristics that both are a collection of persons and neither is incorporated, the large labor union in White bears little resemblance to the three-person law partnership in Bellis. Yet the Court describes them both in similar terms, emphasizing that members could inspect books, that the organizations held themselves out as separate entities, and that each had a central constitution, or agreement.

In effect, the Bellis approach denies fifth amendment protection to any business entity that involves a group of persons. Thus, the "bright line" rule of Bellis effectively precludes an invocation of the privilege by an entity member to avoid producing documents owned by the entity. This odd disparity between rhetoric and result highlights the difficulty that the Court has faced in framing this issue. The Court seems to want to establish a situation-sensitive method of making appropriate and equitable determinations, but the existing frameworks support only superficial decisions. A three-person partnership is equated with a large labor union, which had earlier been equated with a corporation. Under this type of analysis, the spectrum of collective entities collapses into two categories. This result does not realistically reflect the multiple forms of organizations that exist in modern society, nor does it adequately examine the wide range of roles that individuals play within collective entities.

40 See id.
41 See Bellis, 417 U.S. at 96-99; White, 322 U.S. at 701-02.
C. What Forms of Testimony Should Be Protected?

The Supreme Court complicated this issue further when it decided *Fisher v. United States.* Critics perceived *Fisher* as a further curtailment of the fifth amendment protection afforded business because it denied blanket protection for non-corporate business records. More significantly, *Fisher* analyzed fifth amendment claims in the context of a subpoena for documents in a revolutionary way. The *Fisher* Court focused on whether the production of the document would have testimonial value rather than whether the document was the type of evidence that ought to be subject to protection or whether the person subpoenaed merited protection. In *Fisher,* a taxpayer and his attorney sought protection from a subpoena ordering the attorney to produce the taxpayer's financial records. The *Fisher* Court held that, because they were created voluntarily rather than under compulsion, the contents of the records were generally not privileged. Reasoning that by virtue of the attorney-client privilege the documents were protected in the hands of the attorney to the same extent that they would receive protection in the taxpayer's hands, the Court framed the issue as whether the fifth amendment barred the government from compelling the taxpayer to relinquish the records.

The Court concluded that the documents were not privileged. It held that "the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications." Because the act of producing the records did not force the taxpayer to restate, repeat, or affirm "the truth of the contents of the documents sought," it was deemed void of

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43 See e.g., *Fifth Amendment Limitations,* supra note 3, at 565; Note, supra note 23, at 683.
44 *Fisher* constituted a more explicit statement of the shift in fifth amendment jurisprudence found in cases such as *Couch v. United States,* 409 U.S. 322 (1973), in which the Court held that an accountant had to produce documents incriminating to his client because the compulsion did not incriminate the accountant himself. See Note, supra note 23, at 693 & nn.55 & 58.
45 See *Fisher,* 425 U.S. at 396.
46 See *id.* at 409-10.
47 This reasoning was necessitated by the Court's holding that "it [was] not the taxpayer's Fifth Amendment privilege that would excuse the attorney from production . . . because enforcement against [the] taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to 'witness' against himself." *Id.* at 396-97.
48 See *id.* at 404-05.
49 *Id.* at 409 (citations omitted).
50 *Id.* The Court stressed that the fifth amendment would protect the taxpayer
testimonial value. Thus, Fisher substituted the act of production doctrine for the content rule, replacing the content rule's concern about privacy with a concern about compulsion. Under Fisher, the testimonial nature of the response to the subpoena was considered more important than the nature of the documents. Despite the apparent narrowing of the standard, suggestions that Fisher curtailed fifth amendment rights were perhaps short-sighted. It is true that the appellant in Fisher would have been protected under the content rule and was not protected under the act of production doctrine. The disparity in result, however, does not reflect an attempt to narrow fifth amendment protection so much as an attempt to find a test truer to the parameters of the amendment. Rather than depending on the privacy rationale, the Fisher Court emphasized that the constitutional privilege precludes compelled self-incrimination, patterning the standard on the language of the amendment.

In United States v. Doe, the Supreme Court demonstrated the protective potential of the act of production doctrine. Doe held that a sole proprietor may invoke the privilege against self-incrimination to avoid producing business documents, even though the contents of the records were not privileged. Applying the Fisher rationale, the Court stated:

Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Despite this statement, the Court found that given the explicit lower court finding that producing the documents would involve testimonial self-incrimination, the fifth amendment protected the sole proprietor

only from "his own compelled testimonial communications," concluding that because the documents "were not prepared by the taxpayer" (they were prepared by his accountant) "and . . . contain[ed] no testimonial declarations by him," the act of production did not reach the level or kind of incrimination sought to be proscribed by the amendment. Id. (citations omitted) (emphasis added).

51 See id.
52 See Fifth Amendment Limitations, supra note 3, at 565; Note, supra note 23, at 563.
53 Compare Fisher, 425 U.S. at 399-400 with U.S. Const. amend. V.
55 See id. at 610-12.
56 See id. at 611-12 (citations omitted).
In addition to representing heightened concern with finding a test truer to the parameters of the fifth amendment, Doe and Fisher reveal the Court's growing concern with deciding fifth amendment questions in ways responsive to the specific context of the case. Both cases require a close analysis of the facts to determine whether producing the documents would risk self-incrimination. This focus on facts is reminiscent of the situation-sensitive approach adopted by the Court in Boyd. It is premature, however, to claim that the act of production doctrine has completely replaced the content rule. There is, in fact, some dispute within the Supreme Court as to whether the content rule and act of production doctrine are mutually exclusive. In her Doe concurrence, Justice O'Connor stated that the Fisher analysis implicitly repudiated the notion that the fifth amendment provides protection for the contents of documents: "Fisher v. United States . . . sounded the deathknell for Boyd." In contrast, Justice Marshall, in his partial concurrence, partial dissent, established a hierarchy of analysis. He objected to Justice O'Connor's assertion that the Boyd doctrine is extinct, and claimed that "the issue [of] whether the Fifth Amendment protects the contents of documents was obviated by the Court of Appeals' rulings relating to the act of production . . . ." Thus in Justice Marshall's view a complex of analyses is available to ascertain whether fifth amendment protection is pertinent in a given case, but once the act of production requirement is met, no further inquiry is necessary.

The split between Marshall and O'Connor reflects a crucial analytic inconsistency. Justice Marshall, motivated by a concern for personal privacy and a fear that without the content analysis private papers such as diaries might be subject to subpoena, perceives coexistent lines of analysis. Justice O'Connor believes that because the content standard has become obsolete, the methods of analysis are mutually exclusive. The majority opinion rejects the content rule under the facts of the case, but it is unclear from its opinion whether the rule has been utterly repudiated. Despite the Court's historic denial of

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57 Id. at 613-14 & nn.11 & 12.
58 But see Gerstein, The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court, 27 UCLA L. Rev. 343, 376-77 (1979) (arguing that Fisher and Warden v. Hayden, 387 U.S. 294 (1967), have so weakened the Boyd rationale that Boyd was "done away with quite off-handedly").
60 Id. at 619 (Marshall, J., concurring in part and dissenting in part).
61 See id.
62 See id. at 618 (O'Connor, J., concurring).
63 Thus, it is unclear after Doe whether the contents of non-business (personal) papers such as diaries are protected or whether the act of production doctrine is the
fifth amendment protection to corporations, this analytic ambiguity has led lawyers to frame arguments based on *Doe* that attempt to extend fifth amendment protection to the custodians of documents owned by solely owned corporations.

The Supreme Court appears to consider each thread of analysis to have continuing value. The content rule is less important than it was previously, but it has not been expressly overruled. The act of production doctrine is clearly important, but the scope of its reach is not yet defined. At the same time, the bright line test of *Bellis* has not been explicitly rejected. Thus, lower courts faced with deciding whether to recognize the fifth amendment rights of a custodian of a collective entity’s documents have interpreted the mixed messages implicit in the Supreme Court’s treatment of the issue in a variety of ways. The disparity between the Second and Third Circuits’ treatment of the custodian of the records of a solely owned corporation illustrates this problem. The result a court reaches depends on how the issue is framed and which line of analysis is given priority.

II. CRISIS IN ANALYSIS: THE CIRCUIT SPLIT

In *In re Grand Jury Matter (Brown)*, the Third Circuit held that the custodian of records for a solely-owned corporation may receive fifth amendment protection. Brown, the sole owner of an incorporated accounting firm, claimed that his non-verbal authentication of subpoenaed documents could be self-incriminating. The *Brown* majority focused on the testimonial nature of the production of the documents. The court stated:

> The government urges that the holding in *United States v. Doe* does not control because in *Doe* the records were

extent of the fifth amendment protection for private papers as well as business papers. Some lower courts since *Doe* have held that the contents of personal documents are not privileged: compelled production of private documents is prohibited only if there are testimonial aspects to the act of production itself. Other courts have said that personal records are privileged as to content. *Compare In re Kave*, 760 F.2d 343, 355-58 (1st Cir. 1985) and *United States v. Klimavicius*, 620 F. Supp. 667, 671 (D. Me. 1985) *with In re John Doe No. 462*, 745 F.2d 834, 840 (4th Cir. 1984), *vacated as moot*, 471 U.S. 1001 (1985). Although vacated for mootness, *Doe No. 462* is notable for its explicit rejection of the government’s argument that personal records are not privileged as to content and the insight it provides into how the Fourth Circuit is likely to interpret *Doe* in the next case that raises the issue. *See also In re Grand Jury Investigation*, 600 F. Supp. 436, 438 (D. Md. 1984) (implicitly distinguishing between corporate and private records; the former are privileged only as to the act of production, the latter are privileged as to content as well as to the act of production).

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64 *See, e.g.*, *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 147 (6th Cir. 1985) (en banc); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 55 (2d Cir. 1985); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 530 (3d Cir. 1985) (Becker, J., concurring).

65 768 F.2d 525 (3d Cir. 1985).

66 *See id.* at 526.
those of a sole proprietorship, while in this case they belong to a professional corporation. That argument misses the whole point of the Court's analysis in *Fisher* and *Doe*. Those cases, consistent with *Schmerber v. California*, make the significant factor, for the privilege against self-incrimination, neither the nature of the entity which owns documents, nor the contents of documents, but rather the communicative or noncommunicative nature of the arguably incriminating disclosures sought to be compelled.67

The majority clearly considered act of production analysis primary. Under this view, if fifth amendment protection is available, failure to meet the content rule guidelines or to fall on the right side of the bright line of *Bellis v. United States* is inconsequential.68 The Third Circuit majority's priority is the protection of the individual acting within the corporation,69 seemingly echoing the concerns of the law of equal protection. For example, the court described the issue before it as follows: "We must decide whether a person, simply by virtue of his status as a custodian of a corporation's records, can be compelled to make self-incriminating disclosures that are testimonial . . . in nature."70

Judge Becker's concurrence quarreled with the majority's reliance on the act of production doctrine, suggesting that it is a misinterpretation of Supreme Court doctrine to treat custodians of corporate records like other record keepers. A correct interpretation, in his view, would recognize a fifth amendment threshold through which corporate record custodians simply could not pass.71 Judge Becker admitted that the custodian herself is protected by the privilege against self-incrimination from coerced oral testimony, but he maintained that the act of production doctrine does not extend to corporate record keepers.72 He supported this interpretation with the familiar policy rationale that "the custodian should not be able to shield the collective entity, which has no fifth amendment privilege, from governmental scrutiny by asserting a personal right."73

Judge Garth's dissent also criticized the way the majority framed

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67 *Id.* at 528 (footnote omitted).
69 *Brown*, 768 F.2d at 528-29.
70 *Id.* at 526.
71 See *id.* at 530 (Becker, J., concurring).
72 See *id.*
73 *Id.*
the issue: "By treating this as a compelled testimony case rather than a compelled corporate document production case, the majority has decided a case not before us." The dissent rejected the majority's application of the act of production doctrine, perceiving a need for a different sort of analysis when corporate documents are subpoenaed. According to the dissent, the nature of the document should be the threshold test.

A similar problem was addressed by the Second Circuit in In re Two Grand Jury Subpoenae Duces Tecum. Two grand jury subpoenae duces tecum were served at the office of a corporation, one addressed to the corporation and one addressed to the corporate custodian. The custodian moved to quash the subpoenae on the ground that the corporation was essentially a one-person enterprise and if forced to produce the documents, he might incriminate himself. The government admitted that the subpoenae were aimed at discovering information incriminating to the custodian when it named the custodian as the actual target of the investigation.

The Second Circuit asserted that a corporate representative cannot invoke the fifth amendment to protect corporate documents "regardless of whether they contain information incriminating him or were written by him, and regardless of whether the corporation is large or small." The court recognized that an individual may have a fifth amendment privilege against being compelled to produce corporate documents, but maintained that a corporation is never excused from producing incriminating documents. If the corporate record keeper would be incriminated by the act of producing the documents, the corporation must appoint

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74 Id. at 532 (Garth, J., dissenting).
75 See id. at 537-39.
76 769 F.2d 52 (2d Cir. 1985).
77 See id. at 54.
78 See id.
79 Id. at 56; accord In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985). The Sixth Circuit views the nature of the entity as the threshold inquiry:

[S]ince collective entities can act only through officers and agents, the effect of permitting custodians of partnership and corporate records to avoid production of such records in reliance on the Fifth Amendment would be to extend the privilege against self-incrimination to the collective entities. The custodian of corporate or partnership records acts only in a representative capacity, not as an individual, and production of the records is not a testimonial act of the custodians. Production of records communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership.

Id. at 148.
80 See Two Subpoenae, 769 F.2d at 59.
another individual to produce the document. This analysis applies to any corporation of any size. The bright line test of Bellis regarding the nature of the entity, therefore, is absolutely dispositive of the issue, and the specific facts regarding the identity of the individual or fictional person subpoenaed are not to be considered. Thus, the court compelled production of records incriminating a one-person corporation despite the fact that the documents would also incriminate the custodian in his individual capacity. The custodian was, in effect, required to produce the documents despite the formality of appointing a new corporate representative to respond to the subpoena.

The emphasis of the Second Circuit in Two Subpoenaes on the nature of the entity grows out of its concern that "the only way to prevent the corporation from shielding its records from a subpoena is to prevent individual corporate representatives from exercising such a privilege with respect to corporate records." The court's interest in individuals acting within a corporate context seems limited to noting that because corporations are always composed of people, there is the ever-present danger that someone will seek fifth amendment protection from producing documents and thereby thwart criminal investigations. The court justifies the hardship on the custodian by explaining that because businesspersons choose to incorporate in order to enjoy certain benefits, they cannot then discard the form in order to shield the corporate records.

This opinion illustrates the tension inherent in the recent cases analyzing the fifth amendment rights of a corporation's custodian of records. Effective criminal investigations of corporate transgressions are necessary. Individual rights should not be used as a shield against corporate prosecution. At the same time, the corporate form should not be used as a spear depriving individuals of their rights as citizens.

The progeny of United States v. Doe reveal a crisis in analysis. The courts simply do not have an effective framework for deciding whether the compelled production of documents is protected by the fifth amendment. Several approaches are currently used: the act of produc-

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81 See id.
82 The corporation in Two Subpoenaes had three shareholders but was "essentially a one-man operation." Id. at 54.
83 Id. at 56.
84 See id.
85 See id. at 59. The choice to incorporate, however, affects civil rather than criminal liability. Is it appropriate to argue that, by assuming the rights and obligations of incorporating, the individuals involved sacrifice their individual constitutional rights?
tion doctrine, a blanket denial of fifth amendment protection when corporate documents are requested, and a threshold inquiry of whether an individual or a collective entity is required to produce the documents. Unlike Justice Marshall's dissent in Doe, which views the analysis as composed of a complex of considerations, the courts acknowledge the importance of the other lines of analysis, but in the end rely on only one of the approaches. Their conception is more akin to Justice O'Connor's Doe concurrence, in which she argues that the act of production doctrine has replaced the content rule.

Any one of the lines of analysis removed from the others results in mechanical decisions that do not adequately reflect the variety of forms of collective entities and, perhaps more importantly, do not respond to the specific relationship of the individual, the custodian of records, to the entity. Hence a new model of analysis is necessary if the spirit of the Fisher v. United States and Doe decisions are to be implemented in the range of cases in which record keepers will attempt to invoke the privilege against self-incrimination. The courts must either formulate an approach that recognizes the coexistence of the various lines of analysis and applies them as a complex of interrelated factors or structure a hierarchy among the factors.

Because courts will continue to face these problems as corporate crime escalates, the resolution of this "narrow" issue has broad implications. The fundamental question of how to treat individual actors in corporate roles has many ramifications and has troubled the court in other areas. The Court does express one possible approach in United States v. White when it suggests that individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights

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87 See, e.g., Brown, 768 F.2d at 525.
88 See, e.g., Two Subpoenae, 769 F.2d at 52.
89 See, e.g., In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir. 1985).
91 See Ross, How Lawless are Big Companies?, 103 FORTUNE 57 (Dec. 1, 1980) (examining the extent of business crimes in large corporations and the motivations for white collar crime); see also E. HERMAN, supra note 1, at 259 (Bureaucracies submerge "individual values to the demands . . . of the organization as a whole" and the people within them commit crimes in the name of the entity which they would not commit on their own).
92 For example, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court found a corporation's first amendment rights had been violated. The decision was not based on whether corporations have first amendment rights, but in terms of whether the statute in question abridged protected political speech. See id. at 776.
93 322 U.S. 694 (1944).
and duties nor to be entitled to their purely personal privileges. Rather, they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. Yet, should the assumption of a corporate role, merely accepting employment with some collective entity, really sever a person from her constitutional rights? The courts must find a way of protecting individuals' rights even if they are employed by an incorporated entity. If they do not, the law will effectively separate the large number of citizens from their constitutional rights when they act within their occupational roles.

III. PROPOSED MODEL OF ANALYSIS

There are three alternative approaches courts could adopt in resolving the inconsistent analyses of fifth amendment rights when a collective entity's papers are subpoenaed. First, courts could use the existing methods of analysis—the content of documents, the testimonial nature of producing the documents, and the identity of the person invoking the privilege against self-incrimination—as components in a complex of pertinent factors. Alternatively, courts could designate one test exclusively, much as the content test used to be dispositive. Finally, courts could determine that all three lines of analysis are pertinent to fair application of the privilege and could establish a hierarchy among them so one analysis acts as a threshold to the others.

A. The Complex of Factors Approach

Courts could adopt the three tests as components of a single test without ranking the various lines of analysis. This approach would be flexible enough to adapt to varied circumstances along the spectrum of collective entities and would also encourage the type of intensive examination of the entity suggested but not implemented in United States v. White. In the case of the record custodian for a solely owned corporation—the situation splitting the circuits—the court could judge the relative importance of the status of the record owner and the danger that the record custodian will be compelled to incriminate herself. The court would not be required to bar invocation of the privilege simply because the corporation owns the papers. In the hypothetical case of docu-

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94 Id. at 699.
95 322 U.S. 694 (1944); see supra notes 29-32 and accompanying text.
96 Cf. In re Two Grand Jury Subpoenae, 769 F.2d 52, 57 (2d Cir. 1985) (con-
ments owned by a closely held corporation and kept by an employee lacking an ownership interest, the court could consider the identity of the record keeper, the content of papers in such an intimate business, and whether the employee recordkeeper is risking incrimination. In refusing to make one test dispositive, the court enables itself to respond sensitively to a range of fact situations.

The greatest strength of this solution—its flexibility—is also its most serious weakness. The flexibility of this solution would institutionalize the current inconsistencies between the courts in their treatment of solely owned corporations and would multiply that inconsistency as lawyers litigated new situations involving the wide variety of collective entities and record keepers who might seek sanctuary within the privilege. A predictable standard would prevent excessive litigation on this issue and help achieve consistent results. Although a tension always exists between predictability and flexibility, there is an unacceptable level of unpredictability inherent in the complex of factors approach.

Under the complex of factors approach, courts would probably resort to balancing the two central policy issues in these cases: preventing corporations from using the self-incrimination privilege to shield their wrongdoing from investigation and protecting individual rights. Where individual constitutional rights are concerned, balancing tests are highly problematic. Whenever possible, a legal analysis should be constructed that does not force courts to resort to balancing effective criminal prosecutions with individual rights.

B. The "One Test" Approach

Another way to address this problem is to select one line of analysis as dispositive of the issue. This is essentially Justice O'Connor's approach when she suggests that the establishment of the act of production doctrine of Fisher v. United States replaces the Boyd v. United

cluding that because it may appoint an agent or uninvolved employee to produce corporate records, "[t]here simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records".


States\textsuperscript{99} content rule. The primary benefit derived from such an analysis would be a clear statement of legal criteria that would promote more predictable results.

The Third Circuit's opinion in \textit{In re Grand Jury Matter (Brown)}\textsuperscript{100} exemplifies this mode of analysis. The majority opinion treats the act of production doctrine of \textit{United States v. Doe}\textsuperscript{101} as the sole factor in deciding fifth amendment issues in production of corporate document cases. The court focuses on the incriminatory nature of production and dismisses the content rule as invalid after \textit{Fisher}.\textsuperscript{102} It relegates \textit{Bellis v. United States}\textsuperscript{103} to a footnote, explaining that it is irrelevant because "the holdings in \textit{Fisher} and \textit{Doe} render untenable any suggestion that \textit{Bellis} would require a custodian to produce documents where the act of production is both communicative and incriminatory."\textsuperscript{104} The \textit{Brown} dissent attacks the majority's methodology\textsuperscript{105} but presents an alternative that bears an underlying similarity to it. The dissent treats the identity of the party subpoenaed as the single relevant fifth amendment inquiry in a production of corporate documents case. It insists \textit{Fisher} and \textit{Doe} are irrelevant when corporate documents are subpoenaed and states:

\begin{quote}
[T]he real issue in this case, which the majority fails to address, is whether production of the records of a one-man professional corporation is to be treated as production by a sole proprietor—the sort of production involved in \textit{Doe}—or is to be treated as production by a representative of a collective, corporate entity . . . .\textsuperscript{106}
\end{quote}

This case therefore contains two versions of the "one test" approach. Either version, the act of production doctrine or the identity inquiry, follows one line of Supreme Court case law in the area. The majority depends on \textit{Doe}, the dissent on \textit{Bellis}. Both versions suggest predictable, workable rules of law. Neither version, however, reflects the situation sensitive analysis which is at the root of \textit{Doe}.\textsuperscript{107}

The complex of factors model is too inconsistent, and the one rule model too one dimensional. Does the hierarchy of tests model have the

\begin{footnotes}
\item \textsuperscript{99} 116 U.S. 616 (1986).
\item \textsuperscript{100} 768 F.2d 525 (3d Cir. 1985).
\item \textsuperscript{101} 465 U.S. 605 (1984).
\item \textsuperscript{102} \textit{Brown}, 768 F.2d at 527.
\item \textsuperscript{103} 417 U.S. 85 (1974).
\item \textsuperscript{104} \textit{Brown}, 768 F.2d at 528 n.2.
\item \textsuperscript{105} See \textit{id.} at 532 (Garth, J., dissenting).
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} See supra text following note 57.
\end{footnotes}
capacity to incorporate the desired values of flexibility and situation specificity without sacrificing clarity, or does it merely embrace the weaknesses of the other methods?

C. The Hierarchy of Tests

In In re Two Grand Jury Subpoenae Duces Tecum, the Second Circuit applied a tiered model, which recognized the validity of the act of production doctrine in the context of corporate documents. But the court considered the Bellis inquiry into the identity of the document's owner a threshold test before the act of production test could be considered. The court used a model that included the act of production doctrine, but limited its application in the business context to Doe's facts.

The result of the Second Circuit's tiered approach in Two Subpoenae is the same type of blanket denial to corporate record keepers of the privilege against self-incrimination found in the Brown dissent. The method, however, is much closer to the method used, but not articulated, in Doe. The Third Circuit case under review in Doe applied a tiered approach. First, the Doe court of appeals found that the respondent's claim of the fifth amendment privilege was not foreclosed by Bellis because as a sole proprietor he acted in a personal, not representative, capacity. Second, the court considered whether the contents of the document were privileged. Finally, it found that the act producing the documents would have communicative aspects of its own. Although the Supreme Court did not accept the appellate court's finding that the records were privileged because they were essentially private papers, it implicitly accepted the analysis of the status of the record keeper and explicitly accepted the analysis of the act of production. Thus, Doe assumes the tiered analysis without expressly adopting it.

Despite its narrow application in the Second Circuit, the tiered

108 769 F.2d 52 (2d Cir. 1985).
109 See id. at 57.
110 See id. at 59.
111 See id. at 58.
113 See Grand Jury, 680 F.2d at 331.
114 See id. at 333.
115 See id. at 336.
116 The Court insisted that the documents were not protected because they were created voluntarily. See Doe, 465 U.S. at 611-12.
117 See id. at 617.
analysis model constitutes the best structure for a new legal standard in the context of applying the fifth amendment to the production of the documents of a collective entity. By ordering the tests, it provides a predictable, workable rule of law. In addition, it is complete in its acknowledgement of the values embodied in the three lines of analysis: privacy, freedom from compulsion, and restriction of the privilege to natural persons. Attention to content protects privacy. Protection against self incriminatory oral testimony or testimony through production prevents compulsion. Limiting the privilege to natural persons curbs corporate fifth amendment abuses. Thus, this model serves all of the policies underlying the production of document cases.

In addition, the tiered model is closest to the fifth amendment itself. The amendment reads: "[N]o person . . . shall be compelled in any criminal case to be a witness to himself." Each of the three tests reflects an aspect of the amendment. The act of production doctrine protects against "compelled" testimony through response to the subpoena. The "nature of the entity" inquiry ensures that protection will not be given to an entity that, because it is not a "person," is not entitled to such protection. The content rule, to the extent it still has vitality, protects against the production of documents prepared under compulsion or which contain private, testimonial information such as a diary. The tiered model analysis would be applied as follows: first, the court would inquire whether the person claiming the privilege is entitled to it; second, the court would ask whether producing the document constitutes compelled testimony; and finally, the court would determine whether a corporate document was created under compulsion or had the personal, testimonial qualities of a diary. This analysis would enable the court to protect adequately individual rights without undermining the investigation of corporate crime. The model can remain situation-sensitive if the initial inquiry is whether the party seek-

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118 U.S. CONST. amend. V.

119 Although the Powell majority opinion in Doe does not explicitly disavow the content rule, in her concurrence Justice O'Connor states that the Boyd protection for private papers had no coherent rationale, and therefore concludes what she found "implicit" in the majority opinion, that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." Doe, 465 U.S. at 618 (O'Connor, J., concurring). Justice Marshall rejects Justice O'Connor's conclusion and distinguishes between business papers and personal records such as diaries based on degrees "of concern for privacy interests." Id. at 619 (Marshall, J., concurring in part and dissenting in part).

120 Because the majority in Doe gave the act of production doctrine more force than the content rule, this Comment reorders the tiered model used by the court of appeals in Doe. See In re Grand Jury Empaneled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), aff'd in part & rev'd in part sub nom. United States v. Doe, 465 U.S. 605 (1984)
ing protection is entitled to the privilege rather than the more narrow inquiry into the ownership of the documents that the Second Circuit relied on in \textit{Two Subpoenae}.

If the Third Circuit had applied this model in the \textit{Brown} case, it first would have examined whether the party invoking the privilege was entitled to it. The subpoena was addressed to Brown himself, ordering him to produce self-incriminating documents, and not to an entity that included other individuals capable of response.\textsuperscript{121} Thus, the court would have found the first tier satisfied.

The Second Circuit would have faced a somewhat more difficult determination in \textit{Two Subpoenae} because one subpoena was addressed to the custodian and the other to the corporation itself.\textsuperscript{122} A close examination of the facts, however, reveals that because only one person was capable of response—the sole operator of the corporation—and the custodian himself was the subject of investigation, the rights of a natural person were at stake. Thus, the first tier of the hierarchical approach is satisfied in \textit{Two Subpoenae} as it was in \textit{Brown}. The first tier ensures that individual rights will not be sacrificed. Because the government can either find a custodian to produce the documents who would not be incriminating herself, or grant a custodian who merits protection use immunity as suggested in \textit{Doe},\textsuperscript{123} this sensitivity to individual rights does not preclude corporate criminal investigations.

Once the first tier is satisfied, the court must examine whether the production of the documents, although non-verbal, has testimonial value. In cases involving sole owners of corporations whose personal identification with the company is so strong that an investigation of the company is essentially an investigation of the individual, this tier will probably be satisfied. Accordingly, it would be satisfied in both \textit{Brown} and \textit{Two Subpoenae}.\textsuperscript{124}

In cases where the first tier is satisfied, but the second is not, the court would look to the facts to determine, as a final check, if the content of the documents were so private as to trigger fifth amendment concerns or if creation of the documents had been compelled. Only in extreme cases, such as where a partner in a two-person partnership was being compelled to produce her partner’s diary that was kept on the business premises, would the court preclude production based on a

\textsuperscript{121} See \textit{Brown}, 768 F.2d at 526.
\textsuperscript{122} See \textit{Two Subpoenae}, 769 F.2d at 54.
\textsuperscript{123} See \textit{Doe}, 465 U.S. at 616 & n.15.
\textsuperscript{124} Both Brown’s production of his accounting firm’s records and the majority shareholder’s production in \textit{Two Subpoenae} would serve to authenticate the records subpoenaed and would thus have testimonial value, hence satisfying the second tier.
third tier analysis.

**Conclusion**

There are three analytic approaches represented in production of document cases. Courts have inquired into the nature of the documents to ascertain whether the documents themselves merited protection based on privacy concerns. Courts also have considered whether the owner of the documents is eligible for fifth amendment protection while fearing that corporate crimes would be shielded by the rights of corporate employees. Finally, courts have analyzed the testimonial nature of the production of documents although concerned that individuals will be compelled to testify non-verbally.

The courts need to adopt one coherent mode of analysis for applying fifth amendment protection to the production of corporate documents. The current state of the law provides little guidance for evaluating the relative importance of the lines of analysis or the way in which they interrelate. This is reflected in the existing split between the Second and Third Circuits. The split essentially arises out of confusion about when to apply which analysis.

This Comment proposes a tiered model of analysis. Initially, a court would examine whether the party claiming fifth amendment protection is entitled to the right. Then, the court would consider whether compelled production of the documents constitutes a testimonial act. If it does not, as a final check, the court would make sure the compulsion was not an extreme personal privacy intrusion. At all levels the specific facts would be carefully considered.

This model incorporates the situation sensitivity and close attention to the fifth amendment that the Court valued in *United States v. Doe*.\(^{125}\) It articulates the methodology implicit in *Doe* and gives us a reliable model for analyzing this problematic issue. As society becomes more complex and individuals act more frequently within collective entities, courts must meet the challenge of forming analyses that will acknowledge individuals’ varied relationships to groups and protect individual rights without shielding the entities themselves.
