

# FORMER CORPORATE EMPLOYEES AND THE COLLECTIVE ENTITY DOCTRINE

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## Abstract

The Fifth Amendment’s Self-Incrimination Clause prevents those under criminal or civil investigation from being compelled to incriminate themselves, but there is a major exception: the collective entity doctrine. The collective entity doctrine provides that no person may refuse to produce corporate documents under the Self-Incrimination Clause when he holds those documents in a representative capacity on behalf of a corporation. The United States Supreme Court, in its most recent decision on the issue, reasoned that an employee holding corporate documents in this manner produces them on behalf of the corporation and not in his own personal capacity. Thus, the Self-Incrimination Clause cannot apply.

However, federal circuit courts have split on whether this is the case for former corporate employees as well, or, in other words, whether the collective entity doctrine requires former corporate employees to respond to documentary subpoenas. This Note examines which side of the split is most consistent with Supreme Court precedent. To that end, it examines the history of the collective entity doctrine, its reasoning, and its recent applications. Ultimately, this Note concludes that the collective entity doctrine should not apply to former corporate employees because the Court has consistently identified the agency relationship between an employee and his corporation as the key element required for the doctrine to apply. Therefore, a former employee with no remaining agency relationship with his former corporation should not be compelled to produce personally incriminating documents. This Note then assesses avenues for the investigation of corporate crimes in the absence of the collective entity doctrine.

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#### INTRODUCTION

One of the most well-known admonitions in American constitutional law is that “you have the right to remain silent.”<sup>1</sup> This phrase encapsulates the fundamental principle protected by the Fifth Amendment’s Self-Incrimination Clause that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>2</sup> Yet, even this fundamental principle is not without its exceptions.<sup>3</sup> One such exception is that a corporate agent may not refuse to produce corporate documents he possesses by asserting his Fifth Amendment privilege, even where his production of those documents could be personally incriminating.<sup>4</sup> In other words, a person may not assert his Fifth Amendment self-incrimination privilege if he acts in service of a larger collective entity.<sup>5</sup> This principle is known as the “collective entity doctrine.”<sup>6</sup>

Federal courts of appeals have split on whether the collective entity doctrine should apply to former corporate employees in

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1. See, e.g., *Wainwright v. Greenfield*, 474 U.S. 284, 286 (1986); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

2. U.S. CONST. amend. V.

3. See, e.g., *Fisher v. United States*, 425 U.S. 391, 411 (1976) (foregone conclusion exception); *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (public safety exception).

4. See *Braswell v. United States*, 487 U.S. 99, 100 (1988).

5. See *United States v. White*, 322 U.S. 694, 699 (1944).

6. *Braswell*, 487 U.S. at 101.

addition to current ones.<sup>7</sup> This Note examines which side of the split has the better argument based on Supreme Court precedents and provides guidance to future circuits and practitioners addressing this issue.

Part I traces the history of the collective entity doctrine in Supreme Court precedents, beginning with the doctrine's origin in *Hale v. Henkel*<sup>8</sup> and concluding with the Court's most recent decision in *Braswell v. United States*.<sup>9</sup>

Part II examines decisions from the five federal courts of appeals that have addressed whether the collective entity doctrine should apply to former corporate employees.<sup>10</sup> While two circuits have held that the doctrine should apply to former employees based on the corporate nature of the documents,<sup>11</sup> three circuits have held that the doctrine should not apply because former employees no longer have agency relationships with their former corporations.<sup>12</sup>

Part III discusses the policy interests relevant to each approach and how applying the collective entity doctrine to former employees either advances or hinders those interests.

Part IV then analyzes whether, based on Supreme Court precedents, the collective entity doctrine should apply to former corporate employees. To do this, Part IV applies the principles underlying the Court's earlier precedents to former corporate employees. Ultimately, the precedents suggest that the doctrine should not apply to former corporate employees because they lack an agency relationship with their former corporations.<sup>13</sup>

Finally, Part V discusses how law enforcement may investigate corporate crimes if the collective entity doctrine

7. Compare *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999), with *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 813 (11th Cir. 1992).

8. 201 U.S. 43 (1906).

9. 487 U.S. 99 (1988). For an in-depth criticism of the collective entity doctrine, see generally Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U. L. REV. 1523 (2021).

10. See *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 809; *In re Sealed Case (Gov't Recs.)*, 950 F.2d 736, 740–41 (D.C. Cir. 1991); *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181; *United States v. McLaughlin*, 126 F.3d 130, 133 n.2 (3d Cir. 1997); *In re Grand Jury Proc.*, 71 F.3d 723, 724 (9th Cir. 1995).

11. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 812; *In re Sealed Case (Gov't Recs.)*, 950 F.2d at 740–41.

12. See *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181; *McLaughlin*, 126 F.3d at 133 n.2; *In re Grand Jury Proceedings*, 71 F.3d at 724.

13. See *infra* Part IV.

does not apply to former corporate employees. Some scholars have suggested that the collective entity doctrine should be overturned in its entirety because it produces inconsistent results in similar factual situations.<sup>14</sup> As such, it is helpful to discuss what law enforcement's options would be in the doctrine's absence. Overall, while refusing to apply the collective entity doctrine to former corporate employees would make criminal investigations more difficult, practical alternatives, such as search warrants and prosecutions for theft of company documents, would still be available to law enforcement.

### I. SUPREME COURT PRECEDENTS ON THE COLLECTIVE ENTITY DOCTRINE

The collective entity doctrine was established in the early twentieth century to address Fifth Amendment privilege claims in the context of corporate documents. However, the advent of the act of production doctrine in *Fisher v. United States*<sup>15</sup> revolutionized Fifth Amendment jurisprudence and raised new questions about whether the corporate nature of the documents or the individual's act of *producing* those documents controlled the application of the Fifth Amendment privilege. The Court resolved which of these factors should be afforded more weight in *Braswell v. United States*.<sup>16</sup>

#### A. *Origins of the Collective Entity Doctrine*

The collective entity doctrine was first articulated in *Hale v. Henkel*. Hale was an employee of a tobacco company that was under investigation for violating the Sherman Anti-Trust Act, and he was subpoenaed to produce his company's documents.<sup>17</sup> He refused to produce the documents based on his personal Fifth Amendment privilege and was thereafter held in contempt of court.<sup>18</sup> Twenty years earlier, the Court had held in *Boyd v. United States*<sup>19</sup> that a person could refuse to produce documents under the Fifth Amendment Self-Incrimination Clause when those documents were personal in nature.<sup>20</sup> Hale

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14. Maclin, *supra* note 9, at 1523–24.

15. 425 U.S. 391 (1976).

16. 487 U.S. 99, 101 (1988).

17. *Hale v. Henkel*, 201 U.S. 43, 44–46 (1906).

18. *Id.* at 46.

19. 116 U.S. 616 (1886).

20. *Id.* at 633.

argued that the rule in *Boyd* also protected him from being compelled to produce the corporate documents he possessed.<sup>21</sup>

The Court disagreed.<sup>22</sup> It explained that Hale could not assert his Fifth Amendment privilege because he had already received statutory immunity.<sup>23</sup> The Court also addressed and rejected Hale's broader argument that *Boyd's* reasoning applied to corporate documents.<sup>24</sup> The Court explained that a corporate employee has no Fifth Amendment right of his own when acting in service of his company.<sup>25</sup> Because companies are creatures of the state, they do not fall within the ambit of the Self-Incrimination Clause.<sup>26</sup> Thus, Hale could not refuse to produce the documents because he held them on behalf of his corporation.<sup>27</sup>

In *Wilson v. United States*,<sup>28</sup> the Court adhered to the legal principle it established in *Hale*. In *Wilson*, the president of a corporation was subpoenaed for his corporation's books.<sup>29</sup> He refused to produce them, pleading his personal Fifth Amendment privilege.<sup>30</sup> However, the Court held that he had to produce the books.<sup>31</sup> It reasoned that the books were the property of the corporation, making them corporate in nature.<sup>32</sup> Because they were corporate, not personal, *Boyd's* reasoning did not apply and Wilson could not assert his Fifth Amendment privilege.<sup>33</sup>

*Wheeler v. United States*<sup>34</sup> extended the collective entity doctrine to apply to agents of a dissolved corporation.<sup>35</sup> In *Wheeler*, the president and treasurer of a dissolved corporation were subpoenaed for their former corporation's documents.<sup>36</sup> The officers argued that the corporate books became their personal property when the corporation dissolved.<sup>37</sup> Thus, their

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21. *Hale*, 201 U.S. at 70–73.

22. *Id.* at 75–76.

23. *Id.* at 66–67.

24. *Id.* at 74–76.

25. *Id.*

26. *Id.* at 74–75.

27. *Id.* at 76.

28. 221 U.S. 361 (1911).

29. *Id.* at 367.

30. *Id.* at 369.

31. *Id.* at 386.

32. *Id.* at 379–80.

33. *Id.* at 384–86.

34. 226 U.S. 478 (1913).

35. *See id.* at 482–83.

36. *Id.*

37. *Id.* at 484.

argument went, *Boyd* allowed the officers to rebuff the subpoena.<sup>38</sup> The Court disagreed.<sup>39</sup> It explained that, while the corporation no longer existed, the corporate documents nonetheless remained corporate in nature.<sup>40</sup> Therefore, the officers were not shielded by the Self-Incrimination Clause and were required to produce the documents.<sup>41</sup>

Three decades after *Wheeler*, the Supreme Court again applied the collective entity doctrine in *United States v. White*.<sup>42</sup> This time in the context of a labor union.<sup>43</sup> Unlike earlier cases involving corporations, *White* involved a union president who was subpoenaed for union documents.<sup>44</sup> As a result, some of the Court's earlier reasoning based on the states' power to supervise corporations as creatures of the state was inapplicable.<sup>45</sup> Nevertheless, the *White* Court held that the collective entity doctrine also applied to a union.<sup>46</sup> It stated that a group may be considered a collective entity under the doctrine wherever

one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.<sup>47</sup>

The Supreme Court next applied the collective entity doctrine in *Bellis v. United States*,<sup>48</sup> applying *White*'s reasoning to a law partnership.<sup>49</sup> In *Bellis*, a partner left his law firm and took with him some of its documents.<sup>50</sup> When he was subpoenaed for those documents, he attempted to assert his personal Fifth Amendment privilege.<sup>51</sup> The Court rejected this

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38. *See id.*

39. *Id.* at 490.

40. *Id.*

41. *Id.*

42. 322 U.S. 694 (1944).

43. *Id.* at 701.

44. *Id.* at 695.

45. *Compare id.* at 698–99, with *Wilson v. United States*, 221 U.S. 361, 376 (1911).

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

47. *Id.*

48. 417 U.S. 85 (1974).

49. *See id.* at 86.

50. *Id.*

51. *Id.*

argument based on its precedents.<sup>52</sup> Because the partner still held the documents on behalf of his old firm, he fell within the collective entity doctrine.<sup>53</sup> *Bellis* was the final collective entity doctrine case decided before the Supreme Court's landmark decision in *Fisher v. United States*.<sup>54</sup>

### B. *Fisher and the Act of Production Doctrine*

The Supreme Court's decision in *Fisher v. United States* revolutionized Fifth Amendment jurisprudence by introducing the "act of production" doctrine, limiting the importance of whether documents were personal or corporate in nature.<sup>55</sup> Later, then-Deputy Assistant Attorney General Samuel Alito commented in a 1986 law review article that the Court's decision in *Fisher* "repudiated *Boyd's* analytical framework and announced an entirely new approach to the problem of applying the [F]ifth [A]mendment to compulsory process for documents. Under this new approach, the privilege does not shield the contents of preexisting documents but may protect the act of producing them."<sup>56</sup>

In *Fisher*, the Internal Revenue Service (IRS) subpoenaed multiple taxpayers' attorneys for tax documents.<sup>57</sup> The attorneys attempted to assert the taxpayers' Fifth Amendment privileges on their behalf,<sup>58</sup> but the Court held that the assertion was impossible because the Fifth Amendment right can be pled only by the person who would be incriminated by the documents.<sup>59</sup> Because the attorneys would not be incriminated, they could not plead the Fifth.<sup>60</sup>

But that was not the most revolutionary part of the Court's decision. The Court also established a new framework to determine whether the Fifth Amendment privilege applied to a documentary subpoena.<sup>61</sup> The Court concluded that, even if the taxpayers had possession of the documents, the IRS could still compel their production.<sup>62</sup> Unlike the reasoning in *Boyd*, the

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52. *Id.* at 92–93.

53. *Id.* at 97.

54. 425 U.S. 391 (1976).

55. *See id.* at 410–11.

56. Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 29 (1986).

57. *Fisher*, 425 U.S. at 393–94.

58. *Id.* at 395.

59. *Id.* at 397.

60. *Id.*

61. *Id.* at 410–11.

62. *Id.* at 405.

*Fisher* Court's decision did not turn on the nature—corporate or personal—of the documents.<sup>63</sup> Rather, the Court stated that the foundations for *Boyd*'s reasoning had been “washed away” over time.<sup>64</sup> Indeed, future-Justice Alito agreed in his article that time had exposed the weaknesses of the *Boyd* framework.<sup>65</sup> Thus, the *Fisher* Court held that the contents of documents could not be privileged under the Self-Incrimination Clause.<sup>66</sup> The mere contents of documents cannot be considered compelled, because documents are typically created voluntarily.<sup>67</sup> Because the taxpayers were not forced to create the documents, their contents could not be considered compelled.<sup>68</sup>

However, the Court continued, the very “act of production” of documents may have compelled testimonial aspects under the Fifth Amendment.<sup>69</sup> An individual's act of producing requested documents to the government provides the government with information such as the existence, possession, and the individual's knowledge of the documents.<sup>70</sup> The Court opined that this information would always be testimonial unless the government's knowledge of those factors was so substantial that it rendered the individual's admission of them a “foregone conclusion.”<sup>71</sup> At that point, the act of production becomes a matter of “surrender” rather than “testimony.”<sup>72</sup> The *Fisher* Court concluded that the taxpayers could be compelled to produce the documents because the government already knew that the documents existed from speaking to the taxpayers' accountants.<sup>73</sup> Thus, by producing the documents, the attorneys did not provide the government with any information that it did not already know.<sup>74</sup> The government knew that the tax documents existed, it knew that the attorneys had possession of them, and it knew that the documents produced by the accountants were the authentic

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63. *Id.* at 409.

64. *Id.*

65. Alito, *supra* note 56.

66. *Fisher*, 425 U.S. at 410 n.11.

67. *Id.*

68. *See id.*

69. *Id.* at 410.

70. *Id.*

71. *Id.* at 410–11.

72. *Id.* at 411.

73. *Id.* at 410–11.

74. *Id.*

documents.<sup>75</sup> Therefore, any information that production of the documents would provide was already a foregone conclusion.<sup>76</sup>

The Court's reasoning in *Fisher* raised questions concerning the validity of the Court's earlier collective entity doctrine precedents.<sup>77</sup> Many of the Court's earlier collective entity doctrine cases focused on whether the subpoenaed documents were corporate or personal in nature,<sup>78</sup> but *Fisher*'s departure from this focus on the documents' contents raised the possibility that a corporate employee could assert his own Fifth Amendment privilege when producing incriminating corporate documents.

This argument gained support in *Doe v. United States*.<sup>79</sup> In *Doe*, the sole proprietor of a business was subpoenaed for corporate documents, and he asserted his personal Fifth Amendment privilege.<sup>80</sup> The Court followed its reasoning from *Fisher* and held that, while the contents of the documents were not privileged, the sole proprietor's act of production was.<sup>81</sup> Therefore, he could refuse to comply with the subpoena.<sup>82</sup> This left an open question as to whether the collective entity doctrine remained good law in light of the act of production doctrine.<sup>83</sup>

### C. Braswell and Representative Capacity

The Court confronted the apparent conflict between the collective entity doctrine and the act of production doctrine in *Braswell v. United States*. There, a sole shareholder of two corporations was subpoenaed for his corporations' documents.<sup>84</sup> The sole shareholder, Randy Braswell, asserted his Fifth Amendment privilege based on *Fisher*, arguing that his act of producing the corporations' documents could personally incriminate him.<sup>85</sup> The Court held that the collective entity doctrine survived the creation of the act of production doctrine and that Mr. Braswell was obligated to produce the documents.<sup>86</sup> The Court opined that, while *Fisher* made

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75. *Id.*

76. *Id.*

77. *See Braswell v. United States*, 487 U.S. 99, 109 (1988).

78. *See Wilson v. United States*, 221 U.S. 361, 380 (1911).

79. 465 U.S. 605 (1984).

80. *Id.* at 606–07.

81. *Id.* at 613, 617.

82. *Id.* at 617.

83. *See Braswell*, 487 U.S. at 109.

84. *Id.* at 100–02.

85. *Id.* at 101.

86. *Id.* at 100.

significant changes to the interpretation of the Fifth Amendment, it did not overturn the collective entity doctrine entirely.<sup>87</sup> Instead, the collective entity doctrine continued to exist based on the “agency rationale undergirding the collective entity decisions.”<sup>88</sup>

Therefore, the Court said that Mr. Braswell could not plead his Fifth Amendment privilege because he acted in a “representative capacity” when he produced his corporations’ documents.<sup>89</sup> In reaching this conclusion, the Court emphasized that a corporation must act through its agents.<sup>90</sup> If individuals were empowered to assert their own personal Fifth Amendment privileges against government subpoenas, the government’s ability to enforce laws and investigate crime could be hampered.<sup>91</sup> As a result, the Court said, when a corporate custodian produces documents, it is as if the corporation itself produces them, not the individual.<sup>92</sup> Through this reasoning, the Court effectively held that the collective entity doctrine takes precedence over the act of production doctrine based on the agency relationship between a corporation and its employee.<sup>93</sup>

## II. CIRCUIT SPLITS OVER *BRASWELL*’S APPLICATION TO FORMER CORPORATE EMPLOYEES

Since *Braswell*, federal circuit courts have split over whether the collective entity doctrine applies to former corporate employees. The Second, Third, and Ninth Circuits have decided that the collective entity doctrine does not apply to a former corporate employee because there is no longer an agency relationship between the employee and the corporation.<sup>94</sup> However, the Eleventh and D.C. Circuits have maintained that the collective entity doctrine does apply to former corporate

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87. *Id.* at 109.

88. *Id.*

89. *Id.*

90. *Id.* at 110.

91. *Id.*

92. *Id.* at 115–16.

93. *Id.* at 118.

94. See *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d. Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 133 n.2 (3d Cir. 1997); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995).

employees because the subpoenaed documents remain corporate in nature.<sup>95</sup>

The Second Circuit was the first federal circuit to address the issue.<sup>96</sup> Its decision predated *Braswell*, but the court later found that its decision had anticipated *Braswell's* holding.<sup>97</sup> In the Second Circuit's case, a former president of a corporation was subpoenaed to produce the corporation's documents more than a year after leaving its employment.<sup>98</sup> He refused to do so because the documents he possessed were duplicate copies of the originals and because they could personally incriminate him.<sup>99</sup> The Second Circuit held that, while the president had no legal right to maintain possession of the documents, his act of production could incriminate him.<sup>100</sup> The court then considered whether he was still required to produce the documents under the collective entity doctrine.<sup>101</sup> The court determined that he was not.<sup>102</sup> While the former president would have been required to produce the documents if he had still been employed by the company, the court reasoned that, because he was no longer a corporate representative, he could assert his individual Fifth Amendment right and refuse to answer the subpoena.<sup>103</sup>

After *Braswell*, the D.C. Circuit held that the collective entity doctrine applied to former government employees,<sup>104</sup> and the Eleventh Circuit agreed with the D.C. Circuit's decision a

95. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 809–10 (11th Cir. 1992); *In re Sealed Case (Gov't Recs.)*, 950 F.2d 736, 737 (D.C. Cir. 1991).

96. *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981 (2d. Cir. 1983).

97. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 179–80.

98. *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d at 982–83.

99. *Id.* at 983.

100. *Id.* at 986–87.

101. *Id.* at 986.

102. *Id.* at 987.

103. *Id.* at 986–87.

104. There, the government subpoenaed the former Secretary of Housing and Urban Development and his subordinates for government records, but they refused to produce them. *In re Sealed Case (Gov't Recs.)*, 950 F.2d 736, 737 (D.C. Cir. 1991). The court held that the subpoenaed individuals were required to produce the requested documents. *Id.* It reasoned that, like corporate records, government records also could not be shielded from subpoena. *Id.* at 740. This was based on the nature of the documents, rather than on the agency relationship. *Id.* After making this connection, the court concluded, following *Wilson*, that “the nature of the documents and the capacity in which they were held” demanded their production. *Id.*

year later.<sup>105</sup> In the Eleventh Circuit's case, a grand jury subpoenaed a former employee of a bank for documents that he had improperly taken with him to defend himself against future prosecution.<sup>106</sup> The employee argued that he did not fall within the collective entity doctrine because he had no agency relationship with the bank when he was served with the subpoena.<sup>107</sup> The Eleventh Circuit held that his agency relationship with the bank was irrelevant; he was required to produce the documents because they were corporate documents.<sup>108</sup> The court agreed with the district court, which had reasoned that failing to extend the doctrine would provide an obvious safe haven for corporate crime.<sup>109</sup> In support of its conclusion, the court cited *Bellis* and *Wheeler*, which had denied Fifth Amendment privileges to individuals who had left their previous organizations.<sup>110</sup> The Eleventh Circuit concluded that "the immutable character of the records as corporate" required their production.<sup>111</sup>

However, the Ninth and Third Circuits deviated from that trend over the next five years. In 1995, the Ninth Circuit cited the Second Circuit to hold that the collective entity doctrine does not apply to a former corporate employee who no longer acts on behalf of a collective entity.<sup>112</sup> Likewise, in *United States v. McLaughlin*,<sup>113</sup> the Third Circuit observed in a footnote that a former corporate employee who retains possession of corporate documents is "obviously not within the scope of the *Braswell* rule" because he is not authorized to produce those documents on behalf of the corporation.<sup>114</sup> Only an authorized agent of a corporation may produce documents on its behalf, and a former employee ceases to be an authorized agent after he leaves the company.<sup>115</sup>

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105. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 807 (11th Cir. 1992).

106. *Id.* at 809.

107. *Id.*

108. *Id.* at 809–10.

109. *Id.* at 810.

110. *Id.* at 812.

111. *Id.*

112. *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995).

113. 126 F.3d 130 (3d Cir. 1997).

114. *Id.* at 133 n.2.

115. *Id.*

Finally, the Second Circuit reaffirmed its commitment to the agency theory of the collective entity doctrine in 1999.<sup>116</sup> In that case, the government sought to enforce subpoenas against three former officers of a corporation that was under investigation.<sup>117</sup> All three of the officers had worked at the corporation when the corporation itself was subpoenaed for documents.<sup>118</sup> Indeed, two of the officers had produced documents in response to those subpoenas while working for the corporation.<sup>119</sup> Then, once the three officers had resigned from the company, they were individually subpoenaed, but all three resisted the subpoenas on act of production grounds.<sup>120</sup> The issue before the court was whether its pre-*Braswell* decision that permitted former employees to refuse production remained good law after *Braswell*.<sup>121</sup> The Second Circuit concluded that it did.<sup>122</sup> The court traced the development of the collective entity doctrine in one of the most extensive discussions of the doctrine that a court of appeals has performed.<sup>123</sup> The Second Circuit explained that *Braswell* had not altered the underlying reasoning of its 1983 decision because *Braswell*'s reasoning was rooted in the active agency relationship between a corporate employee and his corporation.<sup>124</sup> Consequently, "once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records."<sup>125</sup> The court further concluded that neither *Bellis* nor *Wheeler* required it to apply the collective entity doctrine to the former employees.<sup>126</sup> *Bellis* was inapplicable because the partner in that case still maintained an agency relationship with his previous law firm,<sup>127</sup> and *Wheeler* was inapplicable because its analysis focused on whether the documents in that case were personal or corporate in nature, the test which had been

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116. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d. Cir. 1999).

117. *Id.* at 174–75.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 176.

122. *Id.*

123. Compare *id.* at 176–78, with *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 807 (11th Cir. 1992) (examining the collective entity doctrine precedents in similar detail).

124. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181.

125. *Id.*

126. *Id.* at 181–82.

127. *Id.* at 181.

replaced in *Fisher*.<sup>128</sup> Therefore, the Second Circuit found no reason to recede from its agency-based decision regarding the collective entity doctrine.<sup>129</sup>

In summary, the circuit courts have split over whether the collective entity doctrine applies to former corporate employees. The Eleventh and D.C. Circuits have held that the doctrine applies because of the corporate nature of the documents.<sup>130</sup> An employee's documents remain corporate even after he resigns.<sup>131</sup> Therefore, allowing him to deny production of those documents could assist him in committing corporate crimes or allow him to protect other incriminated employees of the company.<sup>132</sup> If the doctrine were not applied to former employees, then the protections of the Self-Incrimination Clause could be transformed from a shield against improper governmental investigation into a sword against legitimate investigation.<sup>133</sup>

In contrast, the Second, Third, and Ninth Circuits have held that the collective entity doctrine does not apply to former corporate employees because the employees have no remaining agency relationship with their corporations.<sup>134</sup> This rule is grounded largely in *Fisher* and its progeny, which outlined the act of production doctrine. Under this theory, the key inquiry is not whether the documents were corporate or personal in nature.<sup>135</sup> Instead, the question is who the employee would represent if he were to produce documents in response to the subpoena.<sup>136</sup> If the employee had an agency relationship, then he would be covered by *Braswell*'s reasoning and be obligated to produce the documents.<sup>137</sup> However, if he no longer had an agency relationship with the corporation, then his production of the documents would be deemed to be in his personal

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128. *Id.* at 181–82.

129. *Id.* at 183–84.

130. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 809–10 (11th Cir. 1992); *In re Sealed Case (Gov't Recs.)*, 950 F.2d 736, 737 (D.C. Cir. 1991).

131. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 809–10; *In re Sealed Case (Gov't Recs.)*, 950 F.2d at 737.

132. *See Braswell v. United States*, 487 U.S. 99, 115 (1988).

133. *See id.*

134. *See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 133 n.2 (3d Cir. 1997); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995).

135. *Braswell*, 487 U.S. at 109.

136. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181.

137. *Id.*

capacity.<sup>138</sup> Consequently, he would be able to assert his personal Fifth Amendment right against the subpoena and refuse to produce the documents.<sup>139</sup>

### III. WHAT INTERESTS ARE AT STAKE IN APPLYING THE COLLECTIVE ENTITY DOCTRINE?

What are the practical interests at stake when applying the collective entity doctrine to a given situation? Which parties are benefitted or burdened, and why? The answers to these questions help explain why many of the circuit courts arrived at their conclusions, and they inform how the Supreme Court may respond if it confronts the issue or revisits *Braswell* in the future.

The most apparent interest at stake is that of the subpoenaed former employee who would face harm if compelled to turn over information that could be used against him in a future criminal proceeding. Traditionally, compelled disclosures of this type would be privileged under the Fifth Amendment<sup>140</sup>—and for good reason: preventing a person from being compelled to be a witness against himself was a key reason for the common law right against self-incrimination.<sup>141</sup>

Having strong privileges against compelled disclosure also helps to incentivize ethical law enforcement investigations.<sup>142</sup> While robust self-incrimination privileges might allow for some guilty suspects to escape prosecution, the Self-Incrimination Clause is based on the belief that it is better for a guilty party to go free than for the rights of the accused to be trampled.<sup>143</sup> Furthermore, allowing former employees to assert their Fifth Amendment privileges could incentivize law enforcement

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138. *Id.*

139. *Id.*

140. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”).

141. *United States v. Hubbell*, 530 U.S. 27, 51 (2000) (Thomas, J., concurring) (explaining that “one cardinal rule of the court of chancery” at common law was “never to decree a discovery which might tend to convict the party of a crime” (citing *Boyd v. United States*, 116 U.S. 616, 631 (1886))).

142. See, e.g., *In re Grand Jury Subpoena*, Dated April 18, 2003, 383 F.3d 905, 907 (9th Cir. 2000) (remanding an overbroad subpoena back to the district court because it demanded that the appellant produce documents of which the government had no knowledge).

143. *Doe v. United States*, 487 U.S. 201, 212–13 (1988).

officers to be more efficient because they would not be able to investigate former employees based solely on a suspicion that they had engaged in criminal conduct.

However, a strong countervailing interest lends support to the position that a former employee should not be shielded from criminal liability on account of the nature of his relationship with his former corporation: the employee likely would not have committed the criminal act *but for* his role as an agent of a corporate principal. Indeed, if the criminal act was completely unrelated to the employee's actions taken in service of the corporation, then the collective entity doctrine would not apply at all.<sup>144</sup> More so, even if the subpoenaed individual were a senior-level executive in his previous corporation, the collective entity doctrine would still apply because corporations have a separate legal personality from their agents.<sup>145</sup> This special relationship could create extra duties for a former employee because he undertook actions for the corporation's benefit when he was still employed by it.<sup>146</sup> In short, this represents a strong incentive to apply the collective entity doctrine against a former corporate employee because not doing so would shield a corporation from liability for criminal acts that the former employee undertook while still employed. And due to the nature of the agency relationship, the corporation would be presumed to be aware of these criminal acts.<sup>147</sup> In that light, it makes little sense to allow the former employees to assert a personal privilege for acts that they performed exclusively on behalf of their corporate principals.

The state also has a historical interest in regulating corporations. Originally, corporations were established by state legislative charters and other official state acts.<sup>148</sup> This close association allowed corporations to be strictly regulated by state law.<sup>149</sup> Indeed, state supervision was one of the rationales

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144. See *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d at 907.

145. See *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 812 (11th Cir. 1992) (holding that a former corporate official could not refuse to comply with a subpoena for corporate documents that he had copied and taken with him after leaving the company).

146. CATHY HWANG & PAOLO SAGUATO, *BUSINESS ASSOCIATIONS: A MODERN APPROACH* 48 (Saul Levmore et al. eds., 2023).

147. *Id.*

148. *Wilson v. United States*, 221 U.S. 361, 383–84 (1911) (explaining that a corporation is a creature of the state and is incorporated for the benefit of the public).

149. *Id.*

for developing the collective entity doctrine in the first place.<sup>150</sup> Thus, permitting individuals to assert constitutional privileges to frustrate regulation of corporations would harm states' interests by allowing state-created entities to be used to further criminal acts.<sup>151</sup>

Additionally, in some cases, at-will employees may leave the corporation before an agency completes its investigation of the alleged criminal conduct.<sup>152</sup> In those circumstances, law enforcement's efforts would be hindered significantly. Employees would be under no legal obligation to stay employed by the corporation for the duration of the investigation, and they could abscond with important evidence.<sup>153</sup>

For example, after the Ninth Circuit held that the collective entity doctrine did not apply to former employees, it encountered a case where the government sought to obtain documents from a former employee during an antitrust investigation.<sup>154</sup> Federal Bureau of Investigation (FBI) agents interviewed the former employee of the company at his home, and he admitted that he had had conversations about the subject of the investigation with his superiors over email while working for the corporation.<sup>155</sup> At the end of the interview, the agents served the former employee with a subpoena demanding that he produce "all documents" related to the investigation, including documents that he had not mentioned in the interview and documents that the FBI had no knowledge of him possessing.<sup>156</sup> On appeal, the Ninth Circuit held that the subpoena was overbroad because the FBI agents had specific knowledge of only his email conversations and not of any other documents that he may have had relating to the investigation.<sup>157</sup>

This case highlights the practical difficulties that law enforcement would likely encounter if the Supreme Court held that former employees were not included within the collective

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150. *See id.*; *see also* *Braswell v. United States*, 487 U.S. 99, 110–11 (1988) (explaining the role of the state's interest in regulating corporations in the history of the collective entity doctrine).

151. *See In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 812 (11th Cir. 1992).

152. *HWANG & SAGUATO*, *supra* note 146, at 63–64.

153. *See In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905–08 (9th Cir. 2004).

154. *Id.*

155. *Id.* at 908.

156. *Id.*

157. *Id.* at 910.

entity doctrine. Had the former employee decided not to tell the FBI agents about his email conversations with his employers, the government may never have discovered that he had relevant emails, depriving it of actual evidence that it could use in the investigation. In situations such as the case above, the government is much less likely to be going on a “fishing expedition” for incriminating evidence.<sup>158</sup> Law enforcement could be entirely correct that criminal acts were occurring, but, if the collective entity doctrine did not apply to the former employees, then law enforcement would have a much more difficult time holding wrongdoers accountable.<sup>159</sup>

By contrast, this situation also highlights one of the core principles of the Fifth Amendment privilege: it is designed to prevent the “use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.”<sup>160</sup> The privilege also embodies the principle that “the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.”<sup>161</sup> In the above case, if the collective entity doctrine applied, then the former employee would have been compelled to produce the emails and any other responsive material that he possessed without having ever voluntarily decided to offer that information. His personal constitutional rights would have been trampled for the sake of furthering the investigation against the corporation for which he no longer worked.

In summary, both the former employee’s interest in not being compelled to disclose incriminating information about himself and society’s benefit from incentivizing law enforcement to engage in rigorous investigations support not applying the collective entity doctrine to former employees. However, the principal–agent relationship, the state’s interest in regulating corporations, and the practical difficulties inherent in at-will employment all provide substantial reasons to believe that society might be better off if the collective entity doctrine applied to former corporate employees.

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158. See *United States v. Hubbell*, 530 U.S. 27, 30, 42 (2000) (providing that, in situations where the collective entity doctrine does not apply, the government must be able to identify the documents it seeks with “reasonable particularity” for the subpoena to not be deemed an unconstitutional “fishing trip”).

159. See *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d at 907.

160. *Pennsylvania v. Muniz*, 496 U.S. 582, 595 (1990).

161. *Doe v. United States*, 487 U.S. 201, 212 (1988).

The holding of the Second Circuit and the courts that have followed it favor the individual interests involved in this question, while the Eleventh Circuit's approach favors the corporate structure arguments.<sup>162</sup> For example, the Second Circuit referred to Justice Anthony Kennedy's dissent in *Braswell* to justify its holding.<sup>163</sup> It also referred to the agency rationale undergirding the *Braswell* decision.<sup>164</sup> Finally, it dismissed the prosecutorial policy interests by reasoning that its pre-*Braswell* decision had not significantly stifled law enforcement efforts.<sup>165</sup>

By contrast, the Eleventh Circuit adhered more closely to the corporate structure arguments. It reasoned that the subpoenaed individual could not refuse to produce the documents he possessed because his "formalistic view" would undermine *Braswell* and would "create an obvious haven for those who seek to frustrate the legitimate demands for the production of relevant corporate records made by a grand jury."<sup>166</sup> Thus, even when the defendant copied the corporate records, the records remained corporate because he continued to serve as an agent for the corporation when he copied them.<sup>167</sup> In the Eleventh Circuit's view, an agent's acts taken while serving the principal remain corporate even after he has left the corporation.<sup>168</sup> Both sides of the circuit split have weighed the competing interests and arrived at different results. It therefore remains for the remaining circuit courts and the Supreme Court to weigh these interests and arrive at their own conclusions.

#### IV. SHOULD THE COLLECTIVE ENTITY DOCTRINE APPLY TO FORMER CORPORATE EMPLOYEES?

The underlying rationale of the Supreme Court's decision in *Braswell* is the agency relationship, and there is no basis to extend *Braswell's* reasoning to a former employee. First, the Supreme Court's precedents indicate that agency and

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162. Compare *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 809–10 (11th Cir. 1992), with *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999).

163. See *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 179.

164. *Id.* at 181.

165. *Id.* at 182–83.

166. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 810.

167. See *id.* at 812.

168. *Id.*

representative capacity are key elements to the collective entity doctrine. Thus, the doctrine should not apply if those elements are not present. Second, the Court's most recent collective entity doctrine decision, *Braswell*, explicitly grounded its reasoning in the doctrine's agency rationale. Especially given the radical shift in doctrine that was the *Fisher* decision, this means that the doctrine should not apply if there is no agency relationship. Third, the structure of the *Braswell* opinion suggests that corporate document status is an insufficient ground to apply the doctrine. And fourth, the Court's collective entity doctrine decisions have not focused on the nature of the documents since the *Fisher* decision. Thus, the agency rationale should be given its proper place as the determinative inquiry. These reasons are discussed in turn.

First, the collective entity doctrine should not apply to former corporate employees because the Court's precedents indicate that agency and representative capacity are key elements of the doctrine. For example, in *Wilson*, the Court held that the company president could not refuse production of his company's documents because a corporation can only act through its agents.<sup>169</sup> Thus, because the president was an agent of his corporation, he could not assert his personal Fifth Amendment privilege.<sup>170</sup> The Court used this reasoning again in *White*.<sup>171</sup> There, because the Fifth Amendment privilege is a personal one, the Court explained that the agents of a collective entity "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."<sup>172</sup> The Court's use of agency language suggests that a person acting in an individual capacity with no agency relationship would not owe the same duties to a corporation as an employee who still had such a relationship.

Second, the *Braswell* Court's explicit grounding of its reasoning in the "agency rationale undergirding the collective entity decisions" suggests that the doctrine should not apply to former corporate employees.<sup>173</sup> The Second Circuit recognized this as well.<sup>174</sup> Because a former employee has no relationship

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169. *Wilson v. United States*, 221 U.S. 361, 376-77 (1911).

170. *Id.*

171. *United States v. White*, 322 U.S. 694, 699 (1944).

172. *Id.*

173. *Braswell v. United States*, 487 U.S. 99, 109 (1988).

174. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d. Cir. 1999).

with his former employer, he should not be compelled to produce corporate documents in response to a subpoena. To be sure, the Second Circuit recognized that individuals may still be obligated by contract to produce documents after they cease to work for a corporation.<sup>175</sup> However, this is distinct from the constitutional question of whether a person can be compelled to produce documents in the absence of any contract.<sup>176</sup> Thus, based on the explicit reasoning of *Braswell*, circuit courts addressing this question should follow the agency approach.

Third, the structure of the *Braswell* opinion indicates that the agency theory is the proper test to determine whether the collective entity doctrine should apply to an employee. The issue in *Braswell* was whether the collective entity doctrine survived the Court's recognition in *Fisher* that an individual's act of production could be testimonial.<sup>177</sup> If the collective entity doctrine turned only on the nature of the documents subpoenaed, as the Eleventh Circuit's decision suggested,<sup>178</sup> then the Court's opinion would have been structured differently. The Court's analysis began by tracing the history of the collective entity doctrine.<sup>179</sup> It then explained that its precedents supported applying the collective entity doctrine post-*Fisher* because an individual assumes the responsibilities of his corporation by serving as its agent.<sup>180</sup> The Court referenced cases such as *Wilson*, *White*, *Bellis*, and *Fisher* to support its point.<sup>181</sup> The opinion continued by addressing the policy concern that allowing an employee to assert a personal right could shield corporations from criminal investigations.<sup>182</sup> The Court concluded by creating a special rule for the presentation of evidence in a trial involving documents that had been produced by an employee.<sup>183</sup>

The Court would not have organized its opinion in this manner if it had grounded its decision in the nature of the documents themselves. If that were the case, the Court would have mirrored its earlier collective entity doctrine opinions and explained that the nature of the documents was the critical

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175. *Id.* at 180.

176. *Id.*

177. *Braswell*, 487 U.S. at 100.

178. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 812 (11th Cir. 1992).

179. *Braswell*, 487 U.S. at 104–09.

180. *Id.*

181. *Id.* at 109–12.

182. *Id.* at 115–16.

183. *Id.* at 117–18.

factor dictating whether the doctrine applied.<sup>184</sup> Yet, that is not what the Court did.<sup>185</sup> Instead, it addressed how the earlier cases had recognized duties that an *agent* owes to its principal.<sup>186</sup> It did this in place of focusing on the corporate nature of the documents.<sup>187</sup> As such, *Braswell's* overall structure suggests that the Court intended its opinion to apply only to current corporate employees, not to former employees who had no agency relationship with the corporation.

Fourth, the collective entity doctrine is best understood under the agency theory because, since its decision in *Fisher*, the Court has not relied on the nature of corporate documents to decide a collective entity doctrine case.<sup>188</sup> Before *Fisher*, the key fact was whether the documents were personal or corporate in nature.<sup>189</sup> This led to the Court explaining that lower courts ought to decide whether a document is corporate or personal in nature.<sup>190</sup> However, in *Fisher*, the Court distanced itself from this approach by stating that the foundations for the *Boyd* rule had been “washed away.”<sup>191</sup> Since then, the Court’s analysis has focused on *who* produced the documents, rather than *what* documents were produced.<sup>192</sup> For example, in *Doe*, the collective entity doctrine did not apply because Doe was the sole proprietor of his business and therefore had no agency relationship with it.<sup>193</sup> Conversely, in *Braswell*, Mr. Braswell was the sole shareholder of his corporation and therefore served as its agent.<sup>194</sup> In each of these cases, the Court noted those facts and paid special attention to them in its analysis.<sup>195</sup>

The Supreme Court’s shift away from focusing on the nature of the subpoenaed documents contrasts with the approach of

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184. Compare *Braswell*, 487 U.S. 108–19, with *Wilson v. United States*, 221 U.S. 361, 376–78 (1911), and *United States v. White*, 322 U.S. 694, 698–99 (1944).

185. *Braswell*, 487 U.S. at 109–18.

186. *Id.* at 109–10, 116.

187. *See id.*

188. *See id.*; *United States v. Doe*, 465 U.S. 605, 609–10 (1984).

189. *See Wilson v. United States*, 221 U.S. 361, 385 (1911).

190. *See id.* (noting that the president of a corporation signing and making personal notes in a corporate book did not cause the book to be a personal document); *United States v. MacKey*, 647 F.2d 898, 899–900 (9th Cir. 1981) (holding that a diary and a desk calendar were personal documents after the Court’s decision in *Fisher*).

191. *Fisher v. United States*, 425 U.S. 391, 409 (1976).

192. *See id.* at 410–11.

193. *Doe*, 465 U.S. at 613–14.

194. *Braswell v. United States*, 487 U.S. 99, 100–01 (1988).

195. *Id.* at 101; *Doe*, 465 U.S. at 606–07.

the D.C. and Eleventh Circuits.<sup>196</sup> The D.C. Circuit concluded that the collective entity doctrine applied after it decided that the subpoenaed individual was in possession of government records.<sup>197</sup> The court paid no attention to the agency relationship of the former employee to the government.<sup>198</sup> The Eleventh Circuit also decided its case based on the nature of the documents, rather than on the agency relationship between the employee and the corporation.<sup>199</sup> The court stated the collective entity doctrine as an absolute rule that applied wherever the documents were those of a collective entity.<sup>200</sup> Furthermore, while the court discussed *Bellis* and *Wheeler*, it did not address the agency aspect of those cases.<sup>201</sup> As a result, both the D.C. and Eleventh Circuits' decisions failed to account for *Fisher's* shift away from the nature of the documents subpoenaed. Because the Second, Third, and Ninth Circuits' decisions are consistent with the Supreme Court's focus on the agency relationship between a former employee and his corporation, their decisions are a more faithful understanding of the collective entity doctrine's reach.

#### V. INVESTIGATION OF CORPORATE CRIMES WITHOUT THE COLLECTIVE ENTITY DOCTRINE

If the Court were to hold that the collective entity doctrine requires an active agency relationship or were to overturn its collective entity doctrine precedents entirely, then law enforcement would face additional challenges in investigating corporate crime.<sup>202</sup> As the Eleventh Circuit pointed out, a company suspected of crime could terminate one of its complicit employees prior to the start of an investigation and thereby make accessing incriminating documents more difficult for law enforcement.<sup>203</sup> While this concern is valid, it does not make the

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196. Compare *Braswell*, 487 U.S. at 100, with *In re Sealed Case (Gov't Recs.)*, 950 F.2d 736, 739 (D.C. Cir. 1991), and *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d 807, 809–13 (11th Cir. 1992).

197. *In re Sealed Case (Gov't Recs.)*, 950 F.2d at 739.

198. *Id.* at 739–40.

199. *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 809–13.

200. *Id.* at 809.

201. *Id.* at 811.

202. See *Braswell v. United States*, 487 U.S. 99, 115 (1988) (“[R]ecognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.”).

203. See *In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 812.

exclusion of former corporate employees from the collective entity doctrine unworkable.

Even if a company were to terminate an employee in this way, investigators could likely obtain a search warrant to obtain the documents.<sup>204</sup> A magistrate judge may issue a search warrant when “given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>205</sup> Consequently, in cases involving corporate crime, officers could obtain a search warrant to obtain those documents from a former employee if the officers demonstrate probable cause that the former employee had taken the documents with him when he left the company.<sup>206</sup> Alternatively, if an employee had stolen the corporate documents, then the documents could be obtained by other means.<sup>207</sup> In short, refusing to extend the collective entity doctrine to former corporate employees does not grant those employees carte blanche to take incriminating documents with them.<sup>208</sup>

Moreover, the Second Circuit’s opinion suggests that there is little reason to believe that excluding former employees from the collective entity doctrine causes companies to exploit former employees’ Fifth Amendment privileges. The court made note that there had been few instances in which corporate investigations had been stifled by a company’s ability to sever an employee with incriminating documents.<sup>209</sup> It also observed that an employee who left a corporation with incriminating documents after the subpoena had already been served on the corporation could be held in contempt of court because he would be required to answer the subpoena as an agent under *Braswell*.<sup>210</sup> Therefore, the law enforcement concerns presented by the Eleventh Circuit opinion are not as serious as they might appear at first glance.

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204. See *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 183 (2d Cir. 1999).

205. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

206. See, e.g., *Ganek v. Leibowitz*, 874 F.3d 73, 77 (2d Cir. 2017) (conducting a search warrant of a hedge fund based on probable cause).

207. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 182 (“Any such additional criminal behavior is fully sanctionable in an independent prosecution for theft or obstruction of justice . . .”).

208. *Id.*

209. *Id.*

210. See *id.* at 182 n.4.

Finally, the fact that investigations would become more difficult does not pose a problem because that difficulty is part of the inherent nature of the Fifth Amendment privilege.<sup>211</sup> Thus, the practicality of conducting an efficient investigation should not determine whether the privilege applies to former employees. Instead, courts should remain rooted to the legal distinction between an individual's constitutional rights and the rights of an artificial collective entity. The Supreme Court has consistently emphasized that the Fifth Amendment privilege against self-incrimination is a personal privilege.<sup>212</sup> This was the case in even the earliest collective entity doctrine cases.<sup>213</sup> As a result, courts should take the personal nature of this privilege seriously and give the Fifth Amendment privilege its effect when an employee ceases to be an agent of his corporation. The Fifth Amendment privilege was intended to prevent the "use of legal compulsion to extract from the accused . . . facts which would incriminate him."<sup>214</sup> Yet, by ignoring former corporate employees' Fifth Amendment rights, courts do just that.<sup>215</sup> Therefore, because investigations would still be feasible if the collective entity doctrine did not apply to former corporate employees, courts should not hold that the possibility of corporate crime requires the collective entity doctrine to extend to such employees.

### CONCLUSION

The collective entity doctrine should not apply to former corporate employees based on the Supreme Court's collective entity precedents. Since the Court's decision in *Fisher*, the application of the Fifth Amendment privilege against self-incrimination has turned on the individual's act of production, rather than on the type of documents for which he was subpoenaed.<sup>216</sup> This shift in framework has had consequences for the collective entity doctrine, as the Court's decision in

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211. *See id.* at 183 ("[I]t is inherent in the Fifth Amendment's privilege against self-incrimination that a greater burden is placed on law enforcement than would otherwise be the case.").

212. *United States v. Nobles*, 422 U.S. 225, 233 (1975) (stating that the Fifth Amendment privilege is a "personal privilege: it adheres basically to the person, not to information that may incriminate him").

213. *See Wilson v. United States*, 221 U.S. 361, 385 (1911).

214. *Pennsylvania v. Muniz*, 496 U.S. 582, 595 (1990).

215. *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 174; *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting).

216. *See Fisher v. United States*, 425 U.S. 391, 410–11 (1976).

*Braswell* demonstrates.<sup>217</sup> Whereas for many years corporate documents were required to be produced because of their corporate nature,<sup>218</sup> *Fisher* shifted the inquiry's focus to the testimonial aspects of a person's act of production.<sup>219</sup> This shift was further highlighted by the *Braswell* decision, which paid special attention to the agency relationship between employees and their corporations.<sup>220</sup> As a result, a former employee with no remaining agency relationship should be able to assert his personal Fifth Amendment privilege in response to a subpoena. While this rule might cause some difficulties for the investigators of corporate crimes, it does not create an insurmountable burden. Thus, the collective entity doctrine should not apply to former corporate employees.

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217. *Braswell*, 487 U.S. at 102–03.

218. *See, e.g., Wilson*, 221 U.S. at 380.

219. *Fisher*, 425 U.S. at 410–11.

220. *Braswell*, 487 U.S. at 109.