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NOTES

Fifth Amendment Privilege for Producing Corporate Documents

In *Fisher v. United States*,¹ the Supreme Court held that an individual may assert his fifth amendment privilege against compelled self-incrimination² if his production of personal documents pursuant to a subpoena involves incriminating testimonial admissions.³ The Court extended this act-of-production privilege to a sole proprietor required by subpoena to produce proprietorship records in *United States v. Doe*.⁴ In cases decided before *Fisher*, the Court had consistently prohibited a person from asserting his personal fifth amendment privilege in order to avoid producing corporate⁵ documents that he held in a representative capacity.⁶ Lower courts⁷ and commentators disagree as to whether *Fisher* and *Doe* changed this established rule and extended

1. 425 U.S. 391 (1976).

2. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

3. 425 U.S. at 408-10.

4. 465 U.S. 605, 612-14 (1984).

5. This Note uses the terms "corporate" and "corporation" interchangeably with the term "entity" to refer to any organization such as a corporation, professional corporation, single stockholder corporation, unincorporated association, or partnership that the Court has held is not entitled to the protection of the fifth amendment. See notes 28-33 *infra* and accompanying text.

6. See notes 20-33 *infra* and accompanying text. For detailed definitions of "corporate" papers and "personal" versus "representative capacity" see, e.g., *In re Grand Jury Proceedings* (Shiffman), 576 F.2d 703 (6th Cir.), *cert. denied*, 439 U.S. 830 (1978); *In re Grand Jury Investigation*, Special Grand Jury No. II, Sept. Term, 1983, 600 F. Supp. 436, 438 (D. Md. 1984).

7. For post-*Fisher* cases holding that the act-of-production privilege is not available to persons compelled to produce corporate documents see *United States v. Vallance*, 793 F.2d 1003, 1005-06 (9th Cir. 1986); *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857, 861 (8th Cir.), *cert. granted sub nom.* See *v. United States*, 107 S. Ct. 59 (1986); *In re Grand Jury Proceedings* (Morganstern), 771 F.2d 143, 147 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985); *In re Grand Jury Subpoena* (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985); *Butcher v. Bailey*, 753 F.2d 465, 471 n.9 (6th Cir.) (dicta), *cert. dismissed*, 106 S. Ct. 17 (1985); *In re Kave*, 760 F.2d 343, 357 n.30 (1st Cir. 1985); *In re Grand Jury Proceedings* (Vargas), 727 F.2d 941, 946 (10th Cir.), *cert. denied*, 105 S. Ct. 90 (1984); *United States v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984); *In re Grand Jury Empanelled Mar. 8, 1983*, 722 F.2d 294, 296-97 (6th Cir. 1983), *cert. dismissed*, 465 U.S. 1085 (1984); *United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981) (dicta), *cert. denied*, 454 U.S. 862 (1982); *United States v. MacKey*, 647 F.2d 898, 900 (9th Cir. 1981) (Kennedy, J., concurring); *United States v. Popkin*, 623 F.2d 108, 110 (9th Cir. 1980); *In re Grand Jury Proceedings* (United States), 626 F.2d 1051, 1053 (1st Cir. 1980); *In re Grand Jury Empanelled Feb. 14, 1978* (Markowitz), 603 F.2d 469, 476 (3d Cir. 1979); *United States v. Hankins*, 565 F.2d 1344, 1349 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States v. Kretz Equip. Co.*, 56 A.F.T.R.2d (P-H) 85-5135 (N.D. Ind. 1985); *In re Grand Jury Subpoenas Served Feb. 27, 1984*, 599 F. Supp. 1006, 1012 (E.D. Wash. 1984); *In re Heuwetter*, 584 F. Supp. 119, 122-24 (S.D.N.Y. 1984); *Apache Corp. v. McKeen*, 529 F. Supp. 459, 462-63 (W.D.N.Y. 1982); *Pratt v. Kirkpatrick*, 718 P.2d 962, 967-68 (Alaska 1986); *People v. Superior Court* (Ebel), 39 Cal. 3d 740, 742-43, 705 P.2d 347, 349-50, 218 Cal. Rptr. 24, 26-27 (1985); *In re*

the act-of-production privilege to a person compelled to produce corporate documents.⁸

Several courts of appeals have recently addressed this issue and have reached conflicting results. The Third Circuit in *In re Grand Jury Matter (Brown)*,⁹ held that the act-of-production privilege may be available to all persons compelled to produce records, regardless of the nature of the records compelled.¹⁰ Since *Brown*, the Second and Fourth Circuits have acknowledged that the privilege may be available to persons subpoenaed for corporate documents.¹¹ In contrast, the Sixth and Eighth Circuits have held that the *Fisher-Doe* analysis does not displace the traditional fifth amendment doctrine that precluded self-incrimination claims for individuals required to produce corporate records.¹²

Rubin, 100 A.D.2d 850, 474 N.Y.S.2d 94 (App. Div. 1984); *Minnesota State Bar Assn. v. Divorce Assistance Assn.*, 311 Minn. 276, 278-79, 248 N.W.2d 733, 737-38 (1976).

For cases holding that the act-of-production privilege is available to persons subpoenaed to produce corporate documents, see note 11 *infra*; *United States v. Sancetta*, 788 F.2d 67, 74-75 (2d Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528-29 (3d Cir. 1985) (en banc); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984) (dicta), cert. denied, 105 S. Ct. 1356 (1985); *In re Grand Jury Subpoena Duces Tecum* Dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 986-87 (2d Cir. 1983); *United States v. Darwin Constr. Co.*, 632 F. Supp. 1426, 1429 (D. Md. 1986) (assuming "arguendo" that act-of-production privilege applies); *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16, 23-24 (S.D. Fla. 1985); *In re Grand Jury Investigation, Special Grand Jury No. II*, Sept. Term, 1983, 600 F. Supp. 436, 438 (D. Md. 1984) (dicta); *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326, 327-28 (Fla. Dist. Ct. App. 1986); *In re Benkins Record Storage Co.*, 62 N.Y.2d 324, 328-30, 465 N.E.2d 345, 347-48, 476 N.Y.S.2d 806, 808-09 (1984) (dicta). See also *In re Siegel*, 208 N.J. Super. 588, 592, 506 A.2d 776, 778 (1986) (acknowledging split of authority).

8. Compare Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640 (1986) [hereinafter cited as Note, *Organizational Papers*], and Note, *Sole Shareholder's Privilege Against Self-Incrimination in Producing Corporate Documents*, 59 TEMP. L. Q. 219 (1986) [hereinafter cited as Note, *Sole Shareholder's Privilege*], and Comment, *United States v. Doe and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records*, 40 U. MIAMI L. REV. 793 (1986), with Note, *Fifth Amendment Privileges and Compelled Production of Corporate Papers After Fisher and Doe*, 54 FORDHAM L. REV. 935 (1986) [hereinafter cited as Note, *Privilege After Fisher and Doe*].

9. 768 F.2d 525 (3d Cir. 1985) (en banc).

10. 768 F.2d at 528.

11. *United States v. Lang*, 792 F.2d 1235, 1240-41 (4th Cir. 1986); *In re Two Grand Jury Subpoenas Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); see also *In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 46 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986) (an exception to rule that a corporate representative acting in representative capacity cannot claim privilege against production of records exists "when an individual is personally compelled to produce and authenticate corporate records and those acts are self-incriminating").

12. See *In re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861 (8th Cir.), cert. granted sub nom. See v. *United States*, 107 S. Ct. 59 (1986); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 147 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985). The court in *Morganstern* stated:

The appellants contend that *Doe* extended to the custodian of corporate and partnership records the same right to refuse to produce those records as an individual has with respect to personal records. We do not read *Doe* so expansively . . . [N]othing in the *Doe* decision . . . supports an inference that the collective entity rule, developed by the Supreme Court over a period of nearly 80 years, was overruled sub silentio.

771 F.2d at 147; see also note 112 *infra* and accompanying text.

This Note argues that a person should be able to assert her fifth amendment privilege against self-incrimination when her act of producing corporate documents pursuant to a subpoena¹³ causes her to make testimonial admissions that are incriminating. Part I briefly examines the two approaches the Supreme Court has used to decide claims of self-incrimination for records production. First, it explains the Court's traditional entity doctrine which, by focusing on the nature of the documents and the capacity in which they are held, has prohibited records producers from invoking the fifth amendment privilege against self-incrimination if the records produced are those of a corporation or other collective entity. Second, it examines the more recent three-part analysis adopted in *Fisher* and *Doe* which extends fifth amendment protection to a documents producer only if her production of documents involves compelled testimonial incrimination.

Part II surveys recent attempts of lower courts to apply these two conflicting theories to claims by persons compelled to produce corporate records. It argues that although the practical impact of the position of the Second, Third, and Fourth Circuits differs little from that of the Sixth and Eighth Circuits, the approach employed by the former courts is correct. Part II first demonstrates that under the *Fisher-Doe* analysis, a person compelled to produce corporate records would, in certain situations, be entitled to invoke the privilege against self-incrimination. Second, it argues that the rationale of the entity doctrine no longer supports the denial of fifth amendment protection to a person who may be compelled to make incriminating testimonial admissions by producing corporate documents.

I. THE TWO APPROACHES

The resolution of the question whether or not to apply the fifth amendment analysis in *Fisher* and *Doe* to production of corporate documents requires an understanding of both the entity approach to self-incrimination and the more recent *Fisher-Doe* analysis. This part introduces these approaches and discusses their application to the compelled production of corporate records.

A. *The Entity Rule and Its Extension to Entity Agents*

Prior to *Fisher*, the Supreme Court analyzed self-incrimination claims of corporate records producers by examining the nature of the records and the capacity in which they were held. A person holding entity documents in a representative capacity could not invoke her personal fifth amendment privilege in order to avoid producing those

13. The term "subpoena" in this Note is intended to encompass administrative summonses and court orders to obtain documents in addition to subpoenas duces tecum issued to grand jury and trial witnesses.

documents no matter how incriminating they were to her, while a person holding private records in a personal capacity could.¹⁴ This distinction between the treatment of entity records and private records has a long history. In the landmark decision *Boyd v. United States*,¹⁵ the Supreme Court extended fifth amendment protection to persons compelled to produce private papers.¹⁶ In *Hale v. Henkel*,¹⁷ the Court limited this protection to individuals, holding that corporations have no fifth amendment privilege against self-incrimination.¹⁸ The privilege, the Court later explained, should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."¹⁹

The Court subsequently enlarged this entity rule to prohibit individual representatives of an entity, as well as the entity itself, from refusing to produce entity documents on fifth amendment grounds. In *Wilson v. United States*,²⁰ the Court held that the entity rule precludes an individual from asserting his personal fifth amendment privilege to avoid disclosing subpoenaed entity documents, regardless of whether the subpoena was addressed to the corporation or to the individual, and no matter how personally incriminating the contents of the documents. In *Wilson*, a subpoena duces tecum addressed to a corporation was served on the corporation's president, already indicted for mail fraud and conspiracy. The Court rejected the president's fifth amendment argument for resisting production. First, it reasoned that the

14. See generally 1 F. BAILEY & H. ROTHBLATT, *DEFENDING BUSINESS AND WHITE COLLAR CRIMES* FEDERAL AND STATE § 5:21 (2d ed. 1984); 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 8:12(b)-(c) (1984 & Supp. 1986); 8 J. WIGMORE, *EVIDENCE* §§ 2259a, 2259b (J. McNaughton rev. ed. 1961 & Supp. 1986); Heidt, *The Fifth Amendment Privilege and Documents — Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439 (1984); Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 BROOKLYN L. REV. 70 (1966) [hereinafter cited as Note, *Books and Records Privilege*]; *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1281-83 (1979) [hereinafter cited as *Developments — Corporate Crime*]; Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L.J. 351 (1977) [hereinafter cited as Note, *Business Records and the Fifth Amendment*]; Note, *Abolition of Fifth Amendment Protection for the Contents of Preexisting Documents: United States v. Doe*, 38 SW. L.J. 1023 (1984) [hereinafter cited as Note, *Abolition of Fifth Amendment Protection*]; *Recent Developments — Bellis v. United States: Constitutional Law — The Fifth Amendment — Derogation of the Fifth Amendment as it Pertains to Documents of Organized Entities*, 3 HOFSTRA L. REV. 467 (1975).

15. 116 U.S. 616 (1886).

16. 116 U.S. at 634-35.

17. 201 U.S. 43 (1906).

18. 201 U.S. at 74-75.

19. *United States v. White*, 322 U.S. 694, 701 (1944); see also Cramer, *Back From the Brink: Boyd's Private Papers Protection and the Sole Proprietor's Business Records*, 21 AM. BUS. L.J. 367, 374 n.38 (1984); 1 W. LAFAVE & J. ISRAEL, *supra* note 14, at 694 (privilege designed to protect interests unique to the individual); 8 J. WIGMORE, *supra* note 14, at 353 (there can be no abuses of physical compulsion for a corporation since the accused is an artificial entity and the sentiment requiring the government to bear the entire burden of building a criminal case against the accused is almost entirely confined to human beings).

20. 221 U.S. 361 (1911).

records were not the president's private papers, but rather those of the corporation, which he held in a representative capacity.²¹ Second, the Court noted that the president had accepted the duty to permit inspection of the records when he assumed their custody.²²

This entity doctrine applies to the records of unincorporated associations as well as corporations. In *United States v. White*,²³ the Court denied the privilege to a labor union,²⁴ and in *Bellis v. United States*,²⁵ the Court held that a partner of a defunct three-person law firm could not assert his personal fifth amendment privilege to avoid producing partnership records.²⁶ Such records are not privileged, the *Bellis* Court explained, because a partnership, like a corporation or a labor union, is a "well organized and structured" entity with an established identity independent of its individual members.²⁷ In addition to unincorporated associations²⁸ and partnerships,²⁹ entities whose records are not privileged include dissolved corporations,³⁰ single stockholder corporations,³¹ professional corporations,³² and tenancies in common.³³ Standing alone, *Bellis* and the other entity decisions prevent a person from asserting her fifth amendment privilege to avoid producing entity documents.

21. 221 U.S. at 377-78.

22. 221 U.S. at 381-82. Part II *infra* examines in detail the Court's rationale for denying the privilege to entity agents ordered to produce entity records.

23. 322 U.S. 694 (1944).

24. 322 U.S. at 698-705; *see also* *Curcio v. United States*, 354 U.S. 118, 122-23, 128 (1957) (no privilege for records of union).

25. 417 U.S. 85 (1974).

26. 417 U.S. at 95-101.

27. 417 U.S. at 92-93.

28. *See* *Rogers v. United States*, 340 U.S. 367, 371-72 (1951) (records of political party not privileged).

29. *See* *Bellis v. United States*, 417 U.S. 85 (1974). *Bellis* noted there may be some partnerships that retain the privilege. 417 U.S. at 101 ("This might be a different case if it involved a small family partnership, . . . or . . . if there were some other pre-existing relationship of confidentiality among the partners."). Despite this suggested exception, courts generally have not extended the privilege to family partnerships. *See, e.g.,* *United States v. Alderson*, 646 F.2d 421 (9th Cir. 1981). *But see In re Grand Jury Subpoena Dueces Tecum* (Doe), 605 F. Supp. 174 (E.D.N.Y. 1985) (husband-wife consulting partnership entitled to fifth amendment privilege).

30. *See* *Wheeler v. United States*, 226 U.S. 478 (1913); *Grant v. United States*, 227 U.S. 74 (1913).

31. *See* *Grant v. United States*, 227 U.S. 74 (1913); *see also* cases cited in Heidt, *supra* note 14, at 475 n.149.

32. *See, e.g.,* *United States v. Radetsky*, 535 F.2d 556 (10th Cir.), *cert. denied*, 429 U.S. 820 (1976).

33. *In re Grand Jury Proceedings* (Shiffman), 576 F.2d 703 (6th Cir.), *cert. denied*, 439 U.S. 830 (1978) (co-tenancy); *see also* *United States v. Harrison*, 653 F.2d 359 (8th Cir. 1981) (family trust); *In re Grand Jury Proceedings* (Hutchinson), 633 F.2d 754 (9th Cir. 1980) (trust).

B. *The Fisher-Doe Approach: The Act of Production as Compelled Testimonial Incrimination*

In the entity cases, the Court did not extend any greater fifth amendment protection to testimonial admissions implicit in producing records than it extended to testimony contained within the records themselves — neither were privileged. In 1976, however, the Court held for the first time that the fifth amendment may protect *testimony implicit in the act* of producing records even when it does not protect the *contents* of the records.³⁴ In *Fisher v. United States*,³⁵ two taxpayers objected to government summonses to produce workpapers prepared by their accountants.³⁶ In rejecting the taxpayers' fifth amendment claim, the Court adopted a three-part analysis for claims of self-incrimination by producing records. For the privilege to apply, there must be first, *testimonial communication*,³⁷ second, *compulsion*,³⁸ and third, *incrimination*.³⁹ Eight years later, in *United States v. Doe*,⁴⁰ the Court again applied the *Fisher* test, upholding, in part, the fifth amendment claim of a sole proprietor subpoenaed to produce his business records. The opinion acknowledged the sole proprietor's right not to be compelled to produce the documents himself, but rejected his claim of a privilege to prevent disclosure of their contents.⁴¹ A brief explanation of the *Fisher-Doe* three-part approach follows.

1. *The Testimonial Communication Requirement*

Relying on the language and theoretical basis of the fifth amendment, the Court has interpreted the privilege against self-incrimination to apply only to testimonial communication, not to nontestimonial acts.⁴² A person who is compelled to give blood,⁴³ create

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

35. 425 U.S. 391 (1976).

36. The summonses were addressed to the taxpayers' attorneys, to whom the taxpayers had delivered the documents. Because of the attorney-client privilege, the Court examined whether the fifth amendment would have protected the taxpayers had they not turned the records over to their attorneys. 425 U.S. at 402.

37. See notes 42-59 *infra* and accompanying text.

38. See notes 60-68 *infra* and accompanying text.

39. See notes 69-75 *infra* and accompanying text. *Fisher's* three-part test is now well established. See, e.g., *United States v. Doe*, 465 U.S. 605, 613 (1984); *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979) (per curiam); *First Fed. Sav. & Loan Assn. v. Schamanek*, 684 P.2d 1257, 1264-65 (Utah 1984); Cramer, *supra* note 19, at 379 & nn.73-75 (and cases cited therein).

40. 465 U.S. 605 (1984).

41. 465 U.S. at 612-17. Although the approach the Court adopted in *Fisher* and reapplied in *Doe* recognized for the first time that the fifth amendment protects the *act* of producing documents, it essentially narrowed the reach of the amendment by eliminating the privilege for the *contents* of many previously protected nonentity documents. See notes 66-67 *infra* and accompanying text.

42. See, e.g., *Fisher*, 425 U.S. at 408; *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966).

43. *Schmerber v. California*, 384 U.S. 757, 765 (1966).

voice⁴⁴ or handwriting⁴⁵ exemplars, furnish fingerprints,⁴⁶ participate in a lineup,⁴⁷ try on clothes,⁴⁸ or display wounds,⁴⁹ is not protected by the fifth amendment even though she may be forced to provide important evidence against herself. Such evidence is not of a testimonial or communicative nature.⁵⁰ To be testimonial, evidence must reveal the contents of one's mind.⁵¹

In *Fisher*, the Court held that the mere act of producing documents in response to a subpoena or summons has communicative aspects. Production of documents may constitute testimony by the producer that the documents exist, are in her possession or control, and are the documents she believes are described by the subpoena.⁵² Although the argument that production of evidence implicitly admits existence, possession, and authenticity is not novel, the Court did not grant these admissions fifth amendment protection until *Fisher*.⁵³ In *Curcio v. United States*,⁵⁴ for example, the Court noted that the act of producing union records involved potentially incriminating admissions, but reasoned that the fifth amendment protected only a producer's "oral" testimony, not those admissions implicit in

44. *United States v. Dionisio*, 410 U.S. 1, 7 (1973).

45. *United States v. Euge*, 444 U.S. 707, 718 (1980); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967).

46. *See, e.g., In re Maguire*, 571 F.2d 675, 676 (1st Cir.), *cert. denied*, 436 U.S. 911 (1978).

47. *United States v. Wade*, 388 U.S. 218, 222-23 (1967).

48. *Holt v. United States*, 218 U.S. 245, 252-53 (1910).

49. *See* 1 F. BAILEY & H. ROTHBLATT, *supra* note 14, at § 527 n.16.

50. *See generally* 8 J. WIGMORE, *supra* note 14, at § 2265; Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal, 20 AM. CRIM. L. REV. 31, 36-42 (1982); Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 611-12 (1970).

51. *See Schmerber v. California*, 384 U.S. 757, 764 (1966); *see also Developments — Corporate Crime*, *supra* note 14, at 1283-84 ("mental information processing" is required).

52. 425 U.S. at 410; *see Doe*, 465 U.S. at 613 (quoting *Fisher*, 425 U.S. at 410 (1976)); *see also* Andresen v. Maryland, 427 U.S. 463, 475 (1976); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 531 n.5 (3d Cir. 1985) (en banc) (Becker, J., concurring) (production constitutes nonverbal assertive act which is nonhearsay under FED. R. EVID. 801); Heidt, *supra* note 14, at 473 n.139 (methods for introducing act-of-production testimony into evidence include "testimony of the investigator who issued the subpoena for documents and witnessed their submission by the person subpoenaed" and "any cover letter that the person subpoenaed might have included with the documents verifying that they are the documents requested").

53. *See Glanzer, Grand Jury Investigations*, in PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS 527 (N. Kaplan, P. Friedman, R. Bennett & H. Trainor eds. 1981). For earlier recognition that production involves admissions *see, e.g., Couch v. United States*, 409 U.S. 322, 346-48 (1973) (Marshall, J., dissenting); *Curcio v. United States*, 354 U.S. 118, 125 (1957). *See also Haywood v. United States*, 268 F. 795, 802 (7th Cir.), *cert. denied*, 256 U.S. 689 (1920) (witness' production of documents is her voucher of their genuineness); *People v. DeFore*, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926) (Cardozo, J.) (recognizing the testimonial aspects of production); Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 125, 137 (act of production may have testimonial value).

54. 354 U.S. 118 (1957).

production.⁵⁵

Not every act of production involves testimonial communication. Even if a person always makes certain admissions by producing documents,⁵⁶ *Fisher* held that the testimonial character of these admissions varies with the facts and circumstances of each case.⁵⁷ Justice White wrote:

[W]hether the tacit averments of the taxpayer are both "testimonial" and "incriminating" . . . perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. . . .

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. . . . Surely the Government is in no way relying on the "truth-telling" of the taxpayer to prove the existence of or his access to the documents. . . . The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers.⁵⁸

Whether production admissions are testimonial depends, apparently, on how heavily the government must rely on the admissions in order to prove the existence, possession, and authenticity of the documents produced.⁵⁹

2. The Compulsion Requirement

Only those testimonial communications that are compelled are privileged.⁶⁰ Compulsion can result when a police officer,⁶¹ agen-

55. 354 U.S. at 122-25 (1957). For a discussion of *Curcio*, see notes 168-69 *infra* and accompanying text.

56. See, e.g., *In re Grand Jury Proceedings, John Doe*, 754 F.2d 154, 157 (6th Cir. 1985) (Jones, J., concurring) (stating that "*Doe* stands for the proposition that compelled production is equivalent to three testimonial admissions . . .") (emphasis added).

57. 425 U.S. at 410.

58. 425 U.S. at 410-11 (citation omitted).

59. It is unclear whether the Court in *Fisher* applied the same analysis to determine the testimonial sufficiency of the authenticity admission as it applied to the admissions that the documents exist and are possessed by the producer. 425 U.S. at 413. Perhaps the Court denied the privilege for the admission of authentication because it did not consider the admission incriminating enough to be testimonial. On the other hand, the Court may have recognized that the admission of authenticity was testimonial communication but refused to extend the privilege only after determining that the admission would not incriminate the taxpayer. Relying on the findings of the district court below, the Court in *Doe* did little to clear up this ambiguity. 465 U.S. at 613-14.

Part II will examine the varied applications of the *Fisher* test pertaining to the testimonial sufficiency of act-of-production admissions and the implications of that test for corporate records producers. See notes 86-96 *infra* and accompanying text.

60. See *Fisher v. United States*, 425 U.S. 391, 396-97 (1976); *Couch v. United States*, 409 U.S. 322, 327-29 (1973). See generally Note, *Abolition of Fifth Amendment Protection*, *supra* note 14.

61. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation).

cy,⁶² legislative body,⁶³ court,⁶⁴ or grand jury⁶⁵ orders a person to testify. An individual's testimony in response to a subpoena directed to that individual is compelled because the subpoena compels that particular person to testify. *Doe* held that because a subpoena duces tecum does not require a person to restate or affirm the truth of communications contained within voluntarily prepared documents, the contents of subpoenaed documents are not compelled.⁶⁶ However, any testimonial admissions implicit in producing those documents are compelled. The result is that production of a document may be privileged even when its contents are not.⁶⁷ The situation this Note addresses, like that involved in *Fisher* and *Doe*, is one in which a person attempts to claim her fifth amendment privilege to avoid being compelled to produce documents and make the admissions implicit in production, but could not assert her privilege to prevent disclosure of the contents of the documents if they were produced by some other means.⁶⁸

3. The Incrimination Requirement

Even if a subpoena to produce documents compels a person to make testimonial admissions by responding, that person has no fifth amendment privilege unless those testimonial admissions might incriminate her in future criminal proceedings.⁶⁹ Courts have formu-

62. See *Weston v. United States Dept. of Hous. and Urban Dev.*, 724 F.2d 943, 947-48 (D.C. Cir. 1983) (administrative hearing).

63. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

64. See, e.g., *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 944 (10th Cir.), cert. denied, 105 S. Ct. 90 (1984).

65. See, e.g., *United States v. Doe*, 465 U.S. 605, 612 (1984).

66. 465 U.S. at 611-12; see also *Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (the contents of seized records are not compelled since author voluntarily committed them to writing); Note, *The Rights of Criminal Defendants and the Subpoenas Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 685 (1982).

67. See *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976); *Couch v. United States*, 409 U.S. 322, 328 (1973) (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913)); *In re Kave*, 760 F.2d 343, 356 (1st Cir. 1985).

68. Alternative means of production include using a different producer, see *Couch*, 409 U.S. at 329 (no compulsion against taxpayer when summons directed her accountant to produce records), or a search warrant, see note 158 *infra*.

The Court has suggested that the subpoenaed person's possession of the records may be so "temporary and insignificant" that the primary possessor may be able to assert her own fifth amendment privilege through a doctrine of constructive possession. See *Fisher*, 425 U.S. at 398; *Couch*, 409 U.S. at 322, 333 & n.16; see also *In re Grand Jury Proceedings (Manges)*, 745 F.2d 1250, 1252 (9th Cir. 1984) (stating that constructive possession acknowledges "that possession of records by an employee might be so insignificant or fleeting as to leave essentially unaltered the incriminating testimonial effects the act of production would visit upon the employer"). See generally 1 W. LAFAVE & J. ISRAEL, *supra* note 14, at § 8:12(d); *White Collar Crime: Third Annual Survey of Law*, 22 AM. CRIM. L. REV. 279, 569 n.2424 (1985), and cases cited therein [hereinafter cited as *White Collar Crime*].

69. The privilege may be asserted in any civil, criminal, administrative, judicial, investigatory or adjudicatory proceeding. See *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972); see also *Lefkowitz v. Turley*, 414 U.S. 70, 75-77 (1973) (grand jury); *In re Gault*, 387 U.S. 1, 49-55 (1967)

lated various tests to discern when evidence might be incriminating.⁷⁰ Most recently, in *Doe*, the Court suggested that a person claiming the privilege must demonstrate that the “risk of incrimination [is] ‘substantial and real’ and not ‘trifling or imaginary.’”⁷¹ The government may then rebut that finding with evidence that the facts admitted — the existence, possession, and authenticity of the records — are “foregone conclusion[s].”⁷² The Court’s use of the phrase “substantial risk” indicates that what is incriminating about a piece of evidence is that the government is likely to use it. Similarly, the “foregone conclusion” test designates an admission as nonincriminating if there is so much other evidence to prove the fact admitted that the government is not likely to use that particular admission as its means of proof.⁷³ Despite the criticism prompted by the Court’s “foregone conclusion” test,⁷⁴ the test does provide some limited fifth amendment protection for those who would be forced to admit existence, possession, and au-

(juvenile proceedings); *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (custodial interrogation); *Watkins v. United States*, 354 U.S. 178, 195-96 (1957) (legislative investigation); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (privilege applies in both civil and criminal proceedings); *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) (privilege protects documents in a civil forfeiture action); *Minnesota State Bar Assn. v. Divorce Assistance Assn.*, 311 Minn. 276, 277-78, 280-81, 248 N.W.2d 733, 736-38 (1976) (privilege protects documents in a civil case for injunctive relief); *Rice v. State Bd. of Medical Examiners*, 208 Okla. 440, 441-42, 257 P.2d 292, 293-94 (1953) (same). See generally 8 J. WIGMORE, *supra* note 14, at § 2252.

The privilege does not protect a witness from being forced to give testimony that may cause her embarrassment or scorn, injure her friends, subject herself to civil liability or loss of employment, or harm herself in any way other than subjecting herself to criminal liability. See *Ullmann v. United States*, 350 U.S. 422, 430-31 (1955) (other harmful, but not incriminating effects); see also *Allen v. Illinois*, 106 S. Ct. 2988, 2992-95 (1986) (proceedings under Illinois Sexually Dangerous Persons Act not “criminal” within meaning of fifth amendment).

70. See *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (The threat of incrimination must be “‘substantial and real’ and not merely ‘trifling or imaginary.’”) (quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968)); *Hoffman v. United States*, 341 U.S. 479, 487 (1951) (incriminating if answer “might be dangerous because injurious disclosure could result”). See generally Heidt, *The Conjuror’s Circle: The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1071-74, 1088-94 (1982); *White Collar Crime*, *supra* note 68, at 562-63.

71. 465 U.S. at 614 n.13 (quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968)).

72. *Doe* held that there were sufficient findings in the record to leave undisturbed the lower court’s factual determination regarding the risk of incrimination by admitting existence and possession. The district court had found that the risk was substantial where the respondent argued that his production would concede the existence of the records and that the government needed his production to authenticate the documents at trial. The Court noted that the government could have rebutted this finding by producing evidence that possession, existence, and authentication were a “foregone conclusion.” 465 U.S. at 614 n.13 (quoting *Fisher v. United States*, 421 U.S. 391, 411 (1976)).

73. Prior to *Doe*, some formulations of what is incriminating appeared to emphasize the existence of risk more than the degree of risk. See, e.g., *Hoffman*, 341 U.S. 479, 486-87 (1951); *In re Folding Carton Antitrust Litig.*, 609 F.2d 867, 872 (7th Cir. 1979) (standard is possibility, not likelihood, of prosecution); *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973); *Coffey v. United States*, 198 F.2d 438, 440 (3d Cir. 1952); 1 F. BAILEY & H. ROTHBLATT, *supra* note 14, at § 5.15; Falknor, *Self Incrimination Privilege: Links in the Chain*, 5 VAND. L. REV. 479, 483 (1952). The Court has stated, however, that the fifth amendment requires a substantial and real risk, not the mere presence of risk. See generally Heidt, *supra* note 70, at 1071-74.

74. See, e.g., Heidt, *supra* note 14, at 480-82 & nn.169-71. But see BUSINESS CRIMES: A GUIDE FOR CORPORATE AND DEFENSE COUNSEL 171-74 (J. Glekel ed. 1982). See generally

thenticity of records through the production of those records.⁷⁵

II. CORPORATE RECORDS PRODUCTION: THE TWO APPROACHES COMBINED

Relying on the entity theory, the Court has held that compelling a corporate representative to produce corporate documents is constitutional, even when the documents incriminate that individual.⁷⁶ The question before the Third Circuit in *In re Grand Jury Matter (Brown)*,⁷⁷ the Sixth Circuit in *In re Grand Jury Proceedings (Morganstern)*,⁷⁸ and the Eighth Circuit in *In re Grand Jury Subpoena (85-W-71-5)*,⁷⁹ was whether or not the Court's recognition of fifth amendment protection for the act of production in *Fisher* and *Doe* supplemented or replaced the entity doctrine so that a person's claim of self-incrimination to resist producing corporate records might prevail.⁸⁰

Gerstein, *The Demise of Boyd: Self Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 380-82 (1979); Note, *supra* note 66, at 686-88.

75. See, e.g., *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 13, 1984 (Doe), 616 F. Supp. 1159, 1162 (E.D.N.Y. 1985) (witness in real danger of incriminating himself if he complies with subpoena because he has been told he is target of a grand jury investigation, F.B.I. agents have been asking third parties about his business activities, and government refuses to confer even limited immunity upon him).

76. See *Bellis v. United States*, 417 U.S. 85 (1974) (individual cannot rely upon the fifth amendment privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity even if those records might incriminate him personally); *Curcio v. United States*, 354 U.S. 118 (1957) (union records); *United States v. White*, 322 U.S. 694 (1944) (union records); *Grant v. United States*, 227 U.S. 74 (1912); *Wilson v. United States*, 221 U.S. 361 (1910).

77. 768 F.2d 525 (3d Cir. 1985) (en banc).

78. 771 F.2d 143 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985).

79. 784 F.2d 857 (8th Cir.), *cert. granted sub nom.* See *v. United States*, 107 S. Ct. 59 (1986).

80. In *Brown*, the sole owner of an incorporated accounting firm appealed a contempt order entered for his refusal to comply with a subpoena duces tecum seeking production of the corporation's records before a grand jury. The court characterized the issue before it as "a narrow one. 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, i.e., communicative or assertive in nature." 768 F.2d at 526. Upon reargument, the Third Circuit, sitting *en banc*, reversed the district court's judgment that he could. 768 F.2d at 529.

Brown's attorneys argued that "reconciliation of the cases [decided under the 'old' and 'new' fifth amendment doctrines] is impossible" and that the new fifth amendment jurisprudence of *Fisher* and *Doe* required a determination of whether Brown's act of production was protected by the fifth amendment. Brief for Appellant at 6, 9. For a general discussion of *Brown*, see Note, *Sole Shareholder's Privilege*, *supra* note 8.

In *Morganstern*, the Morgansterns appealed the district court's denial of their motion to quash a grand jury subpoena to produce corporate and partnership records claiming that production would violate their privilege against compulsory self-incrimination. The original panel of the Sixth Circuit reversed the district court's judgment, but upon rehearing *en banc*, the court affirmed the district court. 771 F.2d at 144.

In *In re Grand Jury Subpoena (85-W-71-5)*, a federal grand jury subpoenaed the attorney of an officer of a defunct corporation for documents concerning a construction contract with the Defense Department. The district court denied the attorney's motion to quash the subpoena on the ground that the act-of-production privilege did not apply to corporate documents. The court of appeals affirmed. 784 F.2d 857, 859 (8th Cir.), *cert. granted sub nom.* See *v. United States*, 107 S. Ct. 59 (1986). For other cases, see note 7 *supra*.

In *Brown*, the Third Circuit distinguished pre-*Fisher* cases in which the Court had denied the fifth amendment privilege to corporate records producers. Rejecting arguments that applying *Doe* to corporate as well as sole proprietor records would undermine the purposes of the entity doctrine, the Third Circuit held that *Brown* was entitled to fifth amendment protection if he could establish that production would incriminate him.⁸¹ Reaching a contrary result, the Sixth and Eighth Circuits held that the entity rule was the appropriate analysis for corporate records production cases and maintained that the *Fisher-Doe* test was limited to records of individuals and sole proprietors.⁸² The Sixth Circuit also noted that even if *Doe* applied, "production of [corporate] records is not a testimonial act of the custodian."⁸³

These cases illustrate the two major arguments against allowing a producer of corporate records to claim her privilege against self-incrimination: First, under the *Fisher-Doe* test, production of corporate records is not testimonial or incriminating; second, because of the entity rule, the *Fisher-Doe* test does not even apply to the production of corporate records. This Part of the Note refutes these arguments. First, it explains that, under the *Fisher-Doe* analysis, a subpoena to produce corporate records could result in compelled testimonial incrimination. Second, it argues that applying the fifth amendment privilege to such claims is consistent with the underlying principles of the entity approach.

A. *Producing Corporate Records: Compelled Testimonial Incrimination*

Some of the courts that have applied the *Fisher-Doe* test to the production of corporate records⁸⁴ have, through restrictive interpreta-

81. *Brown*, 768 F.2d at 528-29. The Second Circuit also suggested that the *Fisher* analysis applies to corporate records producers. The court explained that the government may still attain the goals of the entity rule by addressing subpoenas for entity documents to the entity rather than an individual agent. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 56-57 (2d Cir. 1985); *In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 47-48 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986) (when a subpoena is addressed to a corporation, dissolution of corporation does not enhance fifth amendment protection for agent of a corporation).

82. *Morganstern*, 771 F.2d at 147-48; *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857, 861-82 (8th Cir. 1986).

83. *Morganstern*, 771 F.2d at 148.

84. Lower courts have split over whether *Bellis* precludes applying *Fisher-Doe* to these cases at all. The Third Circuit in *Brown*, the Second Circuit in *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985), and the dissent in *Morganstern* each believed that the analysis of *Fisher* and *Doe* supplemented, but did not overrule, *Bellis*. The Second and Third Circuits' interpretation of Supreme Court precedent requires application of the *Fisher-Doe* test to all cases in which an individual is compelled to produce records, corporate or otherwise. See *Brown*, 768 F.2d at 528; *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985); *Morganstern*, 771 F.2d at 149 (Jones, J., dissenting). The Third Circuit reasoned that the Supreme Court's entity cases did not preclude *Doe*'s application to corporate records production since the entity cases did not address the issue of whether testimony inherent in the production of the documents was privileged; the Court had held only that the contents of entity

tions of the testimonial and incrimination prongs of the test, effectively precluded fifth amendment protection for persons compelled to produce corporate records.⁸⁵ This section argues that under *Doe*, a person compelled to produce corporate documents may make admissions that are just as testimonial and incriminating as the admissions made by a person subpoenaed for her personal proprietorship documents.

Admissions implicit in producing records do not lose their testimonial quality if the records belong to a corporation rather than to an individual.⁸⁶ Yet, struggling to apply the *Fisher-Doe* test to corporate documents, several courts have held that the act of producing corporate documents is not testimonial.⁸⁷ Although *Doe* protected the testimonial communication implicit in producing the documents of a sole proprietor, language in *Fisher* suggests that the admissions made by producing corporate documents are not sufficiently testimonial to receive fifth amendment protection.⁸⁸ Many lower courts have interpreted *Fisher* to mean that any implicit admission made by a person producing documents is not testimony under the fifth amendment when the possession and existence of the documents is already known

documents were not privileged. 768 F.2d at 528 n.2. See also *Morganstern*, 771 F.2d at 148-49 (Jones, J., dissenting) (stating *Bellis* does not foreclose act-of-production privilege for corporate documents).

Some cases decided before *Bellis* recognized the incriminating potential of the act of producing entity documents and specifically denied the privilege for production as well as contents. Because *Fisher* later extended the fifth amendment privilege to production admissions, however, these cases are distinguishable. For example, in *Curcio v. United States*, 354 U.S. 118 (1957), the Court explained:

The custodian's act of producing books or records in response to a subpoena duces tecum is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination.

354 U.S. at 125; see also *United States v. Austin-Bagley Corp.*, 31 F.2d 229 (2d Cir.), cert. denied, 279 U.S. 863 (1929) (corporation required to produce corporate records may be required to authenticate them as well since this type of testimony is ancillary to production).

85. The compulsion element of *Fisher's* three-part test is not an issue here. No court has suggested that a subpoena duces tecum for corporate documents exerts less compulsion than a subpoena for personal documents. Nothing about a person's status as a corporate agent or the corporate nature of the documents subpoenaed diminishes the compulsion a subpoena duces tecum exerts on that person. See, e.g., *United States v. Doe*, 465 U.S. 605 (1984).

86. The message remains the same: "These documents exist, they were in my possession, and I believe that they are the records described in the subpoena." See 8 J. WIGMORE, *supra* note 14, § 2264(1) (testimonial disclosure implicit in production of documents). But see *Morganstern*, 771 F.2d at 148 ("[P]roduction of [corporate] records is not a testimonial act of the custodian. Production of the records communicates nothing more than the fact that the one producing them is a representative of the corporation or partnership.").

87. See notes 89-90 *infra*.

88. The Court in *Fisher* argued that it had never protected the implicit admissions made when a person produced a handwriting exemplar or corporate documents, "despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor." The Court justified its conclusion that *Fisher's* admissions would not be testimonial by noting that "[t]he existence and possession or control of the subpoenaed documents [is] no more in issue here than in the [handwriting and corporate documents] cases . . ." 425 U.S. at 411-12.

to the government.⁸⁹ Some courts go so far as to say that the act of production has no testimonial value unless the government actually uses the act to implicate the producer.⁹⁰

These cases misapply the concept of incrimination — whether the testimonial evidence might eventually be used to incriminate the producer in a criminal prosecution — by using it to determine whether

89. See, e.g., *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *United States v. Praetorius*, 622 F.2d 1054, 1062-63 (2d Cir. 1979), *cert. denied*, 449 U.S. 860 (1980); *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 13, 1984 (Doe), 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985); *People v. Copicotto*, 50 N.Y.2d 222, 229, 406 N.E.2d 465, 470, 428 N.Y.S.2d 649, 654 (1980); see also *In re Grand Jury Empanelled* Feb. 14, 1978 (Markowitz), 603 F.2d 469, 477 (3d Cir. 1979) (suggesting admissions of existence, possession, and authenticity are not testimonial because, in the case of an attorney's possession of a client's basic corporate records, such admissions are "unremarkable"); *In re Siegel*, 208 N.J. Super. 588, 593, 506 A.2d 776, 778 (1986) (production of records required by law to be maintained is not compelled self-incrimination because the records are "already known to exist").

A related approach is to define an admission as testimonial "if it can be used by the government to show the existence, possession, or authenticity of the documents requested." *In re Grand Jury Proceedings* on Feb. 4, 1982 (Terry), 759 F.2d 1418, 1421 (9th Cir. 1985) (emphasis added); see also *United States v. Amorosa*, 84-1 U.S. Tax Cas. (CCH) ¶ 9453 (S.D.N.Y. 1984) (witness' "inability to vouch for the accuracy of Mrs. Soltanoff's letters . . . bars finding that his act of production would implicitly authenticate them").

Yet another reason provided for refusing to recognize the admissions as testimony is that the documents could be authenticated by other means or by someone else. See *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *In re Matter of Grand Jury Empanelled* Jan. 18, 1982, 579 F. Supp. 479, 481 (E.D.N.C. 1983); *United States v. Braswell*, 436 F. Supp. 699, 674-75 (E.D.N.C. 1977); *People v. Copicotto*, 50 N.Y.2d 222, 229, 406 N.E.2d 465, 428 N.Y.S.2d 649, 654 (1980). For a discussion of when the existence, possession, and authenticity of subpoenaed corporate documents can be considered a "foregone conclusion" within the meaning of *Fisher* and *Doe*, see note 99 *infra* and accompanying text.

90. The Sixth Circuit in *Morganstern* wrote that production by a corporate custodian is not testimony, note 86 *supra*, but it conceded that an attempt by the government to implicate the custodian on the basis of the act of production would "add testimonial value" to what was otherwise not testimonial and would thus be subject to a motion to suppress. *Morganstern*, 771 F.2d at 148 (citing *In re Grand Jury Empanelled* Mar. 8, 1983, 722 F.2d 294, 297 (6th Cir. 1983), *cert. dismissed*, 465 U.S. 1085 (1984), and *United States v. Schlanski*, 709 F.2d 1079, 1083 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984)). The Eighth Circuit expressly adopted this aspect of the Sixth Circuit's position. *In re Grand Jury Subpoena* (85-W-71-5), 784 F.2d 857, 861 (8th Cir.), *cert. granted sub nom.* See *v. United States*, 107 S. Ct. 59 (1986); see also Note, *Fisher v. United States: Is the Taxpayer's Privilege Against Self-Incrimination a Bar to Production of Records Held by His Attorney?*, 1977 DET. C. L. REV. 429, 436 ("If nothing is derived from the averments, there is no testimony; and without testimony there can be no self-incrimination.").

These courts sidestepped the Supreme Court's mandate in *Doe* by failing to require a formal grant of immunity for these witnesses and instead compelling their admissions with only the assurance that if the government tries to use the "testimony" against them, the testimony will be subject to suppression:

We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires. . . . The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. . . . Congress expressly left this decision exclusively to the Justice Department. If, on remand, the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.

Doe, 465 U.S. at 616-17 (footnotes and citations omitted); see also note 131 *infra*.

Other cases fail to give a reason why producing business documents is not testimonial. See, e.g., *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977).

the act is testimonial. First, interpreting *Fisher* to mean that the testimonial quality of an admission must be measured by the value of the admission to the government is inconsistent with the Court's earlier tests for testimonial quality. Earlier tests for testimonial quality centered on whether the evidence revealed the contents of a person's mind.⁹¹ Often, persons compelled to produce the most useful evidence received no constitutional protection because the evidence was "non-testimonial."⁹² Potential for use in a criminal prosecution is the basis for identifying testimony that is *incriminating*.⁹³ The Court never used it to identify what is *testimonial* before *Fisher*.⁹⁴ Even if incrimination must play some role in determining testimonial quality, *Fisher* cannot mean that the implicit admissions involved in the act of producing corporate documents are never incriminating enough to be testimonial, as *Morganstern* suggested.⁹⁵ To classify all admissions made by producing corporate documents as nontestimonial precludes the case-by-case analysis mandated by *Fisher*.⁹⁶

It is also improper to characterize all such admissions as nonincriminating. If the incriminating nature of all testimony is measured by one standard under the fifth amendment, the "foregone conclusion" test that the Court used in *Fisher* and *Doe* should apply to the testimony implicit in producing entity, as well as nonentity, records. This "foregone conclusion" standard⁹⁷ does not preclude a finding that a producer of corporate documents may incriminate herself by

91. See, e.g., notes 50-51 *supra* and accompanying text; see also Arenella, *supra* note 50, at 42-43 (testimonial communication includes the intent to communicate).

92. See notes 42-49 *supra* and accompanying text.

93. See notes 70-73 *supra* and accompanying text.

94. See *Fisher*, 425 U.S. at 429 (Brennan, J., concurring) ("I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him."); cf. Heidt, *supra* note 14, at 476 n.151.

95. *Morganstern*, 771 F.2d at 148 (quoted in note 86 *supra*); see also, 771 F.2d at 149 (Jones, J., dissenting) ("[T]he majority distorts the rationale of *Doe* by promulgating a rule that the act of producing corporate documents is always free of testimonial implications.").

96. See 425 U.S. at 410 (quoted in text accompanying note 58 *supra*). Arguably, one could interpret Justice White's statement that testimonial sufficiency "may depend on the facts and circumstances of particular cases or classes thereof" (emphasis added) to allow for a blanket rule for all corporate records producers. However, no court has adopted this position, and the facts and circumstances of cases in which persons are compelled to produce corporate records are too diverse to be treated as a class. Several lower courts properly determine an admission's testimonial sufficiency and its incriminating potential separately. See, e.g., *United States v. Plesons*, 560 F.2d 890, 892-93 (8th Cir.), cert. denied, 434 U.S. 966 (1977); see also *Morganstern*, 771 F.2d at 149 (Jones, J., dissenting) ("[W]hether a particular act of production is testimonial is a question of fact to be determined by the district court at the time the custodian of documents contests a subpoena for their production.") (emphasis added).

Finally, it may not be appropriate to determine the testimonial sufficiency of all three production admissions in the same way. While existence and possession are not sufficiently testimonial if each is a "foregone conclusion," *Fisher* and *Doe* left open the possibility that the authentication admission may be testimonial even if it is a "foregone conclusion." See note 59 *supra*.

97. See notes 71-72 *supra* and accompanying text.

admitting that she knows the documents exist, that she possesses them, and that she thinks they are the ones the subpoena described, despite *Fisher's* suggestion in dicta to the contrary.⁹⁸

It is difficult to articulate a test for what is considered a "foregone conclusion" because the inquiry turns on the unique facts of each case.⁹⁹ Several courts, including the Supreme Court in *Doe*, have held that the existence or possession of documents of a sole proprietor or individual were sufficiently unknown to the government to deserve the protection of the fifth amendment.¹⁰⁰ Some courts examining the same question when corporate documents are involved have also held that existence and possession are not foregone conclusions. For example, in *In re Grand Jury Proceedings (Katz)*,¹⁰¹ Katz was subpoenaed to produce documents of businesses co-owned or controlled by his client, who sought to intervene to bring a motion to quash.¹⁰² The Second Circuit noted that "the Government obviously does not know the identity of [the client's] corporations or [Katz's] relationship to them" ¹⁰³ For these entities, the court said, "the 'existence and location of the papers' is not a 'foregone conclusion,' and their production may well add much 'to the sum total of the Government's information.'" ¹⁰⁴ The government may sometimes use subpoenas duces te-

98. See note 88 *supra* and accompanying text.

99. See, e.g., *United States v. Lang*, 792 F.2d 1235, 1241 (4th Cir. 1986) ("Lang's act of producing those records would add little or nothing to the sum total of the government's knowledge of the existence and location of the summoned records."); *United States v. Fox*, 721 F.2d 32, 37-38 (2d Cir. 1983) (Before production can be compelled, the government must demonstrate that it "knows enough to eliminate any possibility that . . . production would constitute an incriminating testimonial act."); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984 (Doe)*, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985) (Production is not incriminating "[i]f the government can demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents . . .").

100. See, e.g., *Doe*, 465 U.S. at 614 n.13; *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 106 S. Ct. 17 (1985); *In re Grand Jury Proceedings* on Feb. 4, 1982, 759 F.2d 1418, 1421 (9th Cir. 1985); *In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979); see also Casenote, *United States v. Fox: The Fifth Amendment Shields a Sole Proprietor [sic] from Producing Business Records Pursuant to an IRS Summons*, 38 ARK. L. REV. 670, 681-84 (1985) (discussing what burden government must meet to demonstrate its awareness of records location and existence). Following *Fisher's* lead, many courts separate this inquiry into two tests, one for determining whether the admissions of existence and possession are incriminating and another for determining whether the admission of authenticity is incriminating. See, e.g., *United States v. Fox*, 721 F.2d 32, 36-37 (2d Cir. 1983).

101. 623 F.2d 122 (2d Cir. 1980).

102. 623 F.2d at 123-24.

103. 623 F.2d at 126.

104. 623 F.2d at 126 (quoting *Fisher*, 425 U.S. at 411); see also *Municipal Investigating Comm.*, 200 N.J. Super. 413, 421, 491 A.2d 779, 783 (1984) (existence and location of police records not foregone conclusion); Note, *Organizational Papers*, *supra* note 8, at 646 n.54 (suggesting case in which existence of documents would be unknown to government); cf. *In re Grand Jury Subpoena Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981, 987 (2d Cir. 1983) (production might corroborate that witness misappropriated records). In most cases, however, existence and possession are held to be foregone conclusions. See, e.g., *In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984 (Doe)*, 616 F. Supp. 1159, 1160-61 (E.D.N.Y. 1985) (admission of existence and location of records is not incriminating where subpoena was

cum in these situations because other methods of obtaining documents are unavailable, as when the documents cannot be described with particularity or their location or custodian is unknown.¹⁰⁵ Thus, the incidence of persons incriminating themselves through production of corporate documents may be higher than *Fisher* suggests.

Similarly, a corporate record producer's admission that she thinks the documents she produces are the ones described by the subpoena may also be incriminating. *Fisher* reasoned that this authenticity admission is not incriminating if the government cannot use it to authenticate the documents at trial.¹⁰⁶ However, a requirement that an admission be adequate to authenticate documents at trial in order to be incriminating ignores the possibility that the government can use admissions of authenticity to incriminate a person in other ways. For instance, evidence that a person is familiar enough with documents to identify them may allow a fact finder to infer that the person was familiar with their contents.¹⁰⁷ The admission also may lend credibility to documents in the grand jury setting where evidentiary requirements for authenticity are absent.¹⁰⁸

The Court compounded the inadequacy of *Fisher's* measure for in-

for records including cash receipts and disbursements, general ledgers, cancelled checks, bank statements, and tax returns, where government affidavit showed the government knew witness kept a set of partnership books, knew of two bank accounts, and knew the names on those accounts).

105. See *United States v. Doe*, 465 U.S. 605, 608 n.3 (1984) (subpoenas may be overbroad); 465 U.S. at 613 n.12 (quoting lower court inferring that government attempted to compensate for lack of knowledge by requiring appellee to become the primary informant against himself); *United States v. Fox*, 721 F.2d 32, 38 (2d Cir. 1983); Heidt, *supra* note 14, at 488 (government often cannot describe documents in detail needed to obtain search warrant); Note, *supra* note 66, at 685 n.23 (subpoena duces tecum only alternative when government is unsure of location or existence of evidence); Note, *On Claiming the Fifth Amendment for Mixed Purpose Documents: The Problem of Categorizing Documents as Personal or Corporate in a Business Setting*, 17 U.S.F. L. REV. 333, 343-44 (1983); *White Collar Crime*, *supra* note 68, at 573 n.2475; see also *In re Grand Jury Subpoena Duces Tecum Dated Nov. 13, 1984 (Doe)*, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985) ("A blunderbuss subpoena, such as that issued here, creates an inference that the government is seeking to compensate for its lack of knowledge by compelling petitioner 'to become the primary informant against himself.' " The inference was rebutted by a government affidavit demonstrating that the government already knew the information admitted.) (quoting *United States v. Fox*, 721 F.2d 32, 38 (2d Cir. 1983)); note 158 *infra*. But see *Andresen v. Maryland*, 427 U.S. 463, 479-82 (1976) (search warrant for documents held valid even though warrant contained phrase "fruits, instrumentalities and evidence of crime at this [time] unknown"); K. MANN, *DEFENDING WHITE COLLAR CRIME* 275 n.30 (1985); Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 690-91 (1977).

106. 425 U.S. at 412-13. Justice White reasoned that since the taxpayer did not prepare the subpoenaed papers, he could not authenticate them, and therefore his admission that he thought they were authentic would not represent a substantial threat of incrimination. See also *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir.), *cert. dismissed*, 106 S. Ct. 17 (1985).

107. Heidt, *supra* note 14, at 478.

108. See *Costello v. United States*, 350 U.S. 359, 363 (1956) (grand jury indictment may not be challenged on the ground that there was inadequate or incompetent evidence); see also 2 W. LAFAYE & J. ISRAEL, *supra* note 14, at § 14.4(a) (evidentiary standards for preliminary hearings vary from state to state).

crimination in *Doe*, where it held that the admission of authenticity is not incriminating if authentication is a foregone conclusion (that is, if authenticity is provable by other means).¹⁰⁹ Several lower courts have interpreted *Fisher* and *Doe* to mean that if there is any way to authenticate the documents other than using the admissions of the producer, then the admission of authenticity is not incriminating.¹¹⁰ As there are almost always alternative ways to authenticate entity documents,¹¹¹ a self-incrimination claim for the admission of authenticity will usually fail any test that requires the admission to be the sole means of authentication available to the government. However, the privilege should still be available for those situations in which the government is unable to demonstrate that authenticity, existence, and possession are all foregone conclusions.

B. *The Entity Rule Does Not Preclude the Act-of-Production Privilege for Producing Corporate Documents*

Interpreting *Fisher* and *Doe* to mean that production of corporate records is neither testimonial nor incriminating is not the only ration-

109. 465 U.S. at 614 n.13. *Doe's* adoption of the foregone conclusion language for all three admissions is a departure from *Fisher* and unjustifiably narrows the fifth amendment's protection against compelled testimonial incrimination. Just because a prosecutor *may* use some other method to authenticate the documents instead of a target's testimony does not mean the prosecutor *will* use it. See Note, *Organizational Papers*, *supra* note 8, at 647 n.56 (suggesting that evidence authenticated by a defendant is more influential than evidence authenticated by a third party). Until the witness receives a guarantee that the prosecutor will not use his testimony against him, it is incriminating. See, e.g., *In re Grand Jury Proceedings* (United States), 626 F.2d 1051, 1056-57 (1st Cir. 1980) ("[I]f the government *can* use the compelled obedience to prove an incriminating fact, or to discover other incriminating evidence, the party's constitutional right remains in jeopardy.") (emphasis in original). The appropriate response to the presence of alternative means of authentication is not to pronounce that the producer's authenticating admission is not incriminating, but to require the prosecutor to grant the producer use immunity for that admission. See notes 131-32 *infra* and accompanying text. Granting immunity would not deprive the government of much evidence in the situation where existence and possession and authenticity are foregone conclusions because the government already has other means to introduce this evidence against the witness.

110. See *United States v. Lang*, 792 F.2d 1235, 1241 (4th Cir. 1986) ("[B]ecause Agent Camp can identify the records, the Government need not rely on Lang's act to verify that the documents are in fact what they purport to be."); *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1982) (fifth amendment not a ground for refusing to produce documents as long as the fact of compliance with the summons is not introduced into evidence at the incriminated party's trial); *In re Grand Jury Subpoena Duces Tecum* Dated Nov. 13, 1984 (*Doe*), 616 F. Supp. 1159, 1161-62 (E.D.N.Y. 1985) (When the government can authenticate documents without relying on any act by petitioner, then production by petitioner does not implicate the fifth amendment. The court held that admissions involved in the production of cancelled checks and bank statements are not incriminating since the documents are either self-authenticating or can be authenticated through testimony of bank personnel.); *United States v. Beckman*, 545 F. Supp. 1284, 1285 (M.D. Fla. 1982) (admission "does not implicate the Fifth Amendment unless it is the act of production itself which is to be used as incriminating evidence") (citing *United States v. MacKey*, 647 F.2d 898, 900 (9th Cir. 1981)); see also note 109 *supra*; *In re Special Investigation No. 281*, 299 Md. 181, 195, 473 A.2d 1, 8 (1984) (stating that because others "are in a position to verify the records" the production "does not constitute compelled testimonial incrimination"); Note, *supra* note 66, at 689.

111. See notes 130-58 *infra* and accompanying text.

ale lower courts have employed to deny the privilege against self-incrimination to persons compelled to produce corporate records. Many courts have reasoned that the entity rule precludes applying the *Fisher-Doe* test to claims by producers of corporate records. These courts point to language in *Doe* and *Fisher* which they claim indicates that the Court did not intend to reverse its prior denial of fifth amendment protection for entity records producers.¹¹² In light of the Court's recent shift to compelled testimonial incrimination as the guide for determining the scope of fifth amendment protection, however, the principles behind the entity doctrine no longer justify withholding fifth amendment protection for testimony implicit in the act of producing corporate documents.¹¹³

The Court extended the rule precluding self-incrimination claims for producing entity documents from entities themselves to agents of entities for three reasons. Agents have been denied the right to refuse to produce entity documents that incriminate them because: (1) entity records are not private enough to deserve fifth amendment protection;¹¹⁴ (2) such a privilege would undermine the government's efforts to enforce the law against both entities and their agents;¹¹⁵ and (3) an entity agent, upon accepting his agency, waives his fifth amendment privilege to refuse to produce documents.¹¹⁶ None of these reasons justifies denying an agent his right to assert the fifth amendment privilege when a subpoena compels him to incriminate himself through testimony implicit in the act of producing records.

112. The Sixth Circuit in *In re Grand Jury Proceedings* (Morganstern) cites several passages in *Fisher* and *Doe* that suggest the Court "did not retreat from the collective entity rule" and argues that neither case undercut the vitality of the rule. 771 F.2d 143, 145-46 (6th Cir.) (en banc), cert. denied, 106 S. Ct. 594 (1985) (citing *Fisher*, 425 U.S. at 411-13, quoted in text accompanying note 57 *supra*). In its discussion of *Doe*, the court stated:

Nowhere in the *Doe* opinion is it even hinted that it announces a departure from the collective entity rule. Rather the opinion points out that the Court of Appeals in *Doe* noted that an individual may not assert the fifth amendment privilege on behalf of a corporation, partnership, or other collective entity, citing *Bellis* with apparent approval.

771 F.2d at 147; see also *In re Grand Jury Proceedings* (Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 105 S. Ct. 90 (1984); Note, *Privilege After Fisher and Doe*, *supra* note 8, at 946-47 (arguing that *Fisher* and *Doe* assumed the continued validity of denying corporate agents a privilege to avoid producing corporate documents under the collective entity rule). Other courts have also denied the privilege to producers of corporate records stating both that the entity rule still applies and that production of corporate documents is not incriminating testimony. See, e.g., *In re Rubin*, 100 A.D.2d 850, 852, 474 N.Y.S.2d 94, 96 (1984). But see note 84 *supra*.

113. See Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 41 n.184 (1986); Note, *Organizational Papers*, *supra* note 8.

114. See *Bellis v. United States*, 417 U.S. 85, 92; *Curcio v. United States*, 354 U.S. 118, 122-23 (1957); *United States v. Beattie*, 522 F.2d 267, 273 (2d Cir. 1975); Gerstein, *supra* note 74, at 365-66.

115. See note 123 *infra*.

116. See notes 164-67 *infra* and accompanying text.

1. *A Fundamental Shift in Fifth Amendment Analysis; Eliminating Protection for Private Documents*

The Court's fifth amendment analysis regarding the production of documents no longer depends on how private those documents are. The Court first extended the fifth amendment privilege to compelled production of private papers in *Boyd v. United States*.¹¹⁷ The early decisions denying this fifth amendment privilege to entity agents reasoned that since the records of an organization are subject to inspection by others in the organization and by the state, they "do not contain the requisite element of privacy or confidentiality essential for the privilege to attach."¹¹⁸ Alternatively, because the records were not an agent's personal property, but instead belonged to the entity, the agent could not assert his fifth amendment privilege to avoid their production.¹¹⁹ Records of individuals and sole proprietors remained protected because they were private papers owned by natural persons.¹²⁰

Fisher and *Doe* rendered privacy and ownership irrelevant to analysis of self-incrimination claims. Under *Fisher* and *Doe*, because any testimony contained within voluntarily created papers is not compelled, there is no longer any need to distinguish between private documents and entity documents in order to determine which are privileged — none are.¹²¹ Fifth amendment protection in cases of doc-

117. 116 U.S. 616 (1886); see also *Bellis*, 417 U.S. at 91; *Murphy v. Waterfront Commn.*, 378 U.S. 52, 55 (1964) (listing respect for a "private enclave" as one of several principles behind the fifth amendment privilege). See generally Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981).

118. *Bellis*, 417 U.S. at 92; see also Comment, *Fifth Amendment Interpretation in Recent Tax Record Production Cases*, 46 U. CIN. L. REV. 232, 234 (1977) ("[In *Wilson*, *White*, and *Bellis*] the Court considered the personal and private nature of the documents to be the primary determinant for deciding whether the privilege against self-incrimination would attach.").

119. See *Bellis*, 417 U.S. at 93, 98-99; Note, *Organizational Papers*, *supra* note 8, at 642-43; Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951-64 (1977). For a recent example of a court applying this reasoning to a corporate records producer, see *People ex rel. Clancy v. Superior Court* (Ebel), 39 Cal. 3d 740, 744-45, 705 P.2d 347, 349-58, 218 Cal. Rptr. 24, 26-27 (1985).

120. See *Bellis*, 417 U.S. at 87-90; *United States v. White*, 322 U.S. 694, 698-700 (1944); *Wheeler v. United States*, 226 U.S. 478, 490 (1913); *Wilson v. United States*, 221 U.S. 361, 377 (1911). See generally Note, *Organizational Papers*, *supra* note 8, at 643; note 121 *infra* and articles cited therein.

121. *Doe*, 465 U.S. 605, 618 (O'Connor, J., concurring); see, e.g., *In re Kave*, 760 F.2d 343, 355 (1st Cir. 1985); *Morganstern*, 771 F.2d at 148 (Jones, J., dissenting) ("[T]he Court in *Doe* did not consider the content of the documents . . . or whether their ownership was private or collective."); *State v. Superior Court of Maricopa County*, 128 Ariz. 253, 256, 625 P.2d 316, 319 (1981) (interpreting *Fisher* as rejecting privacy rationale for fifth amendment); 1 W. LAFAVE & J. ISRAEL, *supra* note 14, at § 8.7(a) (*Boyd* "has little current vitality."); Gerstein, *supra* note 74; Heidt, *supra* note 14, at 441 n.5, 473; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 76-78 (1976) (privacy rationale abolished by *Fisher*); Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977); *White Collar Crime*, *supra* note 68, at 565-66 (concluding that *Doe* has left *Boyd* in "limbo"); see also Cramer, *supra* note 19, at 381 n.73 (citing ten cases which hold that the focus of the fifth amendment is on the act of production); Note, *Organizational Papers*, *supra* note 8, at 643-44 (*Fisher* replaced *Boyd*'s privacy standard with a compelled testimony standard); cf. Levinson, *Testimonial Privileges and the Preferences of*

ument production remains, but only for the act of production, not for the documents themselves.¹²²

2. Preventing Agents from Shielding the Corporation

Another fundamental reason for prohibiting an individual from asserting her personal privilege against self-incrimination when producing corporate documents is to prevent individuals from using their personal constitutional rights to shield the records of entities from government inspection.¹²³ Authorities must be able to bring criminal and civil enforcement proceedings against corporations and corporate

Friendship, 1984 DUKE L.J. 631, 638-39 (extent of fifth amendment's privacy orientations should not be over-emphasized).

But see *Doe*, 465 U.S. at 619 (Marshall, J., dissenting) ("I continue to believe that under the Fifth Amendment 'there are certain documents no person ought to be compelled to produce at the government's request.'") (quoting *Fisher*, 425 U.S. at 431-32 (Marshall, J., concurring in judgment)); *Fisher*, 425 U.S. at 414-28 (Brennan, J., concurring); *United States v. (Under Seal)*, 745 F.2d 834 (4th Cir. 1984), *vacated as moot*, 105 S. Ct. 1861 (1985); *In re Grand Jury Proceedings (United States)*, 626 F.2d 1051, 1054 n.2 (1st Cir. 1980); *In re Grand Jury Investigation, Special Grand Jury No. II*, Sept. Term, 1983, 600 F. Supp. 436, 438 (D. Md. 1984); *White Collar Crime*, *supra* note 68, at 567 n.2407 (listing post-*Doe* cases that still distinguish between private and nonprivate documents); Cramer, *supra* note 19, at 382 nn.74, 76 (listing cases prior to *Doe* but subsequent to *Fisher* that applied *Boyd's* privacy rationale).

122. The concurring judge in *In re Grand Jury Matter (Brown)* observed:

Fisher and *Doe* have changed the fifth amendment landscape by refocusing the inquiry on the act of production and not on the nature of the documents at issue. The pre-*Fisher* cases distinguished between corporate documents, which were afforded no fifth amendment protection, and other business records, which were held to be protected by the fifth amendment. In *Fisher* and *Doe*, however, the Court held that voluntarily prepared business records of any kind are not entitled to fifth amendment protection, and that only the act of producing the documents might be privileged. . . . Thus, one basis for the pre-*Fisher* distinction between corporate and other records-keepers — that only the latter were keepers of records with fifth amendment protection — was eroded by these later cases. 768 F.2d 525, 530 n.3 (3d Cir. 1985) (en banc) (Becker, J., concurring) (emphasis in original) (citations omitted); see also Saltzberg, *supra* note 113, at 40-41 (arguing *Andresen*, *Fisher*, and *Doe* suggest that it is "time to reexamine the holding in *Wilson* that a corporate officer may not invoke the privilege to resist the subpoena of corporate documents tending to incriminate him"). But see *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143, 145 (6th Cir.) (en banc), *cert. denied*, 106 S. Ct. 594 (1985) ("Despite this shift in emphasis from the contents of subpoenaed documents to the testimonial act of production, the Court did not retreat from the collective entity rule."). See generally Note, *Organizational Papers*, *supra* note 8, at 640-48.

123. In *United States v. White*, the Court stated:

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of . . . organizations and their representatives demand that the constitutional power of . . . governments to regulate those activities be correspondingly effective. . . . [E]vidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. 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. . . . The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations. 322 U.S. at 700 (citations omitted). See also *Wilson v. United States*, 221 U.S. 361, 384-85 (1911) ("The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of records and papers of the corporation."); *Bellis v. United States*, 417 U.S. 85, 90 (1974); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 702-03 (1951);

agents who violate federal and state law.¹²⁴ The government builds most of these cases with documentary evidence.¹²⁵ Proof of offenses such as fraud, tax, securities, and antitrust violations is virtually always contained within financial records, correspondence, client or account files, written policies, meeting minutes, internal memos, and other corporate documents. The papers themselves, however, are not sufficient proof of an offense if the government takes a case to trial. Because evidentiary rules require documentary evidence to be authenticated for admission at trial, the government's attorneys may need authenticating evidence in addition to the records themselves.¹²⁶

Applying the *Fisher-Doe* act-of-production privilege to producers of corporate records would not significantly limit the government's access to or use of corporate documents against a corporation and its agents. The government can almost always obtain and authenticate entity documents *without* using the compelled and incriminating act-of-production testimony of a corporate representative. This section explains how the act-of-production privilege for producers of corporate records would still allow the government to use corporate documents against corporations and their agents in most situations.

Assume a case in which a federal grand jury is investigating a cor-

Saltzburg, *supra* note 113, at 37; cf. Note, *Books and Records Privilege*, *supra* note 14, at 74 n.21 (citing cases reinforcing the view that corporations cannot assert the fifth amendment privilege).

The question of whether ease of law enforcement should be relevant at all in interpreting the fifth amendment is not settled. See, e.g., *United States v. Fox*, 721 F.2d 32, 40 n.6 (2d Cir. 1983) ("Our decision today should not severely hamper the legitimate investigatory activities of the IRS. . . . [W]e do not believe that effective enforcement of the tax laws should take precedence over constitutional protections."); Gerstein, *supra* note 74, at 368 (balancing of the interest of law enforcement not appropriate in fifth amendment doctrine, unlike fourth amendment analysis); Note, *Books and Records Privilege*, *supra* note 14, at 79 ("[I]t was [the] very recognition of the demands of the government's regulatory interests that engendered the fifth amendment. Indeed, the privilege was formulated for the express purpose of providing the greatest amount of individual protection when government interests in having disclosure were correspondingly great."); Note, *Organizational Papers*, *supra* note 8, at 652-54 (the needs of law enforcement should be irrelevant in determining whether producers of corporate records are protected by the fifth amendment).

124. See 1 W. LAFAVE & J. ISRAEL, *supra* note 14, at § 8.12 n.124; cf. Note, *Organizational Papers*, *supra* note 104, at 649 nn.64-65 (collecting support and criticism of the necessity of prosecuting individual officers in order to control organized crime).

125. Wigmore wrote:

Often the criminal acts of groups — especially of corporations, which virtually can act by written record only — are contained in writings only. They are virtually the sole evidential incriminating material upon which a prosecutor can rely. A rule privileging the group's records from surrender would impose upon the prosecutor a task largely futile.

8 J. WIGMORE, *supra* note 14, at § 2259a. In a civil investigation of a corporation and its agents for tax evasion, an agency may compel the production of corporate documents through the use of an agency summons. A grand jury conducting a criminal investigation may issue a subpoena duces tecum for corporate records to obtain evidence needed to indict. See generally Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigatory Methods*, 14 AM. CRIM. L. REV. 651 (1977).

126. For a discussion of fifth amendment issues raised in the context of authenticating records, see notes 151-57 *infra* and accompanying text; see also note 52 *supra* and accompanying text.

poration for fraud. Assume also that the grand jury issues a subpoena duces tecum to the president of the corporation ordering her to produce several corporate documents. *Fisher* and *Doe* hold that the president may not object to production of documents on the basis that the contents of the documents incriminate her, because any testimony within the records' contents is not compelled.¹²⁷ Consequently, even if the papers contain information incriminating the president, she cannot prevent their disclosure. She can, instead, claim that the government cannot compel her to produce the records if the admissions she would make by producing the records might incriminate her personally.¹²⁸ She may assert her act-of-production privilege by moving to quash the subpoena or by appearing in front of the grand jury without the documents and then in court to argue that her claim of privilege is proper. If the court finds that the admissions implicit in production would not be sufficiently testimonial or incriminating, the president must produce the documents.¹²⁹

If the court finds the president's act of production is privileged, however, the prosecutor has a number of alternative methods of authenticating the documents. First, assume that the corporation, not its president, is the target of the grand jury's investigation.¹³⁰ The prosecutor could grant use immunity to the president for those testimonial admissions implicit in production that the district court found incriminating.¹³¹ As an immunized witness, she would have to produce the

127. See notes 65-68 *supra* and accompanying text.

128. See notes 52-53 *supra* and accompanying text.

129. See text at notes 84-111 *supra*.

130. "A 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, 9-11.260 (1985).

131. See, e.g., *Rogers Transp., Inc. v. Stern*, 763 F.2d 165 (3d Cir. 1985) (en banc) (the granting of use immunity to two employees of a single stockholder corporation allowed document production without risk of testimonial self-incrimination); *In re Grand Jury Subpoenas Duces Tecum* Dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 988 (2d Cir. 1983) (government may immunize the act of production); *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326, 328 (Fla. Dist. Ct. App. 1986) (Pearson J., specially concurring) (same).

A United States Attorney may grant use immunity to a witness who "has refused or is likely to refuse to testify or provide information on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003(b)(2) (1982). Use immunity means that the government may not use the immunized testimony against the witness in any subsequent prosecution, and that the witness must testify under threat of contempt. See *Kastigar v. United States*, 406 U.S. 441 (1972). The Internal Revenue Service may also grant immunity. 18 U.S.C. § 6004 (1982). Without formal statutory immunity, the promise of a prosecutor or a court not to use a witness's testimony against her is constitutionally insufficient to compel her testimony. See *United States v. Doe*, 465 U.S. 605, 616-17 (1984) (quoted at note 90 *supra*); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261-64 (1983); *White Collar Crime*, *supra* note 68, at 576-77 & n.2510 and cases cited therein. The Attorney General or his assistant must approve each formal immunity grant. U.S. DEPT. OF JUSTICE *supra* note 130 at 9-1.112Q.

The immunity need only extend as far as the claim of privilege. For example, a record-keeper subpoenaed for company documents may only receive immunity from the government's use of the incriminating testimony implicit in production, not from the government's use of the con-

records or risk being held in contempt of court. Because immunity would allow the prosecutor to use the immunized testimony against any defendant except the president,¹³² the government could use both the contents of the records and the president's testimony against the corporation. The act-of-production privilege for producers of corporate records does not shield the corporation as long as there is some representative to produce the records to whom the prosecutor is willing to grant immunity.¹³³

Assume another situation where both the president and the corporation are targets of the investigation. An act-of-production privilege for the president in an action against the corporation would not shield her from investigation or prosecution just as it does not shield the corporation from prosecution. Applying *Doe* would only prevent the government from using the president's own admissions against *her*. The government may obtain and authenticate the documents in proceedings against the president without using the president's own testimony.¹³⁴ First, the prosecutor could subpoena some other corporate agent who could produce and authenticate the documents and then use that agent's testimony against the president. Generally there will be someone whom the prosecutor is willing to subpoena who will not have a valid claim of self-incrimination for the act-of-production.¹³⁵ Even if the subpoenaed agent has a valid self-incrimination claim, a grant of use immunity will allow introduction of his testimony against the targeted president.

tents of the documents. *Doe*, 465 U.S. 605, 617 n.17; *In re Grand Jury Proceedings* (United States), 626 F.2d 1051, 1057-58 (1st Cir. 1980); *United States v. Colletta*, 602 F. Supp. 1322, 1327 (E.D. Pa. 1985) (immunity protects authentication, not contents). See generally 1 W. LAFAVE & J. ISRAEL, *supra* note 14, at § 8.11; *The Granting of Witness Immunity*, 67 J. CRIM. L. & CRIMINOLOGY 129 (1976).

132. See note 131 *supra*.

133. It is likely that immunity will be made available to some agent in the interests of prosecuting a more culpable target. See, e.g., U.S. DEPT. OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 39-41 (1980) (The U.S. Attorney should consider a person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his history with respect to criminal activity.); see also Thornburgh, *Reconciling Effective Federal Prosecution and the Fifth Amendment: "Criminal Coddling," "The New Torture," or "A Rationale Accommodation?"*, 67 J. CRIM. L. & CRIMINOLOGY 155, 157 (1976) ("Federal prosecutors . . . have employed the use immunity procedure to compel 'little fish' to convict the 'big fish' in scores of cases involving members of organized crime and racketeering syndicates, as well as corrupt politicians, and masterminds of white collar fraud.") (footnote omitted); Note, *Organizational Papers*, *supra* note 8, at 650 n.69 (citing prosecutors who do not think prosecution of organizations would "unduly suffer by extending the fifth amendment privilege to personally incriminating organizational documents"). But see U.S. DEPT. OF JUSTICE, *supra*, at 38 (If time is critical, there may be cases in which the use of the immunity procedures would "unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation . . .").

134. See *In re Grand Jury Matter* (Brown), 768 F.2d 525, 526 (3d Cir. 1985) (en banc) ("The government acknowledges that the grand jury could obtain the records by means other than a subpoena duces tecum addressed to Brown."); *In re Grand Jury* 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16, 25 (S.D. Fla. 1985).

135. See notes 109-11 *supra* and accompanying text.

Suppose our hypothetical is the rare¹³⁶ case in which every representative that the government could subpoena to produce the documents can and will claim his or her fifth amendment privilege against self-incrimination. Even if the prosecutor chooses not to grant immunity to any of them,¹³⁷ the act-of-production privilege will not deprive the government of the use of the corporation's documents against the president. The prosecutor may direct a subpoena duces tecum to the corporation rather than to an individual associated with the corporation.¹³⁸ An extension of *Fisher* and *Doe* to protect producers of corporate documents will not change the principle of *Bellis* that a corporation, no matter how small, has no fifth amendment rights to assert. The corporation has no privilege against self-incrimination,¹³⁹ and, therefore, cannot resist a subpoena and must find some way to comply.¹⁴⁰ It must provide an agent who will produce and authenticate the documents without asserting his fifth amendment privilege. Some courts have explicitly ordered a corporation to appoint an agent, other than the representative asserting his fifth amendment privilege, to produce documents.¹⁴¹ As the Second Circuit explained in *In re*

136. See Part II.A *supra* (not all act-of-production admissions are incriminating); note 145 *infra* and accompanying text.

137. Unless every agent is a target, it is unlikely that a prosecutor would decline to immunize at least one of them. See note 133 *supra*.

138. See, e.g., *Wilson v. United States*, 221 U.S. 361, 374 (1911) where the Court stated: "Where the documents of a corporation are sought the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena *duces tecum* should not be directed to the corporation itself." See also *Brown*, 768 F.2d at 528 ("Records of collective entities still must be maintained, and their production can be compelled by a subpoena duces tecum addressed to the entity."); cf. *In re Grand Jury Empanelled Feb. 14, 1978* (United States), 597 F.2d 851, 854 (3d Cir. 1978), *affd. in part and revd. in part sub nom. United States v. Doe*, 465 U.S. 605 (1984) (subpoena directed to "any responsible officer" of the corporation); *People v. Modern Amusement Co.*, 72 Misc. 2d 950, 952, 340 N.Y.S.2d 748, 751 (1973) (writ may be directed to corporation itself). But see Note, *Organizational Papers*, *supra* note 8, at 649 n.67 (ability to obtain documents by subpoena to entity still an "open question," citing no authority).

A court may provide similar relief by ordering the entity to produce and authenticate the records. See, e.g., *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 55, 57 (2d Cir. 1985).

139. See notes 17-19, 23-33 *supra* and accompanying text.

140. See *Wilson v. United States*, 221 U.S. 361, 376 (1911) (a command to a corporation is a command to those officially responsible to conduct affairs); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985) (stating that there is no situation in which the fifth amendment would prevent a corporation from producing records); *United States v. G & G Advertising Co.*, 762 F.2d 632 (8th Cir. 1985), (corporate documents must be produced in response to summons addressed to corporation); *In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 46-47 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986) (subpoenae issued to "corporation, not Roe, do not mention him or demand that Roe himself produce them"); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984) (a corporation may be required to supply a new agent should all employees refuse to testify on fifth amendment grounds), *cert. denied*, 470 U.S. 1004 (1985).

141. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 54, 59-60 (2d Cir. 1985); *United States v. Barth*, 745 F.2d 184, 186, 188-89 (2d Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); Glanzer, *supra* note 53, at 527; see also *In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 48 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986) (state law, and

Two Grand Jury Subpoenae Duces Tecum,¹⁴² a court may order the corporation to appoint "an entirely new agent who has no previous connection with the corporation that might place him in a position where his testimonial act of production would be self-incriminating."¹⁴³

The idea that a corporation may be required to provide a person who cannot or will not invoke his privilege against self-incrimination is not new. Courts have required corporations to use their broad corporate powers to provide an agent who could, without fear of self-incrimination, furnish answers to interrogatories.¹⁴⁴ In most circumstances, corporations will have agents who can provide the act-of-production testimony without the risk of self-incrimination.¹⁴⁵ Even in a one-person corporation, the corporation's attorney may be an appropriate agent for production.¹⁴⁶ In the unusual case where the corporation has no employee, attorney or accountant for whom the three admissions implicit in production are foregone conclusions, the entity could appoint somebody off the street, so to speak, to be a corporate agent to produce and authenticate the documents.¹⁴⁷

possibly federal law, empowers corporations to make such appointments or district court may order them to do so); *In re Grand Jury Subpoenas Duces Tecum Served Upon 22nd Ave. Drugs, Inc.*, 633 F. Supp. 419, 423 (S.D. Fla. 1986) (avoiding issue of whether *Doe* applies to custodians of corporate records by ordering corporations to secure representatives who will produce the subpoenaed documents within ten days); *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326, 328 (Fla. Dist. Ct. App. 1986) (Pearson, J., specially concurring) (suggesting using an "appointed surrogate method" of appointing producer in lieu of custodian). *But see United States v. Hankins*, 565 F.2d 1344, 1350 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (court cannot order agent to produce some employee of the firm as a witness who will not claim privilege, and agent cannot compel such witness' attendance or waiver of fifth amendment privilege).

142. 769 F.2d 52 (2d Cir. 1985).

143. 769 F.2d at 57 (2d Cir. 1985); *see also United States v. Sancetta*, 788 F.2d 67, 74-75 (2d Cir. 1986) ("another agent could be appointed by Sancetta Corp. or by the court to produce the records").

144. *See United States v. 3963 Bottles, More or Less, Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir.), *cert. denied*, 360 U.S. 931 (1959) (corporation has no fifth amendment rights and has a "duty to appoint an agent who could, without fear of self-incrimination, furnish such requested information as [is] available to the corporation"); *Apache Corp. v. McKeen*, 529 F. Supp. 459, 463 (W.D.N.Y. 1982); *Priebe v. World Ventures, Inc.*, 407 F. Supp. 1244, 1246 (C.D. Cal. 1976); *see also United States v. Kordel*, 397 U.S. 1, 8 (1970) (while recognizing a corporation's obligation to appoint an agent, the court does not address circumstances where the corporation could not appoint an agent who would waive his right against self-incrimination). *See generally Cooper, Fifth Amendment Rights in Private Treble Damage Litigation*, 48 ANTITRUST L.J. 1381, 1393-94 (1979).

145. *See In re Grand Jury Matter (Brown)*, 768 F.2d 525, 529 (3d Cir. 1985) (en banc); *see also United States v. Lang*, 792 F.2d 1235, 1240-42 (4th Cir. 1986) (characterizing situations in which the admissions of one who produces corporate documents are testimonial and incriminating as "rare," "limited," "unusual," and "narrow"); *cf.* 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2018 at 143-44 (1970) (unlikely that a corporation would not be able to appoint someone who would not subject himself to the risks of self-incrimination in answering interrogatories).

146. *See Brown*, 768 F.2d at 256 (Brown had offered to submit the records to the grand jury through his attorney. The offer was rejected by the government.).

147. *See In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985); 8 J.

Requiring an entity that receives a subpoena to appoint an agent who will not be incriminated by production would not allow entity agents to subvert government enforcement efforts. Assume the case of a subpoena addressed to a professional corporation consisting of one person with no agents. If the professional appoints an agent to produce her documents, the agent, without a fifth amendment claim of his own, may be forced to testify from whom he got the records and what that person said to him in order to authenticate the records. Some argue that, in effect, the professional has been compelled to testify against herself through the agent.¹⁴⁸ If so, the argument continues, a one-person corporation may effectively shield its records through the individual's act-of-production privilege. This conclusion is erroneous, however, under *Bellis*¹⁴⁹ and the other entity cases. There is no compulsion for the individual professional to testify because the subpoena compelled the corporation, not a particular agent, to act.¹⁵⁰

Another criticism is that a corporation might be unable to supply an agent capable of authenticating the documents who is not also a potential target.¹⁵¹ Assume that the only agent the corporation can find to produce the records without self-incrimination has very little personal knowledge of the business. The corporation's personnel must

WIGMORE, *supra* note 14, at § 2259c n.16 ("By directing a subpoena to the organization, [the government] puts it under a duty to obtain the records, its property, from the incriminated custodian and to have them turned over to the court by a representative who would not himself be incriminated."); *see also In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 47-48 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986) (dissolution of corporation does not eliminate the duty of a former corporation to appoint someone to produce subpoenaed records for whom the act of production would not be incriminating).

148. *See* Heidt, *supra* note 70, at 1069 n.31 (forcing agent is like forcing the originally subpoenaed employee because employee must inform agent about documents); Note, *Privilege After Fisher and Doe*, *supra* note 8, at 956; *see also* Rogers Transp., Inc. v. Stern, 763 F.2d 165, 167 (3d Cir. 1985) (en banc) (not deciding on the merits of appellant's argument that a court order directing the company to designate a third party to produce the summoned records is, in reality, equivalent to compelling appellant to do the same, "since [appellant] is the only individual who can appoint and apprise any such agent of these matters"). *But see In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 48 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986) (court rejects witness' claim that he would incriminate himself if ordered to appoint an agent because he has to inform that agent that the records were authentic and those described, and that information could then be used against him).

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

150. *See, e.g., In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985) ("The bright line of *Bellis* still holds. The appellant . . . chose the corporate form in order to gain its attendant benefits; he cannot now disregard this form in order to shield its business records from production."); *In re Grand Jury Subpoenas Issued to 13 Corps.*, 775 F.2d 43, 48 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986), where the Second Circuit explained,

If one of Roe's relatives or associates complies with the subpoena [to the corporation], any information [he or she] obtained from Roe would not have been extracted under an order requiring him to testify . . . [W]e do not share Roe's view that appointment of an outsider would necessarily involve Roe in self-incrimination. . . . [Roe] himself is not being required to testify through any personal act of production.

151. *See, e.g., In re Grand Jury Matter (Brown)*, 768 F.2d 525, 536 (3d Cir. 1985) (en banc) (Garth, J., dissenting); *United States v. Braswell*, 436 F. Supp. 669, 674 n.5 (E.D.N.C. 1977); Note, *Privilege After Fisher and Doe*, *supra* note 8, at 956 nn.150-51.

inform the agent about the records so that the agent may authenticate the records he produces. To authenticate the documents, the government must either prove authenticity with the nontarget's second-hand information and other evidence, or grant a target use immunity for his act-of-production testimony.

Neither choice will seriously disadvantage government enforcement efforts. Authenticating business documents is relatively easy. The Federal Rules of Evidence require only that the party who submits the evidence (in this case, the prosecutor) provide a foundation from which the fact finder could legitimately infer that the evidence is what the submitting party claims it to be.¹⁵² A proponent of documentary evidence may satisfy this requirement by showing that the documents are self-authenticating,¹⁵³ offering evidence that the unique characteristics of the documents demonstrate they are authentic,¹⁵⁴ proving authenticity through circumstantial evidence,¹⁵⁵ or offering testimony of a witness with personal knowledge of their authenticity.¹⁵⁶ If the agent producing the documents cannot testify to their

152. FED. R. EVID. 901(a), (b)(1) (testimony of a witness with knowledge that a matter is what it is claimed to be satisfies requirement of authentication); *see also In re Japanese Elec. Prods.*, 723 F.2d 238, 286 (3d Cir. 1983), *cert. granted in part sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 105 S. Ct. 1863 (1985) (minutes sufficiently authenticated when produced by court order, counsel present when produced, removed from stack of similar minutes, and appearance, content, and substance of minutes appear authentic) (citing FED. R. EVID. 901(b)(4)). *See generally* 5 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(b)(1)[01] (1983).

153. *See Brown*, 768 F.2d at 529 (business records can usually be authenticated without resort to extrinsic evidence); FED. R. EVID. 902(9) (checks are self-authenticating); *In re Richter & Phillips Jewelers & Distrib., Inc.*, 31 B.R. 512, 514 (S.D. Ohio 1983) (original check is admissible without extrinsic evidence of authenticity under 902(9)).

Also, FED. R. EVID. 902(10) provides that documents may be presumed authentic by statute. Such statutes include signature on tax return or SEC registration, 15 U.S.C. § 77(a) (1976), and records and receipts filed with particular agencies. *See, e.g.*, 47 U.S.C. § 412 (1976) (Federal Communications Commission), 49 U.S.C. § 16(13) (1976) (Interstate Commerce Commission), 49 U.S.C. § 1503 (1976) (Civil Aeronautics Board). Section 2-205 of the Uniform Commercial Code provides that certain third-party documents are self-authenticating; *see* 5 J. WEINSTEIN & M. BERGER *supra* note 152, at ¶ 902(9)[01], 902-38.

154. *See* FED. R. EVID. 901(b)(4); 5 J. WEINSTEIN & M. BERGER *supra* note 152, at ¶ 901(b)(4)(01)-(04).

155. *See, e.g.*, *United States v. Black*, 767 F.2d 1334, 1341-42 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 574 (1985) (records authenticated by virtue of being in Black's possession at the time government sought production); *Burgess v. Premier Corp.*, 727 F.2d 826, 835-36 (9th Cir. 1984) (exhibits adequately authenticated by being in the defendant's warehouse); *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) ("Proof of the connection of an exhibit to the defendants may be made by circumstantial, as well as direct, evidence. The prosecution need only prove a rational basis from which the jury may conclude that the exhibit did, in fact, belong to the appellants."); *cf. Greenbaum v. United States*, 80 F.2d 113, 124-25 (9th Cir. 1935) (company's mailing of letter shown by evidence of receipt of a letter through the mail bearing the company's name and sent from a town in which the company operated); *Conner v. Zanuzoski*, 36 Wash. 2d 458, 464-65, 218 P.2d 879, 882-83 (1950) (when combined with some evidence that a letter was written and mailed, evidence that a reply letter was received is sufficient to authenticate the original letter).

156. *See, e.g.*, FED. R. EVID. 901(b)(1) (testimony that a matter is what it is claimed to be is sufficient authentication).

authenticity from his own personal knowledge, as in our hypothetical, the prosecutor may still employ these alternative means of authentication.¹⁵⁷ These techniques are available even if the prosecutor chooses to obtain the documents by granting immunity to the target for his act-of-production testimony. A prosecutor may introduce those documents against the target in a later prosecution if she can show that she did not use the target's immunized act of production admissions in any way.¹⁵⁸

Only when a person's possession, knowledge of existence, or belief in the authenticity of entity documents is both crucial to the case against him and not inferable from sources other than his own production testimony,¹⁵⁹ does the act-of-production privilege become an

157. See generally Alexander & Alexander, *The Authentication of Documents Requirement: Barrier to Falsehood or to Truth*, 10 SAN DIEGO L. REV. 266 (1973); Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632, 635-37 (1956).

158. Immunizing the act-of-production testimony of a target does not prevent the government from proving that the target knew the documents existed, possessed them, and thought they were the ones named in the subpoena. Use immunity means only that the government may not use the target's testimony from production in its case against him, that it must be able to demonstrate that all of its evidence came entirely from independent sources. See *Kastigar v. United States*, 406 U.S. 441 (1972); see also Note, *Organizational Papers*, *supra* note 8, at 651-52 ("Kastigar should not present a serious obstacle to the use of immunity for act-of-production testimony."); U.S. DEPT. OF JUSTICE, *supra* note 133, at 37-38 (use immunity leaves open the possibility of prosecuting the witness on basis of independent evidence). But see Heidt, *supra* note 14, at 488 ("Providing use immunity forces the government to prove the unprovable — that it has made no use, evidentiary or otherwise, of the implied admissions compelled."); Note, *Privilege After Fisher and Doe*, *supra* note 8, at 958.

Another method of obtaining business documents which would not implicate anyone's fifth amendment privilege is available to the government in criminal cases — the search warrant. See *United States v. Fox*, 721 F.2d 32, 40 n.6 (2d Cir. 1983) (government could have obtained documents by search warrant); 8 J. WIGMORE, *supra* note 14, at § 2259c n.16 (in appropriate cases, the government may obtain records by search and seizure). The Court in *Andresen v. Maryland*, 427 U.S. 463 (1976), held that a search and seizure does not involve compelled testimonial incrimination because in seizing documents on its own, the government does not compel the author of the documents to testify. 427 U.S. at 474 (The individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.); see also Comment, *Constitutional Law: Search And Seizure of Private Business Records No Longer Supplies Compulsion Necessary to Invoke the Fifth Amendment*, 29 U. FLA. L. REV. 376 (1977) (analyzing *Andresen*).

Some suggest the warrant is not a viable alternative to the subpoena because the subpoena is the only way to produce documentary evidence when the existence and location of the evidence are unknown. See note 105 *supra*. A subpoena duces tecum, unlike a search warrant, does not require the government to demonstrate probable cause that a crime has been committed, nor to give a description of the type and location of evidence sought. See *United States v. Dionisio*, 410 U.S. 1 (1973); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208-09 (1946). *Andresen* may have weakened this objection, however, in holding that a search warrant seeking documents and "other fruits, instrumentalities and evidence of crime at this [time] unknown" was valid. 427 U.S. at 479-82. See also Applegate, *The Business Papers Rule: Personal Privacy and White Collar Crime*, 16 AKRON L. REV. 189, 198 (1982) (Warrants and subpoenas in white collar crime cases "cannot be models of particularity and limited discretion.").

159. See Note, *supra* note 66, at 690-91 n.42 (admission of possession is exactly what the government hopes to elicit and the defendant fears will be established); notes 161-63 *infra* and accompanying text; see also Note, *Organizational Papers*, *supra* note 8, at 650 n.68 (suggesting a type of prosecution in which a target's act-of-production testimony would be critical to the government's case).

effective shield against prosecution of that individual. There are two reasons why this is not a sufficient basis for limiting the *Fisher-Doe* analysis to individuals and sole proprietors. First, this situation is uncommon.¹⁶⁰ Second, and more important, compelling a person's act-of-production testimony in such a case is clearly inconsistent with the fifth amendment. *Brown* illustrates this well. There, the government sought production of corporate records from Brown, the sole target of the grand jury's investigation.¹⁶¹ The records subpoenaed involved Brown's clients, and neither the grand jury nor the government knew if the records existed.¹⁶² The government refused to immunize Brown's act of production or to permit production by counsel or some other third party. The Third Circuit stated that the government

candidly concedes that what it wants amounts to compelled authentication testimony which may later be used against a target of the grand jury investigation. Such a result would be a convenience to prosecutors We have no doubt that the repeal of the privilege against self-incrimination by a constitutional amendment would even be a greater convenience to prosecutors, but until that occurs prosecutors must live with the rule that no person, even the sole stockholder of a professional corporation, may be compelled to disclose the contents of his mind when such disclosure may tend to provide an incriminating link in an evidentiary chain for use against him.¹⁶³

If producing corporate records may compel incriminating testimony, and if a privilege for that testimony does not shield corporations or their agents from law enforcement efforts, then denial of the act-of-production privilege for persons compelled to produce corporate records must ultimately be justified, if at all, by the theory that those individuals have no privilege against self-incrimination to assert.

3. *The Waiver Theory*

The final justification for prohibiting a producer of corporate records from asserting her act of production privilege is that any person holding corporate records as a corporate representative has waived her constitutional privilege against self-incrimination. When a person acts as an agent for a corporation, the argument runs, she is not acting in her individual capacity, but in a representative capacity that in-

160. See Note, *Organizational Papers*, *supra* note 8, at 650.

161. Brief for Appellant at 4; see also *Brown*, 768 F.2d at 531 n.6 (Becker, J., concurring) (possible that there were other employees of the corporation who could have produced the documents but "the government insisted on production and authentication of the documents by Brown himself . . . suggesting that it is the government's strategy to make testimonial use of production by Brown").

162. Brief for Appellant at 5, *Brown*.

163. *Brown*, 768 F.2d at 529 (citation omitted); see also Gerstein, *supra* note 74, at 372 ("No matter how and why the person may have come into possession of documents, a demand upon him for production is still a demand that he personally come forward and take an active part in establishing his guilt.").

cludes the duty to produce and authenticate corporate records. Because this duty may involve incriminating oneself, courts have reasoned that a corporate agent waives her personal fifth amendment right against self-incrimination upon accepting a corporate agency.¹⁶⁴ The Supreme Court suggested this as a rationale in *Wilson v. United States*¹⁶⁵ and *United States v. White*,¹⁶⁶ two cases that predate the Court's holding in *Fisher* that production admissions may constitute testimony. The Court reasoned in *White* that a person sacrifices certain fifth amendment rights when he takes a job which may require him to produce entity papers:

[I]ndividuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights 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. *In their official capacity, therefore, they have no privilege against self-incrimination.*¹⁶⁷

The waiver justification suggested in *White* does not survive close critique or subsequent decisions of the Court. In *Curcio v. United States*,¹⁶⁸ decided thirteen years after *White*, the Court stated that a custodian of entity records does not waive his fifth amendment privi-

164. See, e.g., *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 537, 539 (3d Cir. 1985) (Garth, J., dissenting); *In re Grand Jury Impanelled Jan. 21, 1975 (Freedman)*, 529 F.2d 543, 547-48 (3d Cir.), cert. denied, 425 U.S. 992 (1976) (quoted with approval in *In re Grand Jury Proceedings (Shiffman)*, 576 F.2d 703, 707 (6th Cir.), cert. denied, 439 U.S. 830 (1978)); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 234 (2d Cir.), cert. denied, 279 U.S. 863 (1929); Swagart, *The Fifth Amendment Privilege in Corporate Litigation*, 7 LITIGATION, Summer 1981, at 22, 23-24; Note, *Privilege After Fisher and Doe*, supra note 8, at 950-55; Note, *Business Records and the Fifth Amendment*, supra note 14, at 355; see also *In re Grand Jury Proceedings (Katz)*, 623 F.2d 122, 128 (2d Cir. 1980) (Lumbard, J., dissenting) ("Those who seek the benefits which the laws of our states allow them through the limited liability and the possible tax advantages of the corporate structure should not be heard to complain when a grand jury seeks to determine their activities, or the scope of their corporate sheltered activities, by directing its inquiries to the one party best qualified to know what has been done publicly and to produce such records."); 8 J. WIGMORE, supra note 14, at § 2259c (the waiver theory is strongest with custodians of public documents). But see Note, *Organizational Papers*, supra note 8, at 641 n.7 (protecting privacy and prosecuting organizational crime are the only two policies that can explain the inability of individuals to withhold personally incriminating organizational documents).

165. 221 U.S. 361, 382 (1911) ("[W]here . . . books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate [sic] him. In assuming their custody he has accepted the incident obligation to permit inspection.").

166. 322 U.S. 694 (1944).

167. 322 U.S. at 699 (emphasis added). Similarly, the Court wrote in *Bellis v. United States*: The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend the question whether or not another was accused.

417 U.S. 85, 98 n.8 (1974) (citing *United States v. Wilson*, 221 U.S. at 385).

168. 354 U.S. 118 (1957).

lege against being compelled to give *oral* testimony against himself by assuming his agency position. The Court in *Curcio* expressly rejected the government's argument that the duty of a custodian of union records includes waiving his privilege against being compelled to testify against himself. Justice Burton wrote for a unanimous Court:

A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitatorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.

....

... There is no hint in [prior cases including *White* and *Wilson*] that a custodian of corporate or association books waives his constitutional privilege as to oral testimony by assuming the duties of his office.

....

... [F]orcing the custodian to testify ... requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment.¹⁶⁹

Curcio protected only oral testimony, not production admissions. Indeed, it is possible to interpret the case as an endorsement of waiver of production admissions by entity agents. However, reading *Curcio* in light of *Fisher* and *Doe* refutes rather than supports the waiver theory for production admissions. *Curcio*'s reasoning shows that an agent, by accepting possession of corporate records, does not waive his privilege against being compelled to give testimony against himself. *Fisher* and *Doe* expanded the "testimony" protected by the fifth amendment to include production admissions. These two cases granted production admissions the same constitutional protection that the Court had previously extended to oral testimony. This protection includes *Curcio*'s rejection of a corporate agent's implied waiver.

Moreover, the principles underlying the waiver theory are no longer persuasive. Courts have traditionally required waiver to "permit inspection" of entity documents by government officials.¹⁷⁰ After *Fisher* and *Doe*, the only privilege against compelled records production left to waive is the privilege for the act of production.¹⁷¹ As shown above, the act-of-production privilege does not prevent inspection of corporate records.¹⁷² Consequently, the interest that the Court

169. *Curcio*, 354 U.S. at 123-24, 128; see *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 527 (3d. Cir. 1985) (en banc) (custodian could not be compelled to authenticate records); see also *In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum*, 611 F. Supp. 16, 22-23 (S.D. Fla. 1985) (no waiver); Heidt, *supra* note 70, at 1069-70 (waiver conflicts with rule that an employee can invoke the privilege rather than sign interrogatories); *White Collar Crime*, *supra* note 68, at 560 (custodian retains personal privilege).

170. See *Wilson v. United States*, 221 U.S. 361, 382 (1911).

171. See notes 121-22 *supra* and accompanying text.

172. See Part II.B.2 *supra*.

once balanced against the constitutional privilege — regulation of entities — is no longer weighty enough to impute a waiver of that privilege.¹⁷³

In addition, the Court has deemphasized the waiver theory in recent entity decisions. *Bellis* stressed the need to regulate entities and an entity's lack of privacy interests as justifications for compelling entity agents to produce entity records.¹⁷⁴ The waiver rationale has only been resurrected by the lower courts to try to explain why their decisions not to protect producers of corporate records are consistent with the *Fisher* and *Doe* rulings.

Finally, to impute a "waiver" by corporate agents is unfair as well as unnecessary. The idea that a person waives a personal constitutional right by taking a job has little support in decisions concerning waiver of other constitutional rights. An employee retains her first amendment rights in free speech and in the free exercise of religion;¹⁷⁵ her fourth amendment protection against government intrusion into areas in which she retains a legitimate expectation of privacy;¹⁷⁶ and her rights under the fifth and fourteenth amendments to due process

173. See Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1761-65 (1979) (rejecting the Court's balancing of the interests underlying the fifth amendment privilege against interests in truthfinding in cases not involving testimonial waiver) [hereinafter cited as Note, *Testimonial Waiver*]. But see Note, *Privilege After Fisher and Doe*, *supra* note 8, at 950 n.117.

Some courts of appeals have adopted implied waiver as a rationale for rejecting fifth amendment protection for testimonial admissions implicit in producing those records that fall within the required records exception. See, e.g., *In re Grand Jury Subpoena Duces Tecum Served upon Underhill*, 781 F.2d 64, 70 (6th Cir. 1986); *In re Doe*, 711 F.2d 1187, 1191-92 (2d Cir. 1983); *In re Grand Jury Proceedings (McCoy)*, 601 F.2d 162, 171 (5th Cir. 1979); cf. *Exotic Coins, Inc. v. Beacon*, 699 P.2d 930, 949 (Colo.), *appeal dismissed*, 106 S. Ct. 214 (1985) (state statute's reporting requirements do not violate fifth amendment). The Supreme Court established the required records exception to the fifth amendment in *Shapiro v. United States*, 335 U.S. 1 (1948). See generally *Saltzburg*, *supra* note 113. The exception requires that (1) "the purposes of the government's inquiry must be essentially regulatory, rather than criminal"; (2) "the records must contain the type of information that the regulated party would ordinarily keep"; (3) "the records 'must have assumed "public aspects" which render them at least analogous to public documents.'" *Underhill*, 781 F.2d at 67 (quoting *Grosso v. United States*, 390 U.S. 62, 67-68 (1968)). These cases reason that a person carrying on such a regulated activity waives his act-of-production privilege for these documents "as a condition of being able to carry on the regulated activity involved." 781 F.2d at 70 (quoting *McCoy*, 601 F.2d at 171). As these decisions involve only those records that fall within the narrow required records exception, they are not controlling here. But see Note, *Privilege After Fisher and Doe*, *supra* note 8, at 952-55 (arguing that courts should find that a corporate records producer impliedly waives his privilege against self-incrimination for the same reasons that courts imply a waiver in the required records cases).

174. *Bellis v. United States*, 417 U.S. 85, 89, 91-94 (1974).

175. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980) (assistant public defender's employment could not be terminated because of political party affiliation); *Sherbert v. Verner*, 374 U.S. 398 (1963) (law refusing unemployment benefits to those who will not work on Saturday violates free exercise clause).

176. See *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978) ("The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.") (quoting *See v. City of Seattle*, 387 U.S. 541, 543 (1967)).

and equal protection.¹⁷⁷ Normally, waiver of a constitutional right is effective only if the person who allegedly makes it does so knowingly and voluntarily.¹⁷⁸ The imputed waiver for corporate employees is particularly unknowing and involuntary. Arguably, corporate officers and custodians of corporate records may have reason to know that they could be required by authorities to produce and identify the records of the corporation, but the average employee certainly does not know that she is waiving her privilege against self-incrimination by accepting employment with a corporation.¹⁷⁹

The "waiver" implied from employment can be distinguished from inadvertent waivers of the privilege against self-incrimination sustained by the Supreme Court in other circumstances. The Court has recognized a waiver only after a person has somehow revealed information that the privilege entitled her to conceal.¹⁸⁰ In contrast, sim-

177. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (state employee has due process right to termination hearing).

178. E.g., *Gardner v. Broderick*, 392 U.S. 273, 276 (1968) (waiver of privilege to refuse to respond to self-incriminatory questions must be knowing and voluntary); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege").

179. Entity representatives subject to subpoena to produce an entity's records include secretaries, clerks, tellers, cashiers, and other employees or members who do not expect to assume personally the entity's responsibility for producing its records. One commentator has noted:

Given the ever increasing number of persons employed by corporations and other forms of organized business entities, the ruling [in *White*] significantly curtails the fifth amendment rights of a large portion of the populace. Moreover, the impact of the decision on the lives of these people is quite pervasive because business affairs constitute the bulk of their daily activities.

Cramer, *supra* note 19, at 373 n.37; see also *Municipal Investigating Comm. v. Servello*, 200 N.J. Super. 413, 422, 491 A.2d 779, 783 (1984) ("The rightful interest of the [investigating committee] in uncovering corruption in its police department cannot prevail against the constitutional rights guaranteed to all our citizens, including police officers. In swearing to uphold and defend the U.S. Constitution, a police officer does not thereby lose his protection."); Note, *Testimonial Waiver*, *supra* note 173, at 1765-66:

[W]hen the events which directly implicate the right (i.e., require the right to be asserted to prevent the immediate loss of some protection afforded by the right) do not occur simultaneously with acts which constitute a relinquishment of the right, we cannot conclude that such a relinquishment is voluntary unless . . . , at the time of waiver, . . . the witness [knows] of the possible consequences of the conduct which creates the waiver.

Cf. *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (mandate of constitutional privilege does not tolerate an attempt to coerce a waiver on penalty of loss of employment); *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent.").

180. A witness may not invoke her privilege against self-incrimination as to details after she has inadvertently disclosed incriminating facts. *Rogers v. United States*, 340 U.S. 367, 374 (1951). Waiver of the privilege to resist answering additional questions relating to a particular subject matter occurs when a witness "opens the door" by answering a question about that subject. See *Brown v. United States*, 356 U.S. 148, 157 (1958); Comment, *Waiver of the Fifth: What Level of Incrimination?*, 26 Sw. L.J. 589, 595-96 (1972). See generally Note, *Testimonial Waiver*, *supra* note 173.

Inadvertent waiver of the privilege for testimony implicit in the act of production, for instance, may result when a person who has received a subpoena duces tecum shows up with the subpoenaed papers in her hand and then refuses to identify them from the witness stand. By the time she attempts to assert her privilege, the admissions that may have been privileged have already been made. See *United States v. Penrod*, 609 F.2d 1092, 1095 (4th Cir. 1979), *cert.*

ply accepting employment, appointment, transfer, or promotion to a job where one might be asked to produce records is very unlike disclosing something one had a constitutional right not to reveal.¹⁸¹ Indeed, when the entity is an association without officers, such as a political organization whose only representatives are members,¹⁸² the waiver theory essentially requires a member to give up one constitutional right — her freedom to associate and become a member — for another — her privilege not to be compelled by the government to incriminate herself.

CONCLUSION

Applying *Fisher* and *Doe* to corporate records does not undermine the vitality of the entity rule's distinction between fifth amendment protection for individuals and fifth amendment protection for entities. Rather, application of the act-of-production privilege to corporate records producers rests on the principles of the entity doctrine. By requiring entities to obey court orders to produce documents, even if compliance means appointing an agent to produce and authenticate those documents, the entity rule of *Bellis* assures that a corporate agent cannot shield contents of corporate documents with her personal fifth amendment privilege. Under *Doe*'s foregone conclusion test, courts will not recognize the self-incrimination claims of most agents ordered to produce entity documents. Authorities may still investigate and prosecute those agents whose self-incrimination claims are successful under *Doe* by using alternative means of production and authentication or a limited grant of immunity. Despite the absence of any substantial increase in actual protection for potential targets, applying *Doe* to incriminating production admissions, regardless of the nature of the documents produced, logically extends to all persons equally what is left of fifth amendment protection for document producers after *Doe*.

— Nancy J. King

denied, 106 S. Ct. 1188 (1986); *United States v. Kretz Equip. Co.*, 56 A.F.T.R.2d (P-H) 85-5135 (N.D. Ind. 1985) ("By producing the sealed boxes respondents admitted that that [sic] documents existed, that they possessed them, and that the papers were those described in petitioner's summons. Thus . . . respondents waived their privilege of self-incrimination as to testimonial conduct indicating the existence and control of the documents."); *see also* Cramer, *supra* note 19, at 398 n.161.

181. *See* Note, *Books and Records Privilege*, *supra* note 14, at 100. The author argued: [T]o demand a waiver of the privilege in return for the right to earn a living . . . would appear to be unconstitutional. . . . A valid waiver would have to be based on a valid election, actually exercised. However, any election which offers as alternatives, loss of one's constitutional privilege or loss of livelihood is purely theoretical and is a transparent excuse for the deprivation of individual rights.

182. *See* notes 24 & 28 *supra* and accompanying text.