A Refusal to Produce Corporate Documents: The Fifth Amendment's Protection of Former Employees

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I. INTRODUCTION

Many business entities have "two faces: producer of stupefying
material wealth on one side, and wreaker of financial, physical, and
environmental havoc on the other."1 While many corporations operate
lawfully, some violate consumer fraud laws, product safety standards, and
environmental protection regulations.2 Corporate crimes occur when
illegal acts are "committed with the support of and for the benefit of a
corporation, organization, or other form of business enterprise."3 Business
entities perpetrating corporate crimes harm the United States citizenry,
government, environment, and other legitimate corporations.4

1 MICHAEL L. BENSON & FRANCIS T. CULLEN, COMBATING CORPORATE CRIME:
2 See id. at 21 (contrasting societal benefits derived from law-abiding corporations
with harm produced by corporate illegalities).
3 See id. at 22 (distinguishing corporate crime from white-collar crime). White-
collar crime is done for the individual's own benefit, whereas corporate crime is done for
the advantage of the business entity. Id.
4 See id. at 22-23. Many economists believe that corporate crime is responsible for
hundreds of billions of dollars in economic losses. BENSON & CULLEN, supra note 1, at 22.
The Savings and Loan scandal in the early 1990s, for example, typifies the drain that
corporate crime has on government resources. See id. at 23. The government initially paid
$200 billion to rescue the insolvent institutions and anticipates spending an additional $100
to $173 billion over the next twenty years. Id. The government approximates seventy to
eighty percent of the financial strain incurred by the Savings and Loans resulted from
criminal behavior. Id. One-third of all work related deaths occur because employers
subject their employees to illegal working conditions. BENSON & CULLEN, supra note 1, at
23. The effect of corporate crime on individual lives is significant as well. See id. In fact,
of the tens of thousands of employees killed in work related occurrences, one hundred
thousand die from an illness contracted on the job. Id. Corporations, for example, once
deceived their employees into believing that asbestos was not harmful. Id. at 23-24.
Corporate crime often harms or even kills the general public. See id. at 24. Some
businesses purposely neglect to test their product's safety before they place it in the stream
of commerce. Id. Businesses routinely perform cost / benefit analyses to determine
economic feasibility of correcting defects verses legal ramifications of paying damages for
uncorrected defects. Id. Corporate crime also damages the environment. See The
Committee on Construction Law, Environmental Issues Facing Construction Contractors,
51 THE RECORD 763, 788 (1996). A national survey conducted in 1993 revealed that
one-third of the nation's businesses violated both state and federal environmental laws. Id.
Prosecutors are focusing more heavily on corporate crime than in previous decades because of the extensive damage that illegal corporate activity causes.\(^5\) Although both federal and state prosecutors have attempted to control corporate crime, it is difficult to uncover evidence of legal infractions because businesses and corporations can effectively limit the government's investigation into its inner-operations and confidential decisions.\(^6\) Even after prosecutors or investigators detect a crime, the corporation has both the resources and power, by making frequent motions and objections, to stall further legal proceedings.\(^7\)

After suspecting that a corporate crime has occurred, prosecutors may use several investigative techniques to obtain the information needed to determine if a crime has been committed and by whom.\(^8\) Specifically,
prosecutors often subpoena corporate documents and employee testimony before the grand jury in order to discover information essential to building a case. In an attempt to continue concealing criminal activity and hinder the government’s criminal investigation, corporations have tried evoking their Fifth Amendment protection against self-incrimination to shield themselves from subpoenas to produce information. The Supreme Court, however, has eroded the corporation and its employees’ ability to refrain from producing information.

This Note will discuss how the Fifth Amendment applies to former employees who possess documents that the government subpoenas. The History section will trace the evolution of the Fifth Amendment protection against self-incrimination, focusing primarily on the compelled disclosure of incriminating corporate documents or testimony. Next, the Facts section will describe the nature of the current federal circuit split questioning whether former employees can claim a Fifth Amendment privilege while in possession of corporate documents. The Analysis section will compare the Eleventh Circuit, D.C. Circuit, and United States Bankruptcy Court’s extension of the Braswell rule to former employees with the Second, Third, and Ninth Circuits, which have declined to extend the Braswell rule to former employees. Finally, this Note will conclude that the Braswell rule should apply to all former employees by compelling the production of corporate documents in their possession.

II. HISTORY

The first recorded case in which anyone invoked his or her privilege against self-incrimination occurred in 1532 during the trial of John Lambert. During the course of the inquisition, the Archbishop
interrogated Lambert, forcing him to respond to forty-five charges designed to elicit his theological beliefs.\textsuperscript{13} Lambert refused to answer the first question posed to him, thereby, defying the judges.\textsuperscript{14} Lambert refused to take the Star Chamber Oath, which would compel him to respond truthfully because he believed that he was not properly implicated.\textsuperscript{15} Instead, he asserted his right not to accuse himself of any offense for which he could later be punished.\textsuperscript{16}

The Star Chamber Oath, used regularly to coerce confessions, had a further challenge made to it during the trial of John Lilburne.\textsuperscript{17} The court charged Lilburne with shipping seditious books from Holland into England after two of his associates implicated him.\textsuperscript{18} The prosecutor’s chief clerk questioned Lilburne in an effort to gain evidence to convict him.\textsuperscript{19} Since the Government did not allow Lilburne to face his accusers, he refrained from answering any questions.\textsuperscript{20} The Attorney General was also unable to

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.} The Archbishop used an oath developed in 1246 which compelled the defendant to answer any question submitted to him truthfully. \textit{Id.} at 47-49. This oath was later called the Star Chamber Oath because the court utilizing it tried its cases in a chamber with stars painted on the ceiling. \textit{Id.} at 49. The Star Chamber Court sought to have the accused declare their guilt from their own lips, rather than from hearing incriminating statements from others. \textit{Andersen v. Maryland}, 427 U.S. 463, 471-72 (1976).
  \item \textsuperscript{14} See \textit{LEVY} supra note 12, at 3. The Court inquired whether he had ever previously been suspected of heresy.
  \item \textsuperscript{15} \textit{Id.} at 4.
  \item \textsuperscript{16} \textit{Id.} Lambert stated that “[n]o man should be bound to bewary [sic] himself.” \textit{Id.} By this he meant that he should not be forced to admit crimes that were not already known to, or proven by the inquisitors. \textit{Id.} at 62. Despite his zeal, the State burned Lambert at the stake in 1537 for heresy. \textit{LEVY} supra note 12, at 62.
  \item \textsuperscript{17} See Miranda v. Arizona, 384 U.S. 436, 459 (1966)(discussing origins of privilege against self-incrimination). See also \textit{LEVY} supra note 12, at 271 (discussing Lilburne’s unwillingness to testify against himself). Lilburne’s trial drew public attention to the court’s practice of requiring a person to be a witness against himself. \textit{LEVY}, supra note 12, at 271.
  \item \textsuperscript{18} \textit{LEVY}, supra note 12, at 273. The state was confident that Lilburne would be convicted because Sir John Banks, the Attorney General prosecuting the case, had secured confessions under oath that Lilburne had been involved in importing banned books. \textit{Id.}
  \item \textsuperscript{19} See \textit{LEVY}, supra note 12, at 271. Lilburne admitted that he had been to Holland and seen both the books and men the chief clerk had inquired about, but maintained that his response was irrelevant to the charge of shipping prohibited books into England. \textit{Id.}
  \item \textsuperscript{20} \textit{LEVY}, supra note 12, at 271. Lilburne told the chief clerk that he was not: imprisoned for knowing or talking with such and such men, but for sending over [b]ooks; and therefore I am not willing to answer any more of these questions, because I see that you go by this [e]xamination to ensnare me: for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination.

\textit{Id.}

\textit{Id.} Lilburne’s motive for his silence stemmed from the “fear that with [his] answer [he] may do [himself] hurt.” \textit{Id.} His statement was made to invoke the protection under English law that would shield him from incriminating questions, which had no relevance to
extract any testimony from him. When Lilburne went to the Star Chamber for his trial, the justices attempted to administer the Star Chamber Oath. Lilburne, however, refused to recite the Oath because he was concerned that the court’s motive was to use his own answers to draft the charges against him. The court held him in contempt and imprisoned him. The court continuously summoned Lilburne from jail and sent him back because he persisted in his refusal to answer the charges under the Star Chamber Oath. Since Lilburne failed to swear under oath, the court found him guilty for contempt. The press reported on the Government’s treatment of Lilburne and when Parliament reconvened, it freed him. Parliament quickly abolished the Oath and replaced it with the protection against self-incrimination because of Lilburne’s efforts. Soon after Parliament abolished the Oath, the English citizenry generally accepted the protection against self-incrimination and it became a tenet of common law.

When the American colonists traveled from England to the New World, they brought the notion of not bearing witness against one’s self with them. On June 8, 1789, James Madison, while serving in the first Congress, proposed what would become the Fifth Amendment to the Constitution. The Amendment, in part, protected citizens from having to

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21 Id. As a result of his uncooperative responses, Lilburne was jailed for two weeks.
22 Id. at 274. In addition to inadequate access to counsel and failing to state the exact charges, the court demanded Lilburne to take an oath to answer all questions asked of him truthfully. Id.
23 Id. at 275. Lilburne explained his opposition to the oath by stating: "[a]nother fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Miranda, 384 U.S. at 459.
24 LEVY, supra note 12, at 275.
25 See LEVY, supra note 12, at 275-76. The court seemed more concerned that Lilburne would not take the oath than the actual charges of sedition. Id.
26 Id. at 276. Lilburne asserted that he was found guilty for refusing to incriminate himself and not for the crime of Sedition. Id. As punishment for his defiance, the court made Lilburne walk two miles while guards whipped him with almost every step he took. Id. Further, the court added torture and an extension to Lilburne’s sentence when he sermonized to the public about his plight during his two-mile walk. Levy, supra note 12, at 276.
27 Id. at 278-79.
28 Id. at 282. Parliament gave Lilburne reparations to compensate for the harm done to him by the court. Miranda, 384 U.S. at 459.
29 LEVY, supra note 12, at 281.
30 Id.
31 See LEVY, supra note 12, at 422. The Fifth Amendment states, [n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in
disclose information to the state that would implicate them in the commission of a crime.\textsuperscript{32} Madison intended that the Amendment set a high standard of conduct for the federal government when it interacted with its citizens.\textsuperscript{33} He and his colleagues feared that the government, in exercising its power, could oppress its citizens.\textsuperscript{34} Thus, Madison sought to ensure that the newly formed United States government protected its citizens from self-incrimination.\textsuperscript{35}

Madison’s prediction that the courts would vigorously protect the privilege against self-incrimination has come to fruition.\textsuperscript{36} The Supreme Court has developed an array of policies supporting the right and has decided several cases interpreting it.\textsuperscript{37} The Court has held that the

the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.


\textsuperscript{32} See \textit{LEVY}, supra note 12, at 422.
\textsuperscript{33} \textit{Id.} Madison believed that if the Fifth Amendment was incorporated into the Constitution, the United States courts would more thoroughly scrutinize any infringements of the individual rights by the other branches of government. \textit{Id.}

\textsuperscript{34} \textit{Id.} at 430. The framers were cognizant of even the most minute of the government’s invasions of individual liberty. \textit{Miranda v. Arizona}, 384 U.S. 436, 459 (1966); see also \textit{Boyd v. U.S.}, 116 U.S. 616, 635 (1886) (discussing how easily unconstitutional practices can infiltrate democratic practices). The framers were so resolute in creating amendments because they believed that illegitimate, tyrannical laws would get their foothold unnoticed by subtle divergences from the current procedure. \textit{Miranda}, 384 U.S. at 459.

\textsuperscript{35} See \textit{LEVY}, supra note 12, at 430. The Supreme Court has suggested that the privilege protecting self-incrimination is essential to prevent the reoccurrence of the Star Chamber trials and Oath. \textit{Couch v. United States}, 409 U.S. 322, 327 (1973).

\textsuperscript{36} \textit{Boyd}, 116 U.S. at 635. See also \textit{Couch}, 409 U.S. at 328 (Court reiterates importance of Fifth Amendment’s prohibition of inquisitors forcing witnesses to speak against their will). The Court asserted that its role was to safeguard an individual’s right to be free from self-incrimination because the magnitude of running a state may divert the legislature’s attention. \textit{Boyd}, 116 U.S. at 635. The Court is also in a better position to detect whether a law that violates the Fifth Amendment because it reviews the law after it has been in operation and had an affected people’s lives. \textit{Id.}

\textsuperscript{37} See \textit{e.g. Hale}, 201 U.S. 43; \textit{Bellis}, 417 U.S. 85; \textit{Miranda}, 384 U.S. 436; \textit{Braswell}, 487 U.S. 99. The courts have articulated the policies behind the self-incrimination clause as:

an unwillingness to subject those suspected of crime to the cruel trilemma of self- accusation, perjury or contempt; [a] preference for an accusatorial rather than an inquisitorial system of criminal justice; [a] fear that self-incriminating statements will be elicited by inhumane treatment and abuses; [a] sense of fair play which dictates 'a fair state- individual balance by requiring the government . . . in its
privilege against self-incrimination is personal, protecting the individual and not the information. In *Boyd v. United States*, the Court expanded the Fifth Amendment personal privilege to include shielding people's private records, papers, or books from use against them. The *Boyd* Court, which extended the Fifth Amendment privilege to individuals' private written communications with others, reasoned that the protection was necessary to prevent potential coercion in forcing witnesses to provide written evidence against themselves. *Boyd*’s protection did not apply to all papers, but rather, the constitutional safeguard depended on the nature of the documents subpoenaed and who had possession of the documents.

*Hale v. Henkel* eroded the *Boyd* protection by creating the collective entity rule. *Hale* differentiated an individual’s private

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*Couch*, 409 U.S. at 328 (quoting from *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

*Couch*, 409 U.S. at 328; *Hale*, 201 U.S. at 69-70.

*Hale*, 201 U.S. at 69-70.

See *Boyd v. United States*, 116 U.S. 616, 631-32 (1886) (holding invoices of seized items could not be used against owners in suits of forfeiture). *See also In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 174, 176-77 (describing *Boyd*, 116 U.S. 616). The *Boyd* Court stated,

any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.


See *Boyd*, 119 U.S. at 634-35 (holding that both written documents and oral testimony protected by the Fifth Amendment). *See also In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 177 (describing *Boyd*, 116 U.S. 616).

See *Boyd*, 116 U.S. at 631-32 (forbidding compelling private individuals from producing their private books). The privilege only applied to documents that were both private and in the possession of the person claiming the privilege. *Id*. Ownership of the papers, alone, is insufficient to invoke the Fifth Amendment privilege. *Id*. The privilege holder must also have actual possession of the papers. *Couch*, 409 U.S. at 330 (holding defendant needed accountant to produce papers she had title to but not control of). The Court has recognized some instances where there was clearly constructive possession, or that the absence of control was only momentary and irrelevant so as to leave the defendant’s Fifth Amendment rights in tact. *Id*. at 333.

*Hale v. Henkel*, 201 U.S. 43, 75-6 (1906) (holding that corporate officers cannot exercise Fifth Amendment privileges on behalf of corporate entity). While the Court recognized that *Boyd* was still good law, it made a distinction when the person holding the documents was a corporate employee. *Id*. at 73-4. There is a public duty to keep documents related to the business in the business offices. *Wilson v. United States*, 221 U.S.
documents from the records of a public corporation. This distinction prevented the Court from extending the protection against self-incrimination to corporations because they are created by statute to benefit the public, and not any one person. The intent of the Fifth Amendment is to protect individual liberty, not the fiscal interests of corporate and unincorporated organizations.

In Wilson v. United States, the Court considered documents public even when a specific person in the corporation is charged. The Wilson Court ruled that the president of the corporation held the books as a part of his obligation as corporate officer. Neither the corporation, nor its president, can withhold records to save themselves from their respective roles in the illegality. The Court held that the conduct of the officer

361, 380 (1911). The government has the right to inspect documents at any time to ensure that the officers and businesses are correctly executing their duties. Id. Hale, 201 U.S. at 74. An individual has the unrestricted power to contract the constitutional protection of a citizen, the freedom of conducting their business in the manner that they choose. Id. Since the individual does not receive any benefits from the state, they do not have reciprocal duties either to the state or neighbors, to give information that would incriminate themselves. Id.

The state and federal governments have sovereignty and control over a corporation because the corporations can only operate after the state approves it. Id. For example, the government can restrict a corporation by ensuring that it only makes contracts that are consistent with the terms of its charter. Id. The state can also deprive a corporation of its franchise if it violates the terms of its creation. Id. at 74-75. To ensure that the corporation stays within its proscribed limits, the legislature has the inherent right to examine its records and contracts. Id. at 75.

Bellis v. United States, 417 U.S. 85, 91 (1974). Had the Fifth Amendment intended to protect public organizations, the government would be ineffective in any attempts to regulate the organizations because the majority of evidence is derived from records or documents. Id. at 90.

221 U.S. 361 (1911).

Wilson v. United States, 221 U.S. 361, 384 (1911); see also Braswell, 487 U.S. at 105-6. The letter-press copy book requested in the subpoena was kept by the president of the United Wireless Telegraph Company in his office. Wilson, 221 U.S. at 368. The prosecution charged both the president and the corporation with fraudulent use of the mails and conspiracy. Id. at 367. The president exclusively used the book and it contained both business and personal correspondence. Id. at 368. The Court noted that adding personal details in the book did not make its contents private. Id. at 378. The Court did recognize that the president did not have to submit the personal correspondence that was unrelated to the business. Id. The Court, however, rejected the president’s argument that he should be exempt from producing the corporate books because he both wrote the incriminating information and it would be used against him personally. Id. at 378.

Wilson, 221 U.S. at 384. A Corporation can only act through its agent because it is an artificial entity. Bellis, 417 U.S. at 90. As a part of their fiduciary responsibility to the corporation, the custodian takes on a representative function, which obligates the custodian to produce the corporate records requested in the subpoena. Braswell, 487 U.S. at 110. Therefore, any claim of a Fifth Amendment privilege would amount to asserting it on behalf of the corporation, which is not privy to the protection since it is not a person. Bellis, 417 U.S. at 90.

See Wilson, 221 U.S. at 382 (holding that corporate officers must surrender official
holding the books or records was irrelevant in determining whether the corporation needs to surrender the materials to the state.\(^{52}\)

In *Wheeler v. United States*,\(^{53}\) the Court ruled that books do not become private just because the corporation disbands.\(^{54}\) The Court rejected the officers' argument that the books and journals were private property because they were no longer officers of the corporation.\(^{55}\) The Court ruled that the material did not change its nature when given to the defendant and his partner.\(^{56}\) The *Wheeler* Court deemed the records "public" and did not allow the former partners to invoke the Fifth Amendment's protection.\(^{57}\)

Moreover, individuals whose function is to represent a collective group do not privately hold any documents stemming from their duty.\(^{58}\) In *United States v. White*,\(^{59}\) the Court considered documents from collective agencies, such as unions, as public, rather than private, because members can view documents upon request and even take legal action when leaders decline their demands.\(^{60}\) In the case of a union, the officers could not

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\(^{52}\) Id. at 385. The Court held that "the visitorial power which exists with respect to the corporation of necessity reaches corporate books without regard to the conduct of the custodian." Id.

\(^{53}\) 226 U.S. 478 (1913).

\(^{54}\) *Wheeler v. United States*, 226 U.S. 478, 489-90 (1913). The grand jury subpoenaed the books, records, and journals from Wheeler and Shaw, Inc. to investigate whether the corporation used the mail to defraud customers. Id. at 482-83. The corporation went out of business a year prior to the issuance of the subpoena and all the books and records relating to the defunct corporation were transferred to the defendant and his business partner. Id. at 486-87.

\(^{55}\) Id. at 489-90.

\(^{56}\) Id. Though the corporation was defunct, the Court allowed the grand jury to inspect the books because they were kept during its operation. Id. at 490. The privilege does not protect "individuals against self-incrimination in the production of their own books and papers [or] prevent the compulsory production of the books of a corporation with which they happen to be or have been associated." Id.

\(^{57}\) Id.

\(^{58}\) U.S. v. White, 322 U.S. 694, 699 (1944). The organization needs to be more than "an informal association of individuals" in order to constitute an independent entity. *Bellis*, 417 at 92-93. One hallmark of an organization having a separate and independent identity from its members is a specific set of organizational records which its members have the right to access. Id. at 93. Representatives of a collective group have the same responsibilities as officers of an organization created by the state for the benefit of the public. Id. In such an organization, the officers hold the documents in a representative capacity rather than a personal one. Id. The representatives of the collective group, therefore, cannot assert any personal privilege under the Fifth Amendment even if the documents would incriminate them. Id.

\(^{59}\) 322 U.S. 694 (1944).

\(^{60}\) U.S. v. White, 322 U.S. 694, 701 (1944). When the collective organization is a
claim a Fifth Amendment privilege because the Court treated the organization like a public entity.\textsuperscript{61}

Further, the Court held that size was not a factor in determining whether a partnership is a public entity.\textsuperscript{62} In determining that the partnership was public, the \textit{Bellis} Court considered whether the identity of the partnership differed from that of the individual partners.\textsuperscript{63} If the partnership is impersonal, then it cannot claim relief from the subpoena.\textsuperscript{64}

In \textit{Fisher v. United States}\textsuperscript{65} and \textit{United States v. Doe},\textsuperscript{66} the Court shifted its standard of analyzing both the possession and content of the documents subpoenaed to considering whether the production of the information was testimonial.\textsuperscript{67} Both \textit{Fisher} and \textit{Doe} considered whether the incriminating contents of the documents were privileged and whether the actual action of submitting the documents was compelled testimony.\textsuperscript{68}

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union, as in \textit{White}, its members could only endorse activities that the union can do lawfully. \textit{Id.} at 702. The union also owned its own real estate, official union books and records are separate from personal records, and the union treasury was segregated from the bank accounts of its individual members. \textit{Id.} The union accounts could not be used by officers or members in to further criminal activity or for private use. \textit{Id.} Additionally, members are not held criminally or civilly responsible for union officers' misconduct unless they were personally involved in the illegal action. \textit{Id.}

\textsuperscript{61} \textit{Id.} at 705.

\textsuperscript{62} \textit{Bellis}, 417 U.S. at 100; see \textit{Braswell}, 487 U.S. at 108 (summarizing \textit{Bellis}). The Court determined that a three-person law firm partnership was not private enough so that the partner could assert his Fifth Amendment protection against self-incrimination to withhold records in his possession. \textit{Bellis}, 417 U.S. at 101. The senior partner kept the records in his office until he left the firm. \textit{Id.} at 86. Upon accepting a new job, the records remained with the two remaining lawyers, as a part of their new partnership, until the former senior partner requested the documents be moved to his new office. \textit{Id.} A subpoena was issued for the former senior partner to bring all records relating to the firm. \textit{Id.} The partner refused to produce the documents, claiming that they were private records. \textit{Id.}

\textsuperscript{63} \textit{Id.} at 95. The Court concluded that the firm was not a private organization which could benefit from the Fifth Amendment privilege. \textit{Id.} The Court based its finding on the following criteria; it was an established institution which practiced for fifteen years, it had an independent structure giving each partner the opportunity to vote on the management of the firm, it had a special bank account bearing the firm's name, it had official firm stationery, and its employees worked for the firm and not themselves. \textit{Id.} at 96-97. The Court also pointed out that the former senior partner had a fiduciary obligation to only use the books for partnership business. \textit{Id.} at 98.

\textsuperscript{64} \textit{Id.} at 100.

\textsuperscript{65} 425 U.S. 391 (1976).

\textsuperscript{66} 465 U.S. 605 (1983).

\textsuperscript{67} See \textit{Fisher v. United States}, 425 U.S. 391, 411 (1976) (holding no Fifth Amendment violation to require attorney to produce tax documents prepared by accountant); \textit{United States v. Doe}, 465 U.S. 605, 614 (1983) (finding the Fifth Amendment would be violated if production of documents were required); see also \textit{Braswell}, 487 U.S. at 109 (discussing \textit{Fisher} and \textit{Doe}). The Court began moving from a collective entity rule to a compelled-testimony analysis. \textit{Braswell}, 487 U.S. at 109. The collective entity rule, however, survived the shift in analysis. \textit{Id.}

The Courts held that there was no Fifth Amendment privilege to the documents’ content because the defendant created it willingly and without coercion. The *Fisher* Court recognized that in addition to the information in the document itself, the mere act of surrendering documents could be communicative. Although supplying the papers would have the effect of admitting to the existence, control, possession, and authentication of the documents, the *Fisher* Court concluded that the Fifth Amendment would not protect inferences based on the admission of the documents. Additionally, *Fisher* stated that the act of producing documents does not require the possessor to say anything that would incriminate himself.

The Court articulated its current policy in *Braswell v. United States*, determining that the Fifth Amendment does not protect the custodian of the records from production of subpoenaed documents. The

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69 *Doe*, 465 U.S. at 611; *Fisher*, 425 U.S. at 409-10. *Fisher* concerned a taxpayer who gave his forms to an accountant to fill out. *Fisher*, 425 U.S. at 393-4. The information was then transferred to a lawyer. *Id.* at 394. The government subpoenaed the information from the lawyer after determining that there was no attorney-client privilege. *Id.* at 394-5. *Fisher* held that the lawyer could not assert an attorney-client privilege on behalf of the client-taxpayer because the accountant made the records. *Id.* at 409-10. The taxpayer in *Fisher* voluntarily had the records created because he hired an accountant to generate the documentation based of his tax information. *Id.* The Court, however, declined to extend its holding to taxpayers that have their forms in their possession. *Id.* at 414. Unlike *Fisher*, the Court in *Doe*, determined it was irrelevant that the records were in the sole practitioner’s possession, since he had voluntarily written the incriminating information in the course of doing business. *Doe*, 465 U.S. at 612. Thus, *Doe* extended the concept created in *Fisher* determining that the Fifth Amendment does not protect the contents of a document when the individual that compiled it did so on his own accord. *Id.*

70 *Fisher*, 425 U.S. at 410. The issue in *Fisher* was whether the actual action of handing over documents would sufficiently incriminate the custodian to violate the Fifth Amendment. *Id.*

71 *Id.* at 411. The production of documents would only be insignificantly “testimonial and incriminating.” *Doe*, 465 U.S. at 613. Additionally, relinquishing records would contribute very little to the government’s case against the custodian because the existence and location of the documents are already known. *Fisher*, 425 U.S. at 411. Admitting to having the information does not harm the possessor since the government is not using the document to show to the holder’s “truth-telling” ability. *Id.* The Court also found the production of the documents only reveals the holder thinks the documents produced are the same in the subpoena. *Id.* In order to legitimately claim Fifth Amendment protection, a holder “must be confronted by substantial and ‘real,’ and not merely trifling or imaginary hazards of incrimination.” *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

72 *Fisher*, 425 U.S. 411. The records are ordinarily given voluntarily and without coercion. *Doe*, 465 U.S. at 609. *Fisher* holds that the taxpayer is not sufficiently threatened by what might be communicated by his act of handing over the documents. *Fisher*, 425 U.S. at 412. *Doe*, conversely, did not overturn the lower court’s decision that the sole practitioner may be incriminating himself by the act of complying with the subpoena. *Doe*, 465 U.S. at 613-4.


74 *Braswell v. United States*, 487 U.S. 99, 100 (1988). In *Braswell*, the subpoena was issued for the president and sole shareholder of two corporations in Mississippi. *Id.* at 101.
Court integrated the Doe/Fisher line of cases with Hale and its progeny in developing its rationale for extending the collective entity doctrine. First, the Court reasoned that a custodian's production of documents was not "testimonial communication." Second, the custodian, as an agent of the corporation, waives his right to assert his Fifth Amendment privilege. While the Court acknowledged that either theory would yield the right result, the majority was more supportive of the latter reason, thereby preserving the collective entity rule. The policy behind compelling custodians to produce corporate records is that law enforcement agencies would be significantly impaired in their attempts to prosecute white-collar crimes. Both the corporation and the individual wrongdoer would unjustly benefit from the protection of the Fifth Amendment if allowed to assert the privilege. Additionally, a corporate privilege would weaken the state's powers to regulate the entity.

The Braswell Court, however, recognized that the act of production could be considered communicative, thereby creating a possible ancillary effect of incriminating the document holder. To prevent the potential self-incrimination that may occur when a custodian relinquishes subpoenaed documents, the Court prohibited the government from using the custodian's individual act of production against him, though it could still use the contents of the documents at his/her trial. The Court held that during the custodian's trial, the jury would not be told that he or she produced the records, severing a connection from the defendant to the documents.

The subpoena requested the documents to be delivered by the president, personally, or through another corporate custodian. The two companies which were active in commerce, filed corporate tax returns, and kept an accounting of its business. The corporate president refused to submit the documents requested claiming it would violate his Fifth Amendment right against self-incrimination. The

75 Id. at 113. Compare Hale, 201 U.S. 74 (holding that employees of corporations cannot claim Fifth Amendment's protection) with Doe, 465 U.S. at 613-14 (focused on whether production of documents would be testimonial) and Fisher, 425 U.S. at 408 (focused on whether production of documents would be testimonial)

76 Braswell, 487 U.S. at 101.
77 Id.
78 Id. at 109
79 Id. at 115. At the time of the decision, white-collar crime was considered the most severe and encompassing problem facing the nation. Id. The Court held majority of the evidence of corporate wrongdoing is contained in the documents. Id.
80 Id. at 115-16.
81 Id. at 116.
82 Braswell, 487 U.S. at 117-18. Producing the records should be viewed as a corporate act because the custodian is acting as an agent of the business and not individually. Id.
83 Id. at 118.
84 Id. However, the jury may draw reasonable inferences as to the authenticity of the records and the defendant's connection to the records. Id. The Court explicitly declines to
III. FACTS

The history of the Fifth Amendment right against self-incrimination has emphasized the importance of distinguishing between private and corporate document holders. Though the Supreme Court has eroded some of the protection established in *Boyd*, the Court has avoided any holding that would compel a private citizen in possession of incriminating papers from using them against him or herself. No Supreme Court case exists that addresses whether the *Braswell* rule would apply to situations where the holder of corporate documents is a former employee of the company. The circuits are currently split on whether to extend the Fifth Amendment privilege to former employees.

IV. ANALYSIS

A. Circuits Extending Braswell to Former Employees

The Eleventh Circuit, D.C. Circuit, and the United States Bankruptcy Court have extended *Braswell* to former employees, requiring employees to submit papers subpoenaed by the government. The Court's decisions beginning with *Hale* and concluding with *Braswell* suggest that the corporate entity rule should also apply to former employees. First, former employees cannot claim the Fifth Amendment's protection because

decide whether a custodian should be compelled to produce records when he is the sole employee of the corporation and the jury could only conclude that the defendant made the document. *Id.*

*Compare Braswell*, 487 U.S. at 114 (holding that corporate officers cannot claim right against self-incrimination) *with Boyd*, 116 U.S. at 631-32 (holding that private citizens can utilize privilege against self-incrimination). The corporate custodian has no privilege, whereas the private individual in possession of his own papers is protected by the Fifth Amendment. *See id.*

*See Braswell*, 487 U.S. at 118 (declining to decide whether submitting evidence communicative for one-employee corporation); *Fisher*, 425 U.S. at 414 (declining to decide whether individual taxpayers would be compelled to produce them).

*See in re* Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191 F.3d 174, 183 (2d. Cir. 1999) (indicating split in circuits); United States v. McLoughlin, 126 F.3d 130 (3d Cir. 1997) (holding that *Braswell* does not apply to former employees); *In re* Grand Jury Proceedings, 71 F.3d 723 (9th Cir. 1995) (holding that *Braswell* does not apply to former employees); *In re* Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807 (11th Cir. 1992) (holding that *Braswell* applies to former employees); *In re* Sealed Cases (Government Records), 950 F.2d 736 (D.C. Cir. 1991) (holding that *Braswell* applies to former government employees).

*See in re* Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807 (holding that *Braswell* applies to former corporate employees); *In re* Sealed Cases (Government Records), 950 F.2d 736 (holding *Braswell* applies to former government officials); *In re* Keller Fin. Services of Florida, Inc., WL 33244257, at *13 (2000-248 B.R. 859) (holding that *Braswell* applies to former corporate director).

the case law, while not dispositive on the issue, suggests that the collective entity rule should be extended to former employees. Second, the agency relationship is not severed when employees depart from the corporation. Third, public policy strongly favors extending Braswell to former employees.

The Supreme Court's decisions suggest that the collective entity rule extends to former employees. The Court has compelled individuals to produce documents even though they were no longer associated with the public entity. The Court in Bellis, for example, held that the collective entity rule applied to a lawyer even after he left the partnership. -Bellis dissolved his partnership with two other lawyers to practice law in another firm. Despite moving to a new location, Bellis left his former financial records with the two remaining partners. Just before the issuance of the subpoena, Bellis had the records brought to his new office. Shortly after, he was served with the subpoena ordering him to testify in front of a grand jury and to provide all records made under the partnership that were in his control. The Court found that Bellis held the records in a "representative capacity." The Court also reasoned in dicta that the "dissolution of a corporation does not give the custodian of the corporate records any

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90 See Bellis, 417 U.S. at 88 (holding lawyer could not claim privilege against self-immunity after he left partnership); Wheeler, 226 U.S. at 489 (holding that individuals do not gain privileges against self-incrimination after corporations disband); Keller Fin. Services, WL 33244257, at *13 (relying on Bellis and Wheeler to prohibit former employees from evoking privilege against self-incrimination); In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 811 (relying on Bellis and Wheeler to prohibit former employees from evoking privilege against self-incrimination).


93 See Bellis, 417 U.S. at 88 (holding that lawyer could not claim privilege against self-incrimination after he left partnership); Wheeler v. U.S., 226 U.S. 478, 489 (1913) (holding individuals do not gain privileges against self-incrimination after corporations disband); see also Keller Fin. Services, WL 33244257, at *13 (reviewing Bellis and Wheeler); In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 811 (reviewing Bellis and Wheeler).

94 See Bellis, 417 U.S. at 101 (lawyer of former partnership compelled to turn over documents to government officials); Wheeler, 226 U.S. at 490 (holding former corporate officers were compelled to turn over documents to government); see also In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d at 812 (interoperating Bellis and Wheeler as requiring former employees to produce cooperate documents in their possession).

95 See Bellis, 417 U.S. at 86-87.

96 Id. at 86.

97 Id.

98 Id.

99 Id.

100 Bellis, 417 U.S. at 101.
greater claim to his Fifth Amendment privilege." Therefore, his privilege against self-incrimination could not be utilized because the Court did not deem Bellis an individual for Fifth Amendment purposes.

The Wheeler Court determined that the collective entity rule obligates former officers of a dissolved corporation to comply with a subpoena to produce documents. In Wheeler, the defendant was the treasurer of Wheeler & Shaw, Inc. The corporation, however, dissolved in April 1911, and all the business records and books went to Wheeler and Shaw to be held jointly. A year later, a the government gave a subpoena to Wheeler and Shaw demanding that they submit all letters, telegrams, and books pertaining to the company to the Grand Jury. The Court determined that it was the "character of the books and papers" which made them corporate rather than private. Therefore, the former partners could not use the Fifth Amendment as a shield from the production of documents. Additionally, the Supreme Court has explicitly refrained from holding that former employees do not have an obligation to produce subpoenaed documents.

Braswell also applies to former employees because the agency relationship is not terminated when employment ends. The Court in Braswell held that individuals who have corporate documents keep them as representatives of the corporation. The circuits extending the Braswell rule reason that even after termination or resignation, the former employee continues to hold the documents as a representative of the corporation. When an employee removes documents from the corporation, he or she retains their custody as a representative of the corporation and continues to

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101 Id. at 97. Bellis conceded the issue of whether he would have had a greater Fifth Amendment protection after the partnership ended. Id.
102 Id.
103 Wheeler, 226 U.S. at 489.
104 Id. at 487.
105 Id. at 486.
106 Id. at 483.
107 Id. at 490.
108 See id. (concluding that documents corporate even though held by former officers).
110 In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d at 811
111 Id. at 812 (11th Cir.1992); Keller Fin. Services, WL 33244257, at *12-13.
112 Braswell, 487 U.S. at 117-18; see also In re Grand Jury Subpoena Dated November 12, 957 F.2d at 812 (citing to Braswell); Slonimsky, 2000 WL 1759721, at *1-2. See In re Grand Jury Subpoena Dated November 12, 957 F.2d at 812; In re Sealed Case (Government Records) 950 F.2d 736, 740 ( D.C.Cir. 1991) (holding similar obligations for former government employees to produce documents as former corporate employees); see also In re Keller Fin. Services of Florida, Inc., WL 33244257, at *12 (following reasoning of In re Grand Jury Subpoena Dated November 12).
have an obligation to submit documents to the grand jury. The focus is on the "immutable character of the records as corporate documents" and not on the status of employment. Therefore, termination or resignation has little effect on the representative nature in which the former employee holds the records because the termination does not end the former employee's custodianship of the documents.

Additionally, the circuits extending Braswell reason that broadening the rule to include former employees is sound public policy. Excluding former employees would undercut the force of the collective entity doctrine and weaken the Braswell holding. Most of the evidence proving corporate wrongdoing exists in the corporate documents. By exempting former employees from the Braswell rule, corporations could circumvent the grand jury's demands for corporate records. Employees who take incriminating documents and then resign would easily avoid individual criminal accountability by evading the judicial process. Moreover, corporations under investigation would have a powerful incentive to assist its employees in leaving with incriminating evidence because the damaging information would be effectively suppressed under the Fifth Amendment.

113 In re Grand Jury Subpoena Dated November 12, 957 F.2d at 812; Slonimsky, 2000 WL 1759721, at *1-2.
114 Keller Fin. Services, WL 33244257, at *12; Slonimsky, 2000 WL 1759721, at *2 (forcing records custodian of defunct businesses to comply with IRS subpoenas); see also Wheeler, 226 U.S. at 490 (holding that character of corporate records did not change because corporation defunct).
115 See Wheeler, 226 U.S. at 486-87 (president and treasurer jointly retained possession of corporate books after corporation disbanded); see also In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 185 (dissent interpreting Wheeler as saying that former employees retain documents after they leave corporations); Slonimsky, 2000 WL 1759721, at *2 (if custodians continue to hold documents after employment ends, it is done as corporate representative).
116 In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d at 810.
117 Id. The court was concerned that safe harbor for criminals would be created if Braswell is not extended. Id.
118 Id. at 813.
119 Id. at 810
120 In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 184 (Justice Cabranes Dissenting). The Second Circuit, however, argued that in the seventeen years it has allowed former employees Fifth Amendment protection, there have been few reported incidents of employees pilfering corporate documents and resignation to thwart an impending subpoena. In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 182. Additionally, the Second Circuit suggests that employees are still deterred from resigning and absconding with corporate documents because separate charges of theft or obstruction of justice may be brought against them. Id. The corporation also has the right to recover its stolen documents in a replevin action. Id. at 182-83.
121 Id.
Further, corporations are entities created by state statute intended to benefit the public. Both state law and corporate charters bind a corporation. It follows then, that the government has the right to investigate corporate books to ensure that corporations comply with all of its rules and regulations. If the court does not extend Braswell to former employees, then the state franchising a corporation would not have the ability to regulate the corporation and end any abuses and misuses of its charter. Further, by providing former employees and corporations with a loophole to circumvent the state's supervisory authority, society suffers, and the purpose behind creating a public corporation is defeated.

B. Circuits Declining to Extend the Braswell Rule to Former Employees

The Second, Third, and Ninth Circuits have declined to extend Braswell to former employees who have retained records from the corporation, thereby allowing the Fifth Amendment privilege against self-incrimination to shield them from government subpoenas. First, the circuit courts reason that the prior Supreme Court precedents do not

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122 See Hale 201 U.S. at 74; Wilson, 221 U.S. at 383. The corporation gets special benefits from incorporation, but also subjects itself to the government's oversight to insure that it is complying with its articles. Hale 201 U.S. at 74; Wilson, 221 U.S. at 383.
123 Hale 201 U.S. at 74; Wilson, 221 U.S. at 383. A corporation's existence is subject to obeying the law of its creation. Id. An example of this restraint is that a corporation's contracts must be within the power granted to it by its charter. Hale, 201 U.S. at 74-75.
124 Hale, 201 U.S. at 74-75. The legislature has an implied right to review the corporation's contracts to determine if it has violated the restrictions placed on its authority. Id. It would be a flaw in the system if the state granting power to the corporation did not have the ability to check whether corporations were misusing their franchise. See id. Therefore, the state retains the power to check corporate records and books anytime. Id.
125 See Hale, 201 U.S. at 75 (asserting that government officials have authority to inspect corporate books because it incarcerates corporations); Wilson, 221 U.S. at 382 (stating that government officials can demand access to corporate books to prevent violations of laws).
126 See Hale, 201 U.S. at 75 (stating state and federal governments have oversight of corporate books to prevent abuses by corporations); Wilson, 221 U.S. at 380-81 (stating state and federal government may investigate corporate documents to ensure corporate franchise followed). Public business or its employees cannot claim Fifth Amendment protection against self-incrimination because they hold their books and records for the public good and not for private use. Wilson, 221 U.S. at 381.
127 In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 183 (three corporate officers resigned from their division involved in corporate wrongdoing prior to subpoenas); In re Grand Jury Proceedings, 71 F.3d 723, 724 (1995) (holding that Braswell inapplicable to employees after they leave corporate entity); In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983, 722 F.2d 981 (2d Cir. 1983) (hereinafter Saxon Industries) (former employee failed to produce documents after being ordered by court); McLaughlin, 126 F.3d 130, 133 (1997) (dicta suggesting that former employees with stolen corporate documents cannot use Braswell).
preclude the Fifth Amendment's protection of former employees. Second, the circuits argue that the agency relationship between the corporation and the employee ceases to exist when the employment ends. Third, the extension of Braswell may put former employees at more of a risk than it puts current employees. Finally, these circuits argue that the extension of the rule would harm the integrity of the judicial system and that public policy mandates the Braswell rule be limited only to current employees.

The Supremacy Clause does not require the Second, Third, and Ninth Circuits to apply the Braswell rule to former employees because no prior Supreme Court decision has expanded the collective entity doctrine to include individuals no longer employed by the corporation. The circuits that advocate the extension of the Braswell rule rely on the facts and holdings in Hale and Wheeler. However, under the Second Circuit's interpretation of the Hale case, the lawyer who left his partnership is not considered a former employee for Fifth Amendment purposes because a partnership is not fully concluded until the "winding up of the partnership affairs is completed." Moreover, the Supreme Court did not decide Bellis based on the dissolution of the partnership, but rather on the premise that a member of a small partnership must respond to the subpoena when held in a representative capacity. The Second Circuit also argued that

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128 See In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 181 (holding that Hale and Wheeler do not limit former employees Fifth Amendment rights).
129 See In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 181 (determining that once agency relationship ends, former employee holds documents as private individual); Saxon Industries, 722 F.2d 981-82 (holding that former employee protected against production of documents because he holds them individually).
130 See Braswell, 487 U.S. at 118 (Braswell provides procedural safeguards for employees compelled to give documents); see also In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 182 (Braswell's safeguard does not explicitly apply to former employees); Saxon Industries, 722 F.2d at 986-87 (holding that corporate agency ends once officer leaves corporation).
131 See In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 183 (Fifth Amendment places additional burdens on law enforcement and intended to prevent compelled testimony).
132 See id. at 181.
134 In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d at 811; Bellis, 417 U.S. at 96. The disbanding of the partnership alone does not end each partner's obligations to one another. In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 181. The partnership dissolves only after discharging all prior obligations. Id. In Bellis, continued outstanding obligations prevented the partnership from ending. Bellis, 417 U.S. at 97.
135 Bellis, 417 U.S. at 96; see also Braswell, 487 U.S. at 107-08 (discussing Bellis); In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 181 (asserting that Bellis' holding does not apply to former employees). Neither the President nor the Treasurer of the corporation ever resigned their positions. Bellis, 417 U.S. at 101. 
the holding in the *Wheeler* decision does not create a precedent for expanding the collective entity rule because the treasurer and the president were considered to be a part of the corporation. Additionally, the Court in *Wheeler* based its decision on whether the documents were personal or corporate, rather than the employment status of the document holders.

The Second, Third, and Ninth Circuits have refrained from enlarging the sphere of the *Braswell* rule because the agency relationship ends when the employee leaves the organization. The core of the *Braswell* holding is that individuals producing corporate documents pursuant to a subpoena are acting as an extension of the corporation because a corporation is a legal fiction and cannot act for itself. Once the employee leaves the corporation, however, he or she is no longer acting

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136 See *Wheeler*, 226 U.S. at 487 (stating corporate officers, who never resigned, obligated to comply with subpoena for corporate documents); see also *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181 (arguing that *Wheeler* not decided based on employment status, but rather nature of documents).

137 *Wheeler*, 226 U.S. at 490. The *Wheeler* Court looked to the prior decision in *Wilson* to conclude that the termination of the corporation before the grand jury subpoena does not change the character of the documents from corporate to private. *Wheeler*, 226 U.S. at 489-90. Thus, the employment relationship does not have much affect on the analysis. *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181. The *Braswell* Court held that current employees must produce documents when subpoenaed, but made no comment on the obligations of former employees. See *Braswell*, 487 U.S. at 110 (stating that current employees hold documents as representatives for corporation); see also *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181 (interpreting *Braswell* as applying only to current employees and not to former employees). In *Braswell*, the sole employee of his own corporation was in business at the time of the subpoena production and his refusal to testify. *Braswell*, 487 U.S. at 101-2.

138 See *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181 (holding that when agency relationship ends, former employees no longer must produce documents for corporations); *McLaughlin*, 126 F.3d at 134. (noting *Braswell's* inapplicability to former employees because employees hold documents as representatives); *Saxon Industries*, 722 F.2d at 986-87 (holding that former employees hold documents as individuals and not as corporate representatives); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (1995) (employees who do not work for the corporation cannot be compelled to produce records).

139 See *Braswell*, 487 U.S. at 118 (noting employees hold corporate documents on behalf of corporations); *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181 (interpreting *Braswell* as obligating only current employees to produce documents on behalf of corporations); *What We Talk About When We Talk About Persons: The Language Of A Legal Fiction*, 114 HARV. L. REV. 1745, 1751 (2001) (commenting on nature of corporations). Corporations have been described as “an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or incidentally to its very existence.” *What We Talk About When We Talk About Persons: The Language Of A Legal Fiction*, 114 HARV. L. REV. 1745, 1753 (2001) (quoting Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (wheat.) 518, 636 (1819)). *Hale* denied to give the corporation a Fifth Amendment privilege, reasoning that the right belonged only to natural persons. *Hale*, 201 U.S. at 74.
as an extension of the entity, but rather as an autonomous individual.\textsuperscript{140} The *Boyd* holding, though diminished in strength after *Hale*, continues to protect the papers found in a private person's possession.\textsuperscript{141} Upon termination or resignation, the former employee stops holding documents in a representative capacity or as a corporate custodian of the records.\textsuperscript{142} Any request for documents by the government, therefore, requires the individual to act in his personal, rather than corporate, capacity.\textsuperscript{143}

The Second circuit, in declining to extend the *Braswell* holding to former employees, reasons that the act of producing the documents might put the former workers at a greater disadvantage than their current corporate employee counterparts.\textsuperscript{144} When corporate employees turn over documents, they sometimes implicate themselves in criminal activity.\textsuperscript{145} *Braswell* created a rule of procedure prohibiting the government from using the fact that the custodian produced the information pursuant to a subpoena when the government individually prosecutes the employee.\textsuperscript{146} The purpose of *Braswell*'s evidentiary rule is to reduce the self-incriminating document's effect on the individual employee when he/she executes his/her obligation as a corporate employee to produce the documents.\textsuperscript{147} It is, however, uncertain whether the *Braswell* evidentiary rule would apply to former employees in the same way that it does current employees.\textsuperscript{148} Further, the *Braswell* holding is not a constitutional requirement of the Fifth Amendment and, therefore, may preclude former employees from benefiting from the procedural safeguard.\textsuperscript{149} Without the personal protection articulated in *Braswell*, the government can argue that

\textsuperscript{140} See *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181 (*Braswell* cannot apply to former employees because they would be compelled to produce personal documents). By acting in their personal interest rather than as a part of the corporation, the former employee no longer fulfills the purpose articulated in *Braswell*. See *id.* (interoperating *Braswell*'s purpose as requiring employee's to produce documents as agents on corporation's behalf).

\textsuperscript{141} See *Boyd*, 116 U.S. at 638.

\textsuperscript{142} *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 181.

\textsuperscript{143} *Id.* *Braswell* does not require public corporations to force the production of documents by its former employees. *Id.* Additionally, the fiduciary relationship between the employer and the former employee does not continue after termination. *Id.*

\textsuperscript{144} See *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 182 (arguing that *Braswell* rule only specifies procedural protections for current and not former employees).

\textsuperscript{145} See *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 182 (discussing *Braswell*'s procedural rule barring government disclosure to jurors of how documents obtained).

\textsuperscript{146} *Braswell*, 487 U.S. at 117-8.

\textsuperscript{147} *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 182.

\textsuperscript{148} *Id.*

\textsuperscript{149} *Id.* There is also nothing in the Fifth Amendment that precludes the government from going after the documents without a subpoena. *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d at 183.
the custodian absconded with the documents because he believed them to prove his guilt.150

The circuits refraining from extending the Braswell rule considered the policy behind the rule against self-incrimination.151 The purpose of the Fifth Amendment, as idealized by its authors, is not to protect the innocent, but rather preserve the integrity of the system.152 The extension of the Fifth Amendment privilege to former employees is a sound policy because it forces the government to prove its entire case.153 An extension of Braswell would undermine the purpose of the right against self-incrimination because the government could compel the former employee to incriminate himself through the production of the documents rather than present evidence of his guilt.154 Additionally, the more numerous and expansive the criminal activity, the broader the privilege against self-incrimination becomes.155 Former employees, for example, would not only be compelled to incriminate themselves by introducing the contents of specific corporate documents under their control but also be required to admit their theft and failure to return the documents from their past employer.156 Prosecutors may also charge former employees with obstruction of justice.157 The added crimes provide justification for extending the privilege against self-incrimination.158

V. CONCLUSION

The Eleventh Circuit, D.C. Circuit, and the United States Bankruptcy Courts are correct to extend Braswell to include former

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150 Saxon Industries, 722 F.2d at 987. Fisher states that the circumstances of each case affect whether the act of production would be incriminating enough to invoke the Fifth Amendment. Fisher, 425 U.S. at 410. Producing a document is significant enough to warrant protection when producing it “poses a realistic threat of incrimination” and would add to the “government’s sum total of information.” Id. at 412. A former employee may have obtained the documents illegally and compelling him to produce them would force the former employee to provide the evidence of his theft. Saxon Industries, 722 F.2d at 986-7.
151 In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 183.
152 Id.
153 Id.
154 See id. (arguing that extending Braswell would lighten governments burden). The Supreme Court articulated that “the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load.” Tehan v. United States ex rel Shott, 382 U.S. 406, 415 (1966).
155 See In re Three Grand Jury Subpoenas Duces Tecum, 191 F.3d at 183 (describing Fifth Amendment’s scope).
156 Id. Production of the documents would be evidence of further crimes.
157 Id.
158 See id. (advocating Fifth Amendment protection for former employees who possess corporate documents).
employees. The reasoning behind Braswell's extension, favoring the
nature of the documents over the agency of the employees, is consistent
with the Supreme Court's prior cases. Additionally, former employees and
their previous corporate employers can contort the Fifth Amendment
privilege into a license for lawlessness. If Braswell were limited to current
employees, there would be reverberations on the state's ability to safeguard
its citizens and prosecution's ability to punish corporate offenders.

The Second, Third, and Ninth Circuits' agency rationale for
extending Braswell to former employees does not conform with Supreme
Court precedents. These circuits incorrectly make the employment status
of the particular person the decisive factor and not the nature of the
documents in question. The Court has supported the extension of Braswell
throughout its development of the collective entity doctrine. The Boyd
holding, for example, extends the Fifth Amendment privilege only to
private papers of an individual and not the papers of the corporation.\footnote{See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191
F.3d at 177 (interpreting Boyd).}

Additionally, in Wheeler, the Court held that the character of the papers
made them corporate, not the status of the defunct company.\footnote{Wheeler, 226 U.S. at 490.} Likewise,
in Wilson, the Court prohibited the company president from using his Fifth
Amendment protection to withhold business documents that implicated
him in criminal activity.\footnote{Wilson, 221 U.S. at 384.} The Court reasoned that the documents were
public.\footnote{Id.} These cases demonstrate that the Court's focus has been on the
character of the document and not the person holding it.

The Second, Third, and Ninth Circuits' exclusion of former
employees from the Braswell rule will affect how felonious corporations
and employees operate. By allowing former employees to have a Fifth
Amendment protection, the courts would create a loophole allowing
employees to take corporate documents and resign without having to turn
the information over to the government when subpoenaed. In essence, the
corporations would be able to hide behind their previous employer's
protection to avoid judicial accountability. Offending corporations on the
verge of discovery could purge their corporation of incriminating
documents by transferring them to an implicated worker and then firing
him or her. In this situation, the employee benefits because he or she
avoids jail, and the corporation benefits because it has blocked the
production of the documents by the worker's Fifth Amendment privilege
against self-incrimination. This structural crack in the corporate entity
document would collapse the entire concept because the corporations could
always avoid production by conspiring with former employees.

\footnote{See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191
F.3d at 177 (interpreting Boyd).}
\footnote{Wheeler, 226 U.S. at 490.}
\footnote{Wilson, 221 U.S. at 384.}
\footnote{Id.}
The Second, Third, and Ninth Circuits’ protection to corporations would impair the prosecution’s ability to gather evidence to convict corporate criminals. Justice Rehnquist noted in *Braswell’s* majority opinion that white-collar crime was "the most serious and all-pervasive crime problem in America today.”

Additionally, the decision noted that it was one of the most difficult challenges facing law enforcement. Corporate crimes are types of white-collar crimes unified by the common theme of the perpetrator acting for the benefit of the business entity, rather than solely for him or herself. Though Justice Rehnquist wrote *Braswell* over a decade ago, corporate crime is still flourishing and posing an even greater problem for law enforcement agents. Though there is a need to fight this growing and destructive crime, prosecutors and investigators often find themselves at a considerable disadvantage because corporations have greater recourse and can insulate themselves from the state’s attempts to uncover incriminating documents. Limiting the *Braswell* rule’s reach to current employees, and not extending it to former employees, would only make it more difficult for prosecutors and investigators to discover corporate crime and its individual offenders than it is at present. In sum, corporations would have another escape route to evade prosecutorial detection.

The Second, Third, and Ninth Circuit, by limiting the *Braswell* rule to current employees only, would prevent the state from effectively regulating the corporations that it franchises and charters. Corporations would hide behind their former employees, serving their self-interests rather than the interests of the public for which they were created. The state would be reduced to nothing more than a toothless tiger unable to enforce the rules it creates. Thus, the corporation would evade the regulatory authority of the state and have the free reign to abuse its charter and the public’s trust.

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164 Id. at 115.
165 See generally *Braswell*, 487 U.S. 99; see BENSON, *supra* note 1, at 4 (defining corporate crime).
166 See BENSON, *supra* note 1, at 20 (discussing difficulty involved in detecting corporate crime).
167 See id. at 26-7 (describing tactics corporations take to thwart law enforcement’s efforts to detect crime).