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Finding What Was Lost: Sorting Out the Custodian's Privilege against Self-Incrimination from the Compelled Production of Records

Peter J. Henning
Wayne State University Law School, peter.henning@wayne.edu

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* Associate Professor, Wayne State University Law School.

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I. INTRODUCTION

The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .”1 The privilege prohibits the government from requiring a person to testify if the declarant’s statement may be incriminating in any subsequent criminal prosecution.2 In addition to requesting testimony, prosecutors frequently demand that individuals and business organizations produce records and other types of physical evidence.3 The Fifth Amendment does not protect the contents of records the author created voluntarily.4 Compelling an individual to turn over papers is testimonial, however, and the Fifth Amendment may prohibit the government from requiring a response if the communicative act incriminates the declarant.5

An organization, unlike an individual, has no privilege under the Fifth Amendment to refuse to produce documents even if production

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1. U.S. CONST. amend. V.
2. See Schmerber v. California, 384 U.S. 757, 761 (1966) (“[T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .”); Murphy v. Waterfront Comm’n, 378 U.S. 52, 55 (1964) (explaining that the privilege against self-incrimination “reflects many of our fundamental values and most noble aspirations: [and] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice”); Counselman v. Hitchcock, 142 U.S. 547, 563-64 (1892) (clarifying that the Fifth Amendment privilege applies “in any proceeding” in which compelled testimony may be incriminating).
3. See, e.g., FED. R. CRIM. P. 17(c) (“A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.”); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 8.3(c) (2d ed. 1992) (“With a subpoena duces tecum, the party served may be required to undertake the extensive task of bringing together records from several different locations and sorting through them to collect those covered by the subpoena.”).
4. See Fisher v. United States, 425 U.S. 391, 408 (1976) (“It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.”).
would incriminate the organization. Because an organization acts only through its members, the Supreme Court has held that representative members are not entitled to the same protection afforded individuals from producing their own personal documents. An organization's representative subpoenaed to produce business records may not assert the privilege to avoid being incriminated by the act of production. Otherwise, according to the Court, the government's "reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation." An organization, nominally represented by the custodian who actually complies with the government's demand, may be compelled to produce documents regardless of how personally incriminating that act may be to the custodian appearing on its behalf. Moreover, the government's authority to compel production is not affected by its interest in bringing charges at some later time against that custodian as an individual.

Once the government compels a custodian to produce the documents, the question arises whether the prosecution can require the representative to provide additional information regarding the records that can be used in a later proceeding against that witness on the ground that the custodian has no Fifth Amendment privilege. Any attempt by the government to compel a defendant to furnish incriminating testimony, such as authentication of evidence, appears to contradict the language of the Fifth Amendment which prohibits the government from forcing a person "to be a witness against himself." Despite the apparent protection provided by the Fifth Amendment privilege, lower courts have held that an individual acting as a custodian of records can be required, qua custodian, to testify about documents produced in response to the government's demand. Although the witness usually appears before a grand jury and testifies only in the capacity of a custodian of records representing a corporate body,

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6. See Hale v. Henkel, 201 U.S. 43, 74 (1906)(corporation "has no right to refuse to submit its books and papers for an examination at the suit of the State").

7. See Braswell v. United States, 487 U.S. 99, 108-09 (1988)("[W]ithout regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian, ... a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.") (citations omitted).


9. See Braswell v. United States, 487 U.S. 99, 104 (1988)("[W]e have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."); Wilson v. United States, 221 U.S. 361, 384-85 (1911)(custodian of corporate records must produce documents even when custodian created documents and they incriminate the custodian personally).

10. U.S. CONST. amend. V.
that testimony can provide the basis for the government to introduce the records into evidence against that person individually at trial.\textsuperscript{11}

The two-prong rationale for compelling the custodian's testimony beyond the production of records is, first, that the statements are only "auxiliary" to the production of the records;\textsuperscript{12} and, second, that the Fifth Amendment protection does not apply to corporations called upon to furnish documents.\textsuperscript{13} If a court can compel a records custodian to give oral testimony in a pretrial proceeding merely because that person acts on behalf of a corporation, then it is just a short step to have the government call the defendant to testify at trial, not in a personal capacity, but solely as the custodian of records. If that were to happen, then the primary protection afforded by the privilege against self-incrimination, that the government cannot require a defendant to testify at his own trial, will be undermined.\textsuperscript{14}

\textsuperscript{11} See United States v. Blackman, 72 F.3d 1418, 1426 (9th Cir. 1995)(recipient of summons to produce tax records can be compelled to testify before the Internal Revenue Service "for the limited purpose of identifying the records sought by the IRS"); United States v. Medlin, 966 F.2d 463, 468 (11th Cir. 1993) (custodian of corporate records "will be called on merely to identify and authenticate the documents he is required to produce . . . . Such testimony merely makes explicit what is already implicit in complying with the [IRS] summons.")(citations omitted); United States v. Ellwest Stereo Theaters, Inc. (In re Custodian of Records of Variety Distrib., Inc.), 927 F.2d 244, 251 (6th Cir. 1991)(enforcing trial subpoena on ground that "[b]ecause a custodian of corporate records has no necessary relation to the contents of the documents which he has produced, we do not believe that statements that he is familiar with the company's recordkeeping practices and knows that the company regularly keeps such records in the course of a regularly conducted business activity is sufficiently incriminating in and of itself"); United States v. Raniere, 895 F. Supp. 699, 707 (D.N.J. 1995)(custodian of corporate records "must also provide authentication testimony as to those documents" sought by IRS).

\textsuperscript{12} See United States v. Austin-Bagley Corp., 31 F.2d 229, 234 (2d Cir. 1929)("[T]estimony auxiliary to the production [of records] is as unprivileged as are the documents themselves.").

\textsuperscript{13} See Hale v. Henkel, 201 U.S. 43, 74 (1906).

\textsuperscript{14} In Wilson v. United States, 149 U.S. 60 (1893), the Supreme Court described eloquently the rationale for granting a defendant the right not to testify:

\begin{quote}
It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.
\end{quote}

\textit{Id.} at 66. To further protect the Fifth Amendment privilege at trial, the Court strictly forbids prosecutors from commenting on the defendant's failure to testify. See Griffin v. California, 380 U.S. 609, 615 (1965); cf. Akhil Reed Amar & Renée B. Lettow, \textit{Fifth Amendment First Principles: The Self-Incrimination Clause}, 93 Mich. L. Rev. 857, 858 (1995)(arguing that the privilege against self-incrimination should be read to prevent a defendant's compelled pretrial statements from...
While this possibility may appear farfetched, the Supreme Court's reasoning for denying the privilege against self-incrimination to organizations could be manipulated to support the prosecution calling a defendant to testify in its case-in-chief. The Court has never considered fully the protection of the Fifth Amendment for a custodian of records compelled to provide information and then prosecuted individually. The analysis that supports compelling a custodian to testify about documents at a preliminary proceeding hinges on the erroneous assumption that the government's power to compel production of records and related testimony is coextensive during both the investigation and the prosecution of a crime. That assumption can be traced to the Court's obtuse statements regarding the availability of the Fifth Amendment privilege and its failure to distinguish between the investigative and trial stages of a case.\footnote{15}

The Court's decisions regarding the scope of the privilege fall into two general categories depending upon the status of the person asserting the privilege. One category consists of individuals resisting the production of personal documents while the other consists of corporate custodians seeking to protect records that would be personally incriminating. Regardless of the person's status, however, the Court has never recognized explicitly in its reasoning that a Fifth Amendment issue arose only in the investigative stage and not during the subsequent prosecution. The clear language of the privilege, however, should prohibit the government from compelling a person to provide incriminating evidence at trial. Yet, the Court has used language in its opinions that evokes issues more relevant to the trial phase of a criminal case than the investigative phase. Thus, the scope of the Court's Fifth Amendment analysis is confusing.

The Court has not faced directly the question whether the compelled production of evidence that may be permissible at the investigative phase of a case, when the privilege against self-incrimination does not apply, should govern the availability of the Fifth Amendment right at trial to prevent the use of compelled testimony. The Court's offhand use of trial-related evidentiary terms such as "authentication" ever being introduced against him at a criminal trial although the defendant would be required to provide truthful testimony in pretrial proceedings).

\footnote{15. The investigative phase of a case is prior to the grand jury's handing up an indictment or the prosecutor's filing a criminal complaint, and the trial phase is after the institution of formal charges. Cases involving the production of records usually entail the government's seeking the records during the investigative stage. In most white collar criminal cases, which frequently involve the production of records, the eventual defendant is not arrested but agrees to appear after the entry of the formal charges. In discussing the two phases of a criminal case, questions relating to the arrest of a defendant and providing a preliminary hearing are not considered because they are largely irrelevant to the Fifth Amendment privilege.}
of records produced to a grand jury obscures the fact that the proper interpretation of the privilege limits the Fifth Amendment's availability to a custodian only during the investigative stage, not the adjudicative stage when that person has been charged as an individual. The government's authority to compel a custodian to produce documents during the investigative phase, when the privilege is unavailable, does not necessarily govern the application of the privilege against self-incrimination at trial. Unfortunately, the Supreme Court's poor choice of words in analyzing the scope of the Fifth Amendment has led lower courts to the mistaken conclusion that the availability of the Fifth Amendment privilege is identical for each phase of a proceeding. Once lost, the privilege cannot then be asserted by a witness on the same subject at trial.

This Article considers the tension between the privilege against self-incrimination and the government's authority to require a custodian to furnish documents and testify about them when those statements will be used by the prosecution to seek the admission of the records at trial. While the language of the Fifth Amendment prohibits the government from forcing a defendant to testify at his criminal trial, the rationale adopted by courts for requiring a custodian of records to provide information about documents undermines the protection afforded the witness at trial. This diminished constitutional protection is a result of confusion arising from the Supreme Court's opinions on the availability of the privilege to witnesses responding to subpoenas for documents, opinions which did not consider the continuing availability of the Fifth Amendment at the trial stage, regardless of whether a person could invoke the privilege during the investigative stage.

Part I of the Article reviews the circumstances in which the government seeks documents from the targets of its investigations, and how the status of the person compelled to produce the records, qua individual or qua custodian of records, will affect the means by which the documents can be introduced at trial. Part II discusses generally the two means by which the Supreme Court avoided the broad language of its decision in Boyd v. United States that appeared to block any compelled production of documents containing incriminating information. Parts III and IV review the analyses of Fisher v. United States and Braswell v. United States that effectively permit the

16. See, e.g., Fisher v. United States, 425 U.S. 391, 412-13 (1976) ("As for the possibility that responding to the subpoena would authenticate the work papers, production would express nothing more than the taxpayer's belief that the papers are those described in the subpoena.") (footnote omitted).
17. 116 U.S. 616 (1886).
compelled production of records in the investigative phase by severely limiting the availability of the privilege against self-incrimination both to individuals and to custodians of records. The Article considers how the Court's language in these cases has also created the erroneous impression that the privilege is not available to resist providing incriminating testimony that will only be used at trial and not during the investigative phase of the case. Part V then criticizes dictum in Curcio v. United States\(^\text{20}\) that "auxiliary" testimony can be compelled from a custodian of records. The Court's assertion regarding the scope of the government's authority to compel testimony that is related to the production of records contradicts Curcio's primary holding and has been misinterpreted to provide the basis for compelling custodians to testify personally and possibly to incriminate themselves. The Article argues that the government's power to compel the production of documents should not override completely the protection of the Fifth Amendment privilege that prevents compelling a person to utter words or otherwise communicate information that will be used to secure that person's conviction in a criminal proceeding.

II. THE ALLURE OF SUBPOENING AN INVESTIGATIVE TARGET

Investigations of economic crimes frequently require the government to gather large volumes of documentary evidence. Once collected, the laborious task of sifting pertinent information of possible criminality from innocuous transactions can take months, sometimes years.\(^\text{21}\) Moreover, investigators acting without a guide to the events which could involve improprieties may be unable to identify whether a series of apparently normal business transactions constitute a criminal violation. As prosecutors have escalated the number of investigations and prosecutions of white collar crimes over the past twenty

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\(^{21}\) An example of the delay that can occur between the transactions which are the subject of a criminal prosecution and the commencement of formal proceedings came up for review in United States v. Crouch, 84 F.3d 1497 (5th Cir. 1996). The district court dismissed an indictment of two defendants for bank fraud that the grand jury handed up in November 1992, concerning seven loans that all closed in June 1985, on the ground that the pre-indictment delay violated the defendants' Fifth Amendment due process rights. See United States v. Crouch, 835 F. Supp. 938, 943 (S.D. Tex. 1993). The government argued to the district court that it could not complete its investigation earlier due to "insufficient personnel available to investigate or properly prepare" the case. Id. at 946. A divided panel of the Fifth Circuit upheld the dismissal in United States v. Crouch, 51 F.3d 480 (5th Cir. 1995), but the full court, sitting en banc, reinstated the indictment because the defendants failed to show that the government intentionally delayed indicting the case in order "to gain tactical advantage or to advance some other improper purpose." United States v. Crouch, 84 F.3d 1497, 1511 (5th Cir. 1996)(en banc).
years, they increasingly have sought proof of criminality directly from
the investigative target, regardless of a refusal to cooperate, either by
issuing a subpoena duces tecum22 or by executing a search warrant.23
By compelling the likely defendant to produce documents, the prosecu-
tors hope to learn, *inter alia*, what acts are relevant to the investiga-
tion and what the target knew at the time, based on the creation or
possession of records. The following hypothetical example illustrates
the attraction of securing documents from an investigative target and
the Fifth Amendment issue that inheres when the government obtains
documents without the consent of the person who will be the defend-
ant in a subsequent criminal prosecution.

The government has information that a bank president directed
home mortgage loan applicants at the bank to use the services of a
local title company to conduct property closings. The president had a
secret agreement with the title company to have $250 kicked back
from the closing costs paid by each client referred. The title company
remitted the funds to a corporation formed by the president, with each
check payable to the corporation and containing a notation that the
payment was a "consulting fee."24

A key step in the investigation would involve the government's ef-
forts to obtain records from the president's corporation that show re-
ceipt of the funds and any consulting agreements with the title
company. These corporate documents could provide pivotal informa-
tion demonstrating illegal conduct by the president. If the govern-
ment secures the records,25 it may show the *actus reus* of a crime, such
as receipt of an illegal gratuity by a bank officer,26 and may reveal the

22. A grand jury may issue a subpoena requiring the recipient to produce documents
or other tangible items, *see* Fed. R. Crim. P. 17(c), and the government need not
show probable cause for the subpoena to be enforced. LaFave & Israel, *supra*
note 3, at § 8.3(c).
23. The Fourth Amendment requires that items seized pursuant to a warrant must
be "particularly described." U.S. Const. amend. IV. A search warrant can spec-
ify any type of item or area, *see* Warden v. Hayden, 387 U.S. 294 (1967), and there
is no Fifth Amendment privilege to resist the seizure of specified items pursuant
to a valid warrant. *See* Andresen v. Maryland, 427 U.S. 463, 477 (1976) (seizure
of business records described in search warrant).
24. The government can obtain copies of the checks from the title company's bank,
*see* Right to Financial Privacy Act, 12 U.S.C. § 3413(I) (1994)(disclosure require-
ments not applicable to grand jury subpoena for bank customer financial
records), and can also subpoena the title company for all records relating to its
consulting arrangements.
25. *See* Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*,
48 U. Pri'r. L. Rev. 27, 47 & n.104 (1986)(when the government does not have
independent evidence that the target possesses the records, "common sense and
experience suggest that incriminating evidence frequently will not be produced"
unless the person is "exceptionally honest or exceptionally stupid").
26. Such an arrangement with a bank officer likely runs afoul of the bribery statute
prohibiting financial institution employees from receiving any gratuity in connec-
president's knowledge of the source and amount of the payments. Moreover, possession of incriminating documents probably forecloses the president from asserting the defenses of lack of knowledge of the transactions or the good faith belief that the funds were unrelated to the bank's business.\footnote{27} The documents, together with any information the government investigators gather showing surreptitious transfers or misleading accounting, would be strong circumstantial evidence of a specific intent to defraud or mislead.\footnote{28}

The government's customary means for gathering the documents would be the issuance of a grand jury subpoena duces tecum to the president as the custodian of the corporation's records. The grand jury's authority to compel the production of the documents rests on its historic role as the principal means of investigating crimes. A grand jury is entitled to "every man's evidence,"\footnote{29} and can issue subpoenas to compel testimony and the production of evidence without resort to the courts. Another avenue available to secure the documents would be for the investigators to request that the court issue a warrant to search for evidence of criminal behavior.\footnote{30} Neither the rules

\footnote{27} The criminal violations for which the hypothetical banker most likely would be charged are specific intent crimes, so she could argue that her actions were in good faith and therefore she did not have the requisite intent to be convicted. \textit{See} JosHUA DRESSLER, UNDERSTANDING CRIMINAL LAw § 12.05[A] (2d ed. 1995).

\footnote{28} \textit{See}, e.g., United States v. LeDonne, 21 F.3d 1418, 1426 (7th Cir. 1994)(fraudulent intent may be proved by circumstantial evidence and inferences drawn from the totality of the prosecution's evidence); United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976)("To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required.").

\footnote{29} Branzburg v. Hayes, 408 U.S. 665, 688 (1972)(citations omitted). The grand jury's powers include the authority to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

\footnote{30} See Warden v. Hayden, 387 U.S. 294, 300-01, 306-307 (1967)(rejecting "mere evidence" rule and holding that government can search for any evidence of criminality if probable cause exists). The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." \textit{U.S. Const. amend. IV}. In order to search for records and seize them, the government must meet the constitutional requirements of the Warrant Clause by "particularly describing the place to be searched, and the persons or things to be seized." \textit{Id.} It is quite unlikely that any of the common exceptions to the Warrant Clause, such as the automobile or search incident to arrest exceptions, can be invoked to permit the seizure of documents, especially records related to business activity that are created and stored as part of the normal operation of a commercial establishment. The advantage of using a search warrant to obtain records is that they are imme-
of evidence nor the exclusionary rule constrains the scope of the grand jury’s consideration in determining whether there is probable cause that a crime has been committed.\textsuperscript{31}

If the government obtains documents from the president’s corporation in the course of its investigation, the prosecutor will likely want to use them at trial if the government files criminal charges against the president individually. Unlike information presented to a grand jury, documents that the government seeks to use at trial must meet the evidentiary requirements to authenticate the records and produce sufficient indicia of reliability for the admission of hearsay, i.e., out-of-court statements “offered in evidence to prove the truth of the matter asserted.”\textsuperscript{32} While grand juries have a broad mandate to investigate criminal activity and may consider any evidence to make a probable cause determination,\textsuperscript{33} a petit jury in a criminal case is limited to reliable, relevant evidence that a judge decides meets the requirements for admissibility. Simply obtaining documents with a subpoena or warrant does not guarantee their admission into evidence at trial. The government, therefore, may try to use its authority to compel the production of records as part of its investigation to further require that a witness provide the necessary information to secure admission of the documents at trial.

When the government obtains documents from the target of its investigation, the circumstances under which it procures the items can

\begin{footnotesize}
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\textsuperscript{31} See United States v. Calandra, 414 U.S. 338, 351-52 (1974) (grand jury’s power to investigate based on evidence obtained through an illegal search is not restricted)(footnote omitted); Costello v. United States, 350 U.S. 359, 363-364 (1956)(indictment cannot be dismissed because it was based solely on hearsay inadmissible at trial); Fed. R. Evid. 1101(d)(2) (“The rules (other than with respect to privileges) do not apply in the following situations:...[p]roceedings before grand juries.”).
\end{footnote}

\begin{footnote}
\textsuperscript{32} Fed. R. Evid. 801(c). The Rule defines a statement as either “an oral or written assertion or...nonverbal conduct of a person, if it is intended by the person as an assertion.” Fed. R. Evid. 801(a).
\end{footnote}

\begin{footnote}
\textsuperscript{33} See United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991)(“The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush.”).
\end{footnote}
\end{footnotesize}
affect substantially the ultimate admissibility of the records at trial because of the Fifth Amendment's privilege against self-incrimination. In order to be introduced at trial, the prosecution must show both that the documents are authentic, i.e., "that the matter in question is what its proponent claims," and that they should not be excluded as hearsay. When the target of the investigation produces the documents, he or she becomes a tempting source for the authentication testimony and information that will allow admission of the records.

The question of whether the government can compel the production of records appears simple, but the answer is decidedly complicated. The complexity can be traced to *Boyd v. United States*, the first case decided by the Supreme Court that considered a privilege claim relating to the production of documents. The Court in *Boyd* asserted that compelling the production of incriminating records violated the witness's right to privacy under the Fourth and Fifth Amendments. Although the Court has never overturned explicitly its initial statement in *Boyd*, such broad protection for documentary evidence has not stood the test of time. The Court has whittled away the availability of the Fifth Amendment privilege to resist the production of records by adopting new tests for when a witness can claim the privilege.

The Court's analysis of the scope of the privilege against self-incrimination for those called upon to produce records relies primarily

34. Fed. R. Evid. 901(a).
35. Hearsay statements are excluded unless they are admissible under an exception to the hearsay rule. Documents may be admissible as business records, see Fed. R. Evid. 803(6); as present sense impressions, see id. 803(1); recorded recollections, see id. 803(5); or even under the residual exception. See id. 803(24). Similarly, documents that contain admissions of a party-opponent are not subject to the hearsay rule and are therefore admissible without meeting the requirements for an exception. See id. 801(d)(2).
36. The seizure of records under a warrant does not resolve evidentiary questions regarding the admission of those documents at trial. For example, records seized from a business can be authenticated as those taken from a particular location by an agent who seized them, but linking them to a particular defendant or establishing that they are in fact the records of the business is a different question that the agent cannot address. In *United States v. Schultz*, 917 F. Supp. 1320 (N.D. Iowa 1996), the government's witnesses testified only that the documents it sought to introduce at trial were "consistent with" those seized from two locations controlled by the defendant, which "did not suffice to satisfy the authentication requirements" that they were in fact the records seized in the search. *Id.* at 1340-41. The district court found that the defendant's failure to object to the lack of proper authentication testimony made any error in admitting the records harmless. *See id.* at 1341.
37. 116 U.S. 616 (1886).
38. *See id.* at 634-635.
on the label attached to the witness's act of production, not the degree of incrimination involved or the potential use of the information in a subsequent prosecution of the witness. The decisions concerning the Fifth Amendment in the context of demands for documents do not address the deeper question: whether the government can use a person's testimonial act of producing documents, compelled in the investigative phase of a case, as evidence to convict that person in a criminal trial.

III. PRIVACY, PAPERS, AND THE PRIVILEGE: OVERCOMING THE LEGACY OF BOYD V. UNITED STATES

In the late nineteenth century, the Supreme Court proclaimed that the government could not compel a person to produce documents which could be used against him because the Fourth and Fifth Amendments prohibited "any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of a crime or to forfeit his goods . . . ."40 Taken at face value, Boyd's broad interpretation of the constitutional privacy right would make it virtually impossible to force any person to surrender records in a government investigation.41 By the turn of the century, however, Congress had adopted economic regulatory statutes which included criminal provisions directed against corporations and its directors.42 Any effort to enforce these provisions required a narrower view than Boyd's of the Fifth Amendment protection of documentary evidence; otherwise, the government's power to combat abusive practices would be stymied at the outset.

The Court's first limitation on Boyd's protective approach for documents came in Hale v. Henkel,43 a 1906 decision that involved a subpoena for corporate records in an antitrust investigation of the tobacco industry. The Court held that the custodian subpoenaed for the corporation's records could not assert the privilege against self-incrimination because that would effectively permit the organization to resist

41. See Peter J. Henning, Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?, 54 U. PITT. L. REV. 405, 416 (1993)[hereinafter Henning, White Collar Crime] ("If taken to its logical extreme, Boyd would prevent the government from obtaining any documents that qualified as the property of the person subpoenaed, including a corporation . . . ."); Robert Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line, 49 Mo. L. Rev. 439, 449 (1984)("Logically, Boyd would suppress property owned by corporations as well as by natural persons.").
43. 201 U.S. 43 (1906).
producing documents.\textsuperscript{44} The hypothetical bank president who chose to form a corporation to receive illicit payments could not resist the government's subpoena for records because \textit{Hale v. Henkel} made the form of the organization the focal point for determining the availability of the privilege.\textsuperscript{45}

To reach this result, the Court did not engage in a comprehensive analysis of why corporations should be treated differently from individuals. Instead, the Court put forth a result-oriented rationale, justifying its holding on the ground that permitting a corporation to assert the privilege "would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers."\textsuperscript{46} The Court reaffirmed \textit{Hale v. Henkel} and what had come to be called the collective entity doctrine in \textit{Braswell v. United States},\textsuperscript{47} which mandated that a custodian of records "may not resist a subpoena for corporate records on Fifth Amendment grounds"\textsuperscript{48} regardless of the size or complexity of the organization.\textsuperscript{49}

The Court's second proscription on the scope of \textit{Boyd} came in \textit{Fisher v. United States}\textsuperscript{50} which held that the contents of voluntarily created documents were not protected by the privilege against self-incrimination because only the physical act of producing the records pursuant to the subpoena could be testimonial, and therefore potentially incriminating, for Fifth Amendment purposes.\textsuperscript{51} In \textit{Fisher}, the

\begin{itemize}
\item \textsuperscript{44} See id. at 74.
\item \textsuperscript{45} See id. at 74-75.
\item \textsuperscript{46} Id. at 74. See Peter J. Henning, \textit{The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions}, 63 TENN. L. REV. 793, 819 (1996)(arguing that the Court rejected a corporate Fifth Amendment privilege claim in order to preserve the government's ability to use its criminal enforcement authority to police the actions of corporations).
\item \textsuperscript{47} 487 U.S. 99 (1988).
\item \textsuperscript{48} Id. at 109.
\item \textsuperscript{49} See id. Braswell adopted the same rationale as \textit{Hale v. Henkel}, noting that "recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." Id. at 115 (footnote omitted).
\item \textsuperscript{50} 425 U.S. 391 (1976).
\item \textsuperscript{51} For the purpose of asserting the Fifth Amendment privilege, the compelled production of "required records" is equivalent to the seizure of records with a warrant, even though the government uses a subpoena to compel the production that would appear to permit the witness to invoke the privilege against self-incrimination. The Supreme Court adopted a three-part test to determine whether documents qualify as a required record: (1) were they created pursuant to a statutory scheme that is essentially regulatory and not criminal; (2) are the records of a type normally maintained; and, (3) do the records have a "public aspect" to them. Grosso v. United States, 390 U.S. 62, 67-68 (1968). See Smith v. Richert, 35 F.3d 300, 302 (7th Cir. 1994)("[I]f the documents were required records, the person could not resist the subpoena on this ground, for the only acknowledgment con-
Court stated that “[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced.”52 The act of production was testimonial because it conveyed information about the existence, possession, or authenticity of the documents. A subpoena to the hypothetical bank president for production of her personal records, not those of the corporation, may be subject to an assertion of the privilege because the response may incriminate the president individually.

The Fisher Court explained, however, that the communicative aspect of the act of production may not be protected by the privilege against self-incrimination if the information conveyed was not incriminating. The act of production would not be subject to the privilege if the information was “a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.”53 Fisher focused the Fifth Amendment analysis on the heretofore unnoticed aspect of physically responding to a subpoena as the sole basis for asserting the privilege, removing from the constitutional inquiry any consideration of whether the documents incriminated the person who created or possessed them.54

52. Fisher v. United States, 425 U.S. 391, 410 (1976). The Court noted that the incriminating nature of a document does not permit the holder to assert the Fifth Amendment privilege, a point at odds with the apparent thrust of Boyd that a defendant should never be convicted by his own words. See id. at 410-11. Having changed the focus of the Fifth Amendment analysis, the Court observed that Boyd’s holding regarding the scope of the privilege “has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give ‘testimony’ that incriminates him.” Id. at 409.

53. Id. at 411.

54. See Henning, White Collar Crime, supra note 41, at 421 (“Fisher’s analysis is unnecessarily complicated and focuses on one aspect of the subpoena process, the act of production, which is largely irrelevant to the real issues of the grand jury investigation.”). In United States v. Doe, 465 U.S. 605 (1984), the Court created a gap in its collective entity doctrine in considering the effect of the act of produc-
Once the Court adopted the collective entity doctrine and limited the protection of the privilege against self-incrimination to the physical act of production, Boyd's paean that the Fifth Amendment prohibits any governmental "invasion of [the] indefeasible right of personal security, personal liberty and private property" lost much of its force.\(^5\) Instead, the status of the person called on to produce the records and the nature of the entity responsible for creating or maintaining the documents played the dominant role, rather than the identity of the person implicated by the records or even the reason that the government wanted them.\(^6\) Justice O'Connor was probably correct when she noted in the concurring opinion of a later case that "[t]he notion that the Fifth Amendment protects the privacy of papers originated in Boyd v. United States, but our decision in Fisher v. United States sounded the death knell for Boyd."\(^57\)

The two narrow approaches that confine the scope of the Fifth Amendment privilege in cases involving subpoenas for records place a premium first, on determining the way in which a document came into existence, and second, who the government can compel to produce that document without regard to whether it can be used later at trial. The Court's opinions that consider the availability of the privilege against self-incrimination deal with actions challenging the government's...
power to compel the production of records at the investigative stage. The Court has not yet considered how its analyses might affect a defendant's rights at the trial stage. The individuals asserting the Fifth Amendment protection had not yet been indicted, so the privilege question at the trial stage did not arise. Unfortunately, in the Court's treatment of the scope of the privilege, it used terminology related to the admission of evidence at trial without fully examining the question of whether the privilege applied to the production of documents at the later stage, and if so, what effect compelling a response to a subpoena at the earlier stage had on the availability of the privilege to prevent use by the government at trial of the compelled response.

IV. FISHER v. UNITED STATES: WHAT DOES "AUTHENTICATION" MEAN AT THE INVESTIGATIVE STAGE

A. The Irrelevance of Authentication Before the Grand Jury

In Fisher, as part of an investigation into possible violations of the tax code, the IRS issued a summons to the taxpayers' attorney for workpapers prepared by an accountant that reflected the clients' personal income and expenses. The Supreme Court rejected the taxpayers' argument, based on Boyd, that compelling an individual to produce personal records was an unconstitutional invasion of privacy: "[T]he Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which . . . did not involve compelled testimonial self-incrimination of some sort."58 According to the Court, the Fifth Amendment only protected the individual from having to testify, not from producing incriminating evidence, so that only the communicative component of providing documents in response to a subpoena comes within the ambit of the privilege against self-incrimination.

The Court agreed that the physical act of production conveyed information about a document's existence, possession, and authenticity, and therefore was testimonial under the Fifth Amendment.59 But Fisher did not prohibit the government from requiring the production

58. Fisher v. United States, 425 U.S. 391, 399 (1976). The Court stated that the constitutional right to privacy traced its origins to the Fourth Amendment, and that the framers of the Constitution "did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination." Id. at 400.
59. See id. at 410. ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena.")
of records by an individual just because that act may communicate information. Instead, the Court held that the government could enforce the subpoena if it was a "foregone conclusion" that the prosecution could establish the existence, possession, and authenticity of the items independent of the act of production.\textsuperscript{60} If existence, possession, and authenticity could be shown independently of the communicative act, then "however incriminating the contents of the accountant's workpapers might be, the act of producing them . . . would not itself involve testimonial self-incrimination."\textsuperscript{61} Fisher's foregone conclusion analysis meant that, once the government demonstrated at the investigative stage an alternative means to prove the existence, possession, and authenticity of the records, then the witness could not assert the Fifth Amendment to resist the subpoena.

Of the three components of the act of production that may be communicative, authentication is the most important for any subsequent use of the records as evidence at trial. In order to introduce an item into evidence, the party seeking to use it must authenticate the item by producing "evidence sufficient to support a finding that the matter in question is what its proponent claims."\textsuperscript{62} The act of production contains a tacit admission that the records are those described in the subpoena, i.e., that they are genuine. As Fisher noted, "the 'implicit authentication' rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas."\textsuperscript{63} The Court concluded that the taxpayers resisting the subpoena "would be no more competent to authenticate the accountant's workpapers or reports by producing them than [they] would be to authenticate them if testifying orally. The taxpayer[s] did not prepare the papers and could not vouch for their accuracy."\textsuperscript{64} Therefore, the Court found the subpoena enforceable because the act of production did not incriminate the subpoena recipients.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{60} Id. at 411.
\item \textsuperscript{61} Id. at 410-11.
\item \textsuperscript{62} Fed. R. Evid. 901(a).
\item \textsuperscript{64} Id. at 413.
\item \textsuperscript{65} See id. ("Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination.").
\end{itemize}
If the Fisher Court meant to apply the usual rules of evidence regarding the requirements for proper authentication of evidence, then Fisher's analysis of the potential authentication by the subpoena recipient's act of production is mistaken. The standard for authentication does not require that the witness be able to testify as to the accuracy of the contents of the document. The Court's analysis, however, equated the question of accuracy, that the contents of the record are truthful, with authenticity, that the item is what it purports to be. The distinction is subtle, but very important when considering the issue of admitting an item into evidence at trial. The Court's statement implies that if the act of production did not add to the government's knowledge of the accuracy of the information reflected in the document, or if the witness could not testify regarding its truthfulness, then there was nothing incriminating in producing the document because the witness's production would not authenticate it.

B. Distinguishing the Investigative and Trial Phases in the Act of Production Analysis

A better interpretation of Fisher's authentication analysis views the Court's discussion as limited to whether the taxpayers' act of production conveyed any information about the accuracy of the records in the investigative phase, not whether the information communicated by the witness authenticated the documents for admission as evidence at trial. The accuracy question may be important to the prosecutor and the grand jury, and therefore potentially incriminating, but meeting the technical authentication requirements would be wholly irrele-

another Fifth Amendment case permitting the compelled production of a handwriting exemplar because "although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege." Id. at 411 (citation omitted). At the end of the opinion, however, the Fisher Court summarized its holding by ordering the production of records because "the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment." Id. at 414.

Fisher's analysis of why the privilege may not apply to the act of production must be grounded on the fact that the "foregone conclusion" mitigates any incriminating effect of the communication, not that the act somehow loses its communicative nature. As an initial matter, the individual compelled to produce documents has the privilege unless the government can show it will gain no new information from compliance with the subpoena; i.e., it learns nothing incriminating. The question whether a witness transmits information by the act of production assumes that there is a communication, and the Fifth Amendment issue depends on the effect of that testimonial act, not whether it was in fact testimonial.

66. See Robert P. Mosteller, Simplifying Subpoena Law: Taking the Fifth Amendment Seriously, 73 Va. L. Rev. 1, 16 (1987)("The Court erred, however, by using the term 'accuracy' as if it were interchangeable with 'authenticity'.").
vant in an investigation not bound by the rules of evidence. The taxpayers in *Fisher* could not convey any information about the accuracy of the workpapers, i.e., the manner in which the accountant prepared them, so there was nothing incriminating in the act of production. The communicative act could, however, authenticate the records in a trial-related evidentiary sense, i.e., establish that they were the accountant's workpapers regarding the taxpayers' liability, but that particular piece of information was not at issue in the investigative phase.

An authentication analysis that focuses on whether information regarding accuracy is important to the party reviewing the records means that determining whether an act of production incriminates a witness depends upon the procedural context in which the privilege claim arises. The accuracy of records may be important at both stages of a criminal case, and any testimony regarding documents could be incriminating on that question. Yet, in most cases, any consideration of the accuracy of the records at the investigative stage can be resolved simply by reviewing the documents to determine whether they appear relevant to the investigation.\(^67\) Therefore, *Fisher*’s “authentication” information arising from the response to a subpoena may have testimonial significance about the accuracy of the documents only when the grand jury or government investigators question seriously the veracity of the records in making the probable cause determination that a person should be charged with a crime. The act of production in that context makes authentication and accuracy equivalent, much as the Court suggested in *Fisher*.\(^68\)

Authentication is not an issue in the investigative stage unless the rules of evidence apply to proceedings at that phase. Limiting *Fisher*’s Fifth Amendment privilege analysis to the investigative context in

\(^{67}\) The only limit on the grand jury's power to subpoena evidence is that it be relevant to the general subject matter of the investigation. See United States v. R. Enterps., 498 U.S. 292, 300 (1991). Whether the accuracy of a document is important should be measured by the same criterion as the grand jury's authority to issue the subpoena compelling the production of records.

\(^{68}\) For example, in cases involving false or inflated billings, such as Medicare fraud, the investigatory target's records may not reflect the improper claims filed with the government or insurer. The grand jury may want the records to determine the target's knowledge of the possible violations so that any implicit statement as to their accuracy would assist the grand jury. If the billing documents are inaccurate because they conflict with the false or inflated claims submitted for reimbursement, then that can show an intent to hide the illegal acts. Similarly, if the records show procedures that the government can establish the providers did not perform, then the implicit testimony regarding their accuracy arising from the act of production can show the defendant's knowledge of the criminal acts. In either case, the “authentication” derived from the act of production may be incriminating at the investigative phase because of the information conveyed about accuracy, not that the records are authentic for admission at trial.
which it arose overcomes the Court's suggestion that authentication under the rules of evidence is equivalent to testifying about the accuracy of the records. That limit shifts the question from one of determining the strict evidentiary question of authentication as a condition for admitting evidence at trial to one of ascertaining whether the grand jury would learn anything of importance from the witness' response concerning the nature of the documents. Fisher hinted at just such a limited scope to the act of production analysis when the Court considered whether the information regarding existence or possession of the records conveyed in responding to the subpoena would incriminate the taxpayers. Before reaching the authentication issue, the Court stated, "At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer." Fisher did not present a question arising at trial, and the Court was careful to note that while two communicative aspects of the act of production were not incriminating, that did not foreclose the possibility that the act of production could incriminate the witness at a later point in the proceeding.

In United States v. R. Enterprises, Inc., the Court, in reviewing the propriety of a subpoena duces tecum, distinguished explicitly the investigative from the trial phase of a case. The Court held that challenges to grand jury subpoenas should not be reviewed according to the higher standard required for trial subpoenas because "[s]trict observance of trial rules in the context of a grand jury's preliminary investigation 'would result in interminable delay but add nothing to the assurance of a fair trial.'" Although R. Enterprises involved construction of a Federal Rule of Criminal Procedure, the Court's approach in differentiating between the investigative and trial phases is instructive for understanding the scope of the Fifth Amendment privilege. R. Enterprises noted that because "many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings," the freedom required at the earlier stage counsels against application of tests that "invite procedural delays and detours." The Court's ac-

71. Id. at 298 (quoting Costello v. United States, 350 U.S. 359, 364 (1956)). The court of appeals had quashed a subpoena duces tecum on the ground that the government could not demonstrate that the records would be both relevant and admissible at trial, applying the test the Supreme Court adopted in United States v. Nixon, 418 U.S. 683, 699-700 (1974). The Court rejected application of the Nixon standard on the ground that "[o]ne simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense." United States v. R. Enterps., 498 U.S. 292, 300 (1991).
73. Id.
knowledge of the government's different needs in the two phases of a criminal case supports separating the authentication issue arising from the act of production during the investigative phase from the technical evidentiary analysis applied at trial. That approach is similar to the Court's hesitation to foreclose the witness from asserting the Fifth Amendment at a later point in Fisher when the Court noted only that at the particular investigative "juncture" at which the taxpayers' challenge arose could it not find the communicative act incriminating.75

Fisher's authentication analysis should be understood to mean that information conveyed by the act of production about the accuracy of the documents is an issue that may be relevant to the grand jury, but the Fifth Amendment privilege does not apply if the government can establish the accuracy of the records by other means. Fisher should not be read to suggest that the compelled production of documents at the investigative stage can be used to establish their authenticity at trial. Most challenges on Fifth Amendment grounds to subpoenas for documents occur in the investigative phase, when the government's principal interest is to gather information to evaluate the legality of an act or transaction. The need to authenticate a document at that point, in the technical evidentiary sense, is minimal because the primary question is whether the records are relevant to the investigation.76 Authentication testimony that the government can introduce at trial, however, will be much more likely to incriminate the witness because it will facilitate the admission of the records into evidence.

C. Once Lost, Can the Privilege Be Reasserted?

Lower courts have not distinguished between the investigative and trial phases for the availability of the Fifth Amendment privilege on the authentication issue. They assume that the Supreme Court's dis-

74. In the context of discussing the role of the Fifth Amendment in constraining the conduct of police interrogations, Professor Grano makes a similar point regarding the difference between the investigative and trial phases of a criminal case: Because successful investigation often depends on the questioning of reluctant witnesses and suspects, and on other intrusive strategies as well, the investigative stage as a practical matter, cannot be subject to the same restraints that govern the adjudicative stage. The operative rules will be different because the institutions that dominate the successive stages of the process have dissimilar functions and responsibilities. Simply put, an investigation is not, and cannot be a trial.


76. See In re Matter of Trader Roe, 720 F. Supp. 645, 648 (N.D. Ill. 1989)("There is a difference between the initial act of surrendering the documents—the act of production—and the later evidentiary use of that act as evidence against the witness.").
cussion of authentication in *Fisher* comprehended only the trial-type proof that the item was what its proponent claimed. This interpretation of *Fisher*, in turn, leads lower courts to focus on how the government could prove authenticity in a later proceeding that would be governed by the rules of evidence to decide the availability of the privilege against self-incrimination, even though the prosecution seeks production of the records at the investigative phase of the case and not to introduce them into evidence at that proceeding. The assumption appears to be that if the government can demonstrate an alternative method of authenticating records at trial, then any authentication information from the act of production can never be incriminating.

Lower courts that view *Fisher* as adopting a trial-related authentication analysis rather than an accuracy-related analysis may make questionable applications of the act of production doctrine. After the government made a plausible argument that it could authenticate the documents at trial without reference to the witness's act of production, the Eighth Circuit, in *United States v. Rue*, 77 compelled an individual to produce records in response to an IRS summons. 78 The circuit court accepted the government's position that it might proceed to authenticate the documents at trial even though the preliminary investigation had not yet been completed and the grand jury proceeding had not begun to determine whether there was probable cause that a crime had been committed.

The Eighth Circuit's analysis of the availability of the privilege assumed that a court's responsibility under *Fisher* was to determine whether, during an investigation, the government, without relying on the investigative target's act of production, could possibly authenticate documents at trial that had not yet been produced. For a court to decide at a preparatory stage whether proposed methods of authenticating documents would be sufficient to mitigate any incrimination from the act of production is specious because the authentication analysis is purely speculative. The court in *Rue* did not require the government to demonstrate how it would in fact authenticate the records, only that it make some plausible argument that if called upon it probably could assemble sufficient proof that the documents were what the prosecution purported. 79 Once the government secured the docu-

77. 819 F.2d 1488 (8th Cir. 1987).
78. See id. at 1494 ("[A]uthenticity could readily be established under Rule 901(b)(4) by comparing the contents of the patient cards with information from other documents whose authenticity is already established . . . .").
79. The focus on authentication as an evidentiary issue can result in a conclusion opposite of that reached in *Rue*, with the court quashing a subpoena for documents because the government could not articulate the means by which it might authenticate the records. In *In re Grand Jury Proceedings, Subpoenas For Documents*, 41 F.3d 377 (8th Cir. 1994), the Eighth Circuit held that a grand jury could not compel the production of sole proprietorship records "because the [sole
ments over the assertion of the privilege, because authentication was a foregone conclusion under *Fisher, Rue* did not state whether the prosecution would be limited to the proffered methods of authenticating the records if it sought their admission at trial. Moreover, once provided to the government, the contents of the documents themselves may provide the basis for authentication, information which would not have been available to the government prior to compliance with the subpoena. By focusing on the narrow evidentiary issue of authentication, *Rue* ignored the broader implication in *Fisher*: whether the act of production would provide information about the accuracy of the records, which is the primary concern at the investigative stage.

*Fisher*'s failure to differentiate the government's power at the investigative and trial stages raises a broader concern: whether trial-type authentication information conveyed by the defendant in response to a grand jury subpoena can be used against that person in a subsequent criminal proceeding in which the government seeks to introduce the documents. If the government granted a witness immunity for the act of producing records, then it cannot use that testimonial act against the person at trial. But if a court compelled a person to produce records because it found no incriminating authentication information conveyed by the act of production, then would the government be able to introduce that testimonial act at trial because the defendant was not allowed to assert the Fifth Amendment privilege in the earlier phase of the case? A broad reading of *Fisher*'s act of production approach does not foreclose this possibility *ab initio*. Thus,

proprietary proprietors, as preparers of the documents, would implicitly vouch for the genuineness of the documents." *Id.* at 380. The Eighth Circuit noted that the government had not provided evidence that could independently authenticate the documents, although the case was only at the investigative phase so the government did not have to meet any evidentiary requirements for records it might obtain for use before the grand jury. The circuit court ordered the subpoena quashed unless the government granted immunity to the subpoena recipients.

80. See *United States v. Clark*, 847 F.2d 1467, 1474 (10th Cir. 1988)("Other authenticated documents, when compared with the contents of the summoned documents, may serve to authenticate them.").

81. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972)("[Immunity] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."); *In re J.W.O.*, 940 F.2d 1165, 1167 (8th Cir. 1991)("Should the government decide to prosecute J.W.O. following the grand jury investigation, it will be prohibited from any use of the testimonial aspects relating to J.W.O.'s compelled act of producing the documents against him."); *United States v. McCollom*, 651 F. Supp. 1217, 1223 (N.D. Ill. 1987)("McCollom's immunity prevents the government from using his act of producing the documents as a means of authenticating them.").
the act of production can become incriminating in the transition from
the investigation to the trial.\textsuperscript{82}

To prevent a witness's compelled testimonial act from being used
against him in a subsequent trial, the assessment of the incriminating
effect of the act of production should be limited to ascertaining any
incrimination only as it may affect the investigative stage. A defend-
ant should be permitted to assert the privilege against self-incrimina-
ation at the trial stage when the prosecution uses any aspect of the act
of production that was compelled at the investigative stage, either by
a subpoena or by the threat of contempt. The court's determination of
the privilege issue should be limited to the preliminary phase in which
the assertion of the privilege against self-incrimination occurred. This
interpretation of \textit{Fisher} becomes more compelling when the denial of
the privilege results from some measure of proof by the government at
a preliminary proceeding about the way it \textit{might} authenticate the doc-
uments to establish the foregone conclusion required by \textit{Fisher}. The
prosecution should not then be allowed to dispense with its prior posi-
tion and simply use the defendant's communicative act because it was
not protected by the privilege against self-incrimination before a
grand jury.

The government's power to require the production of records is not
uniform throughout the course of a proceeding, and the authority to
enforce compliance with a subpoena at the investigative phase should
not extend to use of compelled testimony in the trial phase of the case.

\textsuperscript{82} The determination that a witness cannot assert the Fifth Amendment privilege is
fundamentally different from a grant of immunity. \textit{Fisher}'s foregone conclusion
analysis results in a finding that the communicative act would not be incriminat-
ing, a prerequisite for a witness to assert the privilege. A grant of immunity
eliminates the incriminating effect of the witness' testimony because "a defend-
ant's compelled statements ... may not be put to any testimonial use whatever
The rationale for such strict treatment of a defendant's statements compelled af-
after an immunity order is that the immunity is a substitute for the witness's Fifth
Amendment privilege, that the defendant be in roughly the same position after
testifying as if the person had interposed the Fifth Amendment to resist the gov-
The \textit{Fisher} analysis of the incriminating effect of an individual's act of production
does not result in a grant of immunity to the witness, and the Court rejected
expressly any judicial authority to grant immunity to a witness producing records
absent a request by the government for such an order. \textit{See United States v. Doe},
465 U.S. 605, 616 (1984)("We decline to extend the jurisdiction of courts to in-
clude prospective grants of immunity in the absence of the formal request that
the statute \textit{[18 U.S.C. §§ 6001-6005 (1994)]} requires.".). Therefore, the govern-
ment's subsequent use of testimony for which a witness could not assert the privi-
lege against self-incrimination does not receive the same protection as that
accorded an immunized statement, and the prosecution would not appear to be
inhibited from using the statement against a witness in a later proceeding once a
court determines that the Fifth Amendment does not apply to the act of
production.
For a court to hold otherwise would mean that, once the government obtained records, the prosecution could use the act of production at trial because the defendant could not assert the privilege to prevent the government from introducing the prior testimonial act. Fisher's holding is not so broad that it should be interpreted to mean that once a court finds the privilege inapplicable to resist the production of records, the witness can never again assert it to block the prosecution's use at trial of the communicative aspect of production. If lower courts construe Fisher as establishing the doctrine that once lost, the privilege can never be regained, then the Supreme Court in Fisher certainly sounded the death knell for more than just Boyd; it also sounded the death knell for much of the Fifth Amendment's protection of individuals compelled to produce documents.

V. BRASWELL V. UNITED STATES: LIMITING USE AT TRIAL OF THE CUSTODIAN'S ACT OF PRODUCTION

The Supreme Court's act of production analysis in Fisher was a new approach to the privilege against self-incrimination that turned the constitutional inquiry away from Boyd's focus on the incriminating content of the records as the basis for asserting the Fifth Amendment protection. By focusing on the communicative aspect of production rather than the inculpatory nature of the documents, the Fisher Court provided a plausible basis for every custodian of corporate records to resist producing the entity's documents by arguing that the act of production was personally incriminating. In Braswell v. United States, the Court emphatically rejected that position, rendering irrelevant for Fifth Amendment purposes the personally incriminating effect of responding to a subpoena on behalf of a collective entity. What the Court did not consider in Braswell, much like Fisher, was the next step: whether a custodian could ever assert the privilege against self-incrimination when the government sought testimony in addition to the production of records that the prosecutor could subsequently use to prosecute the custodian individually.

In Braswell, the government subpoenaed a broad array of records from two corporations of which the custodian was sole shareholder and president. Braswell refused to produce the records on the ground that his act of production would be personally incriminating under Fisher. Rather than extend Fisher's act of production analysis to

83. See Boyd v. United States, 116 U.S. 616, 634-635 (1886).
85. See id. at 102-03 ("Petitioner instead relies solely upon the argument that his act of producing the documents has independent testimonial significance, which would incriminate him individually . . . . The bases for this argument are extrapolated from the decisions of this Court in Fisher and [United States v.] Doe."). In Doe, the Court held that the act of production of business records by a sole propri-
corporate custodians, the Court held that the collective entity doctrine barred all corporations from interposing the privilege against self-incrimination in response to a subpoena, regardless of the entity's size or the potential incrimination of the custodian of records.86 Braswell reinforced the presumption that a custodian of records acts only in a representative capacity, and therefore may not claim the privilege if doing so would shield the collective entity from complying with a subpoena duces tecum.87

The Court reasoned that allowing a corporate custodian to invoke the Fifth Amendment at the investigative stage would involve greater costs to the government's successful prosecution of criminal activity than the benefit of bestowing on a custodian the right to assert the privilege to protect both himself and, ultimately, the organization. If the custodian were allowed to invoke the privilege, then the government's only alternatives for securing the records would be to obtain a search warrant, which may be impossible for reasons unrelated to the Fifth Amendment, or to grant immunity to the custodian for the act of production. The latter option, however, could make the ultimate prosecution of the custodian problematic. The grant of immunity can easily taint the prosecution's evidence and might place the government's entire case at risk.88

86. See Braswell v. United States, 487 U.S. 99, 104 (1988). The Court stated: Had petitioner conducted his business as a sole proprietorship, Doe would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals. This doctrine—known as the collective entity rule—has a lengthy and distinguished pedigree.

87. Braswell v. United States, 487 U.S. 99, 108-09 (1988)("The plain mandate of [prior] decisions is that without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as a custodian... a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.")(citations omitted).

88. See Kastigar v. United States, 406 U.S. 441, 461-62 (1972)(when government prosecutes a witness granted immunity in the investigative phase of the case, it bears a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources"); United States v. North, 910 F.2d 843 (D.C. Cir. 1990), modified per curiam, 920 F.2d 940 (D.C. Cir. 1990)(reversing conviction of defendant who had testified before Congress under grant of immunity because trial court had not determined whether any witness's testimony had been influenced in any way by the immunized testimony); Henning, White Collar Crime, supra note 41.
The Court acknowledged a weakness in its view of the custodian acting solely in a representative capacity if the government's true intent was to prosecute the custodian individually. In that situation, the government could use the collective entity doctrine to bypass the privilege against self-incrimination by subpoenaing the putative defendant in the capacity of custodian of records for the purpose of gathering individually incriminating information. To ensure the production of corporate records, the Court deprived custodians of the right to assert the privilege, but Braswell observed that "certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity."89 The Court prohibited the government from making direct evidentiary use of the individual's production of the documents in response to the subpoena in a subsequent prosecution of that custodian.90 Braswell's protection is limited, however, because it does not provide custodians with full immunity for the act of production. A statutory grant of immunity would prevent the government from making any use of the testimonial act. The Court's limitation, however, allows prosecutors to introduce the fact of the entity's production at trial.91 That information in turn can lead to an inference that the defendant's position in the collective entity is such that he must have been involved in responding to the subpoena, and therefore has knowledge of the content or existence of the documents.92 Braswell acknowledged that its evidentiary limitation would not prevent the prosecution from introducing an organization's production in the hope that it would incriminate the custodian, only that it must do so indirectly.93

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90. See id. at 118.
91. See id.
92. See id. ("The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena."). The Court stated that its protection for the custodian was not a form of immunity because that could impose serious costs on prosecuting the custodian at a later point. Id. at 117.
93. See id. at 118 ("[I]f the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents."); see also United States v. Dean, 989 F.2d 1205, 1210 (D.C. Cir. 1993)(act of production by former government worker may not be introduced into evidence under Braswell, although "jury might infer that Dean created and kept the records but that inference will not come from Dean's testimonial act of production."). Using the custodian's act in a more direct way should result in a violation of Braswell's protection. See United States v. McLaughlin, 126 F.3d 130, 134 (3d Cir. 1997) ("The government's repeated reference
The origin of this narrow evidentiary protection is obscure. The Court observed cryptically that "certain consequences flow from" the custodian's act of production. The Court could not have grounded the prohibition against using the act of production as direct evidence of the defendant's involvement with the documents on the Fifth Amendment because the rationale of the collective entity doctrine, reaffirmed in Braswell, was that a custodian could never assert the privilege on behalf of the corporation. It would be illogical to rely on the Fifth Amendment privilege as the basis for protecting the person who must comply with a subpoena when the justification for compelling production is that the privilege does not apply. Although the Court described this peculiar evidentiary safeguard as a "necessary concomitant" of the agency rationale of the collective entity doctrine, there is nothing in the law of agency that holds an agent immune when acting on behalf of the principal.

A more likely source of Braswell's limited protection for custodians was the Court's supervisory power to prevent the prosecution from overstepping its investigative authority by using the collective entity doctrine as a subterfuge to gather evidence that would be used to prosecute the representative individually. In United States v. Hasting, the Court held that federal courts may formulate procedural rules, inter alia, "to preserve judicial integrity by ensuring that a conviction to [the custodian's] incomplete act of production as evidence of his culpability flies in the face of Braswell and vitiates [his] Fifth Amendment privilege.".


95. See id. at 128 (Kennedy, J., dissenting)(evidentiary limitation "cannot rest on the Fifth Amendment, for the privilege against self-incrimination does not permit balancing the convenience of the Government against the rights of a witness, and the majority has in any case determined that the Fifth Amendment is inapplicable").

96. Id. at 118 n.11 ("Rather, the limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity.").

97. The Court may be relying on the agency law principle that "[a]n agent, by making a contract only on behalf of a completely disclosed or partially disclosed principal whom he has power so to bind, does not thereby become liable for its nonperformance," Restatement (Second) of Agency § 328 (1957). The problem with looking to the agent's liability on a contract as the basis in Braswell for prohibiting any direct evidentiary use of the act of production is that the third party, i.e. the government, is only seeking to use the agency relationship to prove a separate violation, not to hold the agent liable for acts on behalf of the collective entity. The act of production has a distinct informational content and is not itself the basis for holding the agent liable. Moreover, it is quite a stretch to ground a quasi-constitutional prohibition on evidentiary use of relevant information in a criminal prosecution on a rule from an area of law that is so far afield that the Court never saw fit to cite it in support of the evidentiary limitation.

rests on appropriate considerations validly before the jury . . . ."99 Reliance on supervisory powers, rather than the Constitution, as the basis for Braswell's evidentiary use limitation reflects the point, discussed earlier in connection with Fisher, that the government's power to investigate criminal activity should not be the vehicle for introducing evidence of a defendant's compelled testimony in a subsequent prosecution.100

If the prosecution could make direct use of the act of production to convict the custodian, then the jury would have evidence that, while not a specific violation of the Fifth Amendment, contravenes the spirit of the privilege by allowing the government to compel a person to respond and then use that communicative act to secure a conviction.101 Moreover, the Court expressly left open the question of whether Braswell's Fifth Amendment privilege analysis for collective entities permits any evidentiary use of the corporation's act of production when

99. Id. at 505. Two other considerations that may form the basis for a federal court exercising its supervisory powers are "to implement a remedy for violations of recognized rights" and "to deter illegal conduct." Id.

100. The obtuse language regarding the source of the limited protection for custodians provided in Braswell, and the opinion's direct avoidance of supervisory powers as the basis for limiting the government's use of the act of production, was probably because the Court was in the process of narrowing quite dramatically the availability to lower courts of a supervisory power that could be used to dismiss indictments or reverse convictions based on prosecutorial misconduct or other non-constitutional violations. In Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), a decision announced the same day as Braswell, the Court overturned the dismissal of an indictment in which the district court invoked its supervisory powers to deter prosecutorial misconduct. See id. at 253. The Court held that absent actual prejudice to the defendant, prosecutorial misconduct before the grand jury could not be the ground for dismissing an indictment. In a case decided the previous term, United States v. Mechanik, 475 U.S. 66 (1986), the Court held that prosecutorial misconduct before the grand jury was harmless error after the defendant's conviction, and therefore the trial court could not use its supervisory power to dismiss the indictment based on the government's actions in the investigative stage of the case.

Justice Kennedy's dissent in Braswell criticized the majority's effort to mitigate the effect of its analysis by prohibiting direct evidentiary use of the act of production, noting that "perhaps the Court makes this concession out of some vague sense of fairness, but the source of its authority to do so remains unexplained." Braswell v. United States, 487 U.S. 99, 128 (1988)(Kennedy, J., dissenting). The majority never directly addressed Justice Kennedy's point, which may reflect an implicit acknowledgment that the Court imposed a rule designed to prevent prosecutorial abuse without identifying the true source of the requirement as judicial supervisory power so as not to undercut the message of Bank of Nova Scotia that lower courts should not expansively apply their supervisory authority over prosecutors.

101. See United States v. McLaughlin, 126 F.3d 130, 133-34 (3d Cir. 1997)(reversing conviction of corporate custodian in which government introduced custodian's failure to turn over all corporate financial records as evidence of the custodian's knowledge).
the jury would inevitably conclude that the defendant was the only person who could have complied with the subpoena.102

Braswell's indirect creation of a quasi-constitutional limited immunity for custodians, as well as the Court's acknowledgment that in certain circumstances the collective entity doctrine may prevent the prosecution from utilizing the corporate act of production, demonstrates the Court's concern about possible misuse at the trial stage of the government's investigative power. While Braswell denied the privilege to a custodian of records, it retained an important aspect of the Fifth Amendment right for custodians by circumscribing the evidentiary use of a compelled testimonial act at a later stage in a criminal proceeding. Braswell's convoluted discussion of the need to protect the custodian despite denying the explicit benefit of the Fifth Amendment privilege signals the Court's unwillingness to view the government's power to compel the production of records as uniform at both stages of a criminal case. After Braswell, the privilege against self-incrimination retains its vitality at trial even if it cannot be asserted to resist producing records during the investigation.

VI. COMPELLING A CUSTODIAN'S TESTIMONY AS "AUXILIARY" TO THE ACT OF PRODUCTION

A. Curcio v. United States: Dictum Masquerading as Fifth Amendment Analysis

At first blush, it seems unlikely that the government would need to compel a custodian of records to testify orally before a grand jury about issues related to the admissibility of documents. At the investigative stage of a case, the government only gathers information, and

102. See Braswell v. United States, 487 U.S. 99, 118-19 n.11 (1988)(noting that if the custodian were the "sole employee and officer of the corporation," that may lead a jury to "inevitably conclude that he produced the records"). Braswell was the sole shareholder and President of the corporation, but that apparently was not sufficient to trigger this additional consideration. See In re Grand Jury Proceedings, 814 F.2d 190, (5th Cir. 1987), aff'd sub nom. Braswell v. United States, 487 U.S. 99 (1988). In United States v. Maxey & Co., 956 F. Supp. 823 (N.D. Ind. 1997), the district court found that the owner's "conscious decision to incorporate his tax preparation business rather than operate it as a sole proprietorship" precluded any Fifth Amendment claim to resist producing records of the corporation. Id. at 829. The Supreme Court's hesitation regarding the availability of the privilege for a single shareholder corporation, however, appears to have no real effect on the analysis once the owner chooses the corporate form. See United States v. Stone, 976 F.2d 909, 911-12 (4th Cir. 1992) (citation omitted)("The business could have been formed as an unincorporated sole proprietorship and production of its business records protected by the privilege against self-incrimination. [Defendant] chose the corporate form and gained its attendant benefits [and] he cannot now disregard the corporate form to shield his business records from production.").
grand juries in most jurisdictions are not constrained by the rules of evidence in what they may consider. Requiring anything more than the production of records, then, would appear meaningless. Nevertheless, the government has sought to require custodians to provide oral testimony about the creation, maintenance, and authenticity of documents subpoenaed from an organization. The genesis of this authority to compel live testimony beyond the act of production springs from the Supreme Court’s dicta in Curcio v. United States, a decision that, ironically, applied the Fifth Amendment privilege to rebuff the government’s effort to require a custodian of records to testify.

In Curcio, the government issued a subpoena to the secretary-treasurer of a union local to produce records to a grand jury investigating labor racketeering. Curcio testified that he did not have possession of the records and therefore could not produce them. He then asserted the Fifth Amendment privilege in response to further questions about the location or possession of the records, and the District Court found him guilty of criminal contempt for refusing to answer questions before the grand jury.

On appeal the government argued to the Supreme Court that once the custodian undertook to represent a collective entity, that person must either produce the records sought “or account under oath for their nonproduction, even though to do so may tend to incriminate him.” The government relied on the Second Circuit’s decision in United States v. Austin-Bagley Corp., a 1929 decision in which Judge Learned Hand asserted, “since the production [of records] can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. . . . [T]estimony auxiliary to the production is as unprivileged as are the documents themselves.” The Curcio court rejected the government’s argument, holding that the custodian of records did not “waive his constitutional privilege as to oral testimony by assuming the duties of his office,” and that the voluntary acceptance of the role of custodian overcame the privilege

103. See, e.g., In re Grand Jury Subpoena Dated Apr. 9, 1996, 87 F.3d 1198 (11th Cir. 1996)(quashing subpoena seeking testimony of custodian of records regarding location of records not in her possession); United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995)(compelling production of records to IRS and oral testimony to authenticate documents).


105. See id. at 119.

106. See id.

107. See id.

108. See id. at 121.

109. Id. at 123.

110. 31 F.2d 229 (2d Cir. 1929).

111. Id. at 234 (emphasis added).

"only with respect to the production of the records themselves."\(^{113}\) The Court noted that *Austin-Bagley* was "distinguishable and we need not pass on [its] validity."\(^{114}\)

If *Curcio* had stopped at that point, the scope of a custodian's Fifth Amendment privilege would be clear: the government's authority would extend only to the physical production of documents, because collective entities may not assert the privilege to resist production of documents, while a custodian of records could assert the privilege to resist furnishing oral testimony. While the union's custodian in *Curcio* could be required to provide the records, compelled testimony regarding their location would require the disclosure of information from the custodian in an individual capacity, at which point the privilege would attach. This approach reflects the thrust of the Court's later Fifth Amendment decisions that allowed assertions of the privilege for incriminating testimonial acts\(^{115}\) but denied any constitutional protection to an organization or the custodian acting on its behalf.\(^{116}\)

*Curcio* then went on, however, to accept in large part Judge Hand's sweeping analysis in *Austin-Bagley* of the additional testimonial duty of a custodian beyond the physical act of producing records. After announcing its holding that the custodian could assert the privilege, the Court cited *Austin-Bagley* for the following proposition: "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 subject to little, if any, further danger of incrimination."\(^{117}\) This assertion differed markedly from the Court's distinction, based on the nature of the government's questioning that sought personal knowledge from the custodian, that permitted the custodian to invoke the Fifth Amendment privilege to resist a demand for oral testimony. The Court's unexplained acceptance of compelled auxiliary testimony is confusing in light of its primary holding. It appears that *Curcio* held that authentication testimony could never be incriminating, while *Austin-Bagley* upheld authentication testimony because a witness in the role of a custodian could not assert the privilege, regardless of the personal incrimination that might result.\(^{118}\)

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113. *Id.* at 124-25 (quoting Wilson v. United States, 221 U.S. 361, 380 (1911)).
114. *Id.* at 125.
117. *Id.* The Court stated in a footnote that "[t]he leading case of United States v. Austin-Bagley Corp., explains the scope and limitations of this doctrine." *Id.* at 125 n.4 (citation omitted).
118. The confusion as to what exactly *Curcio* meant was reflected in the Court's analysis of the decision in *Braswell*, when it stated, "[t]he *Curcio* Court made clear that with respect to a custodian of a collective entity's records, the line drawn was between oral testimony and other forms of incrimination." *Braswell* v. United
There are two problems with the Curcio dictum accepting the Austin-Bagley holding that compelling auxiliary testimony would not violate the Fifth Amendment privilege. First, the Court's decisions on the scope of the Fifth Amendment privilege prior to Curcio had only considered whether the records must be produced, not whether the custodian's duty could be extended beyond the physical act of production. In Hale v. Henkel, the Court held that a corporation cannot assert the privilege, and in Wilson v. United States that a custodian cannot assert the privilege even if the documents are personally incriminating. Curcio's principal holding, that a court cannot compel additional testimony beyond the production of records, was consistent with prior decisions because it permitted the assertion of the privilege when the government sought statements from a custodian. The demand for oral testimony traverses the line beyond which the collective entity analysis should no longer apply. The demarcation between the actual production and later testimony was crucial because the privilege could not protect the contents of the business records, but Curcio allowed the custodian to assert the Fifth Amendment to resist furnishing information that was not contained in the records themselves.

The flaw in Curcio's dictum endorsing the duty to furnish auxiliary testimony was the Court's assumption that the testimony could not be incriminating because it only related to the records produced. While the testimony pertains to the documents, the government seeks the statements as a means to gather information beyond that contained in the records; otherwise, the prosecution would have no interest in demanding the testimony. Therefore, the testimony might be incriminating beyond the content of the documents. Curcio's assertion that auxiliary testimony could not be incriminating was based on the mistaken premise that because the privilege did not protect the contents of business records, it could not protect anyone associated with producing those documents.

Deciding that an entire category of testimony cannot incriminate a witness conflicts with the broad test of incrimination adopted in Hoff-

119. 201 U.S. 43 (1906).
120. See id. at 74; see also supra, text accompanying notes 47-49 (discussing development of collective entity doctrine).
121. 221 U.S. 361 (1911).
122. See id. at 384-85.
124. See id. at 125, 128.
125. See id. at 125.
man v. United States. There, the Court held that testimony could be inculpatory, and therefore within scope of the Fifth Amendment protection, when the statements could provide a link in the chain of evidence that may lead to a conviction, and not just statements that are explicitly incriminating. Statements about the authenticity of records can be highly incriminating if that testimony supports the admission of documentary evidence used to convict the declarant. Slapping the label "auxiliary" on testimony skips a crucial step in the privilege analysis by applying an empty formalism rather than an examination of whether the testimony can incriminate the witness in light of the government's purpose for demanding it as part of an investigation or prosecution.

A second problem with the Curcio dictum is its failure to note that Austin-Bagley differed fundamentally in its view of the custodian's role and its effect on the privilege against self-incrimination. The Second Circuit held that one's acceptance of the role of custodian "not only exposes [him] to producing the documents, but to making their use possible without requiring other proof than his own." This statement conflicts with Curcio's primary holding that custodians must produce records, but need not testify. The testimony compelled from the defendant in Austin-Bagley, that the records were authentic, was quite similar to the information the government sought in Curcio from the union's custodian regarding the location of the books. Both types of information should be within the knowledge of a custodian, and both can be equally incriminating to the declarant. Yet, the Curcio dictum adopted the inconsistent position that statements regarding the authenticity of records were auxiliary, and therefore exempt from any privilege claim, while a witness could assert the Fifth Amendment privilege to resist testifying about their location or possession by another person.

The Court's terse discussion of Austin-Bagley also glossed over the most troublesome aspect of the Second Circuit's decision permitting the government to compel testimony about the documents from a corporate custodian. In Curcio, the Court, ignoring the fact that the witness was a defendant in the case, stated only that the prosecution in Austin-Bagley had called a corporate officer to authenticate the records. The Second Circuit did not question the government's

126. 341 U.S. 479 (1951).
127. See id. at 486 ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").
130. See id. at 125 n.4 (1957). In Austin-Bagley, the government charged a corporation and its officers with conspiracy to violate the National Prohibition Act in
right to call a defendant as a witness that apparently flowed from the
authority to compel the production of corporate records. Austin-Bag-
ley's acceptance of the prosecution's right to compel a defendant to tes-
tify in its case-in-chief exemplified the Second Circuit's flawed
assumption that once a court held the Fifth Amendment privilege was
unavailable to a witness it could never be regained.131

Curcio's viability as precedent for permitting the government to
compel custodians to furnish oral testimony authenticating records as
merely auxiliary to the act of production is open to question. As an
initial matter, the Court did not have to reach the issue of whether
live testimony could ever be required, having noted that it did not
need to pass on the validity of Austin-Bagley.132 Further, Austin-Bag-
ley's assertion that the nature of the records removed any constitu-
tional protection for the custodian conflicted with Curcio's primary
holding that oral testimony beyond the production of records remained
subject to the privilege against self-incrimination. Austin-Bagley
looked to the nature of the documents as the basis for rejecting the
privilege claim, while Curcio, consistent with the language of the Fifth
Amendment, upheld the personal right of the custodian to resist being
compelled to speak against himself.133 Although Curcio's dictum
claimed to accept the analysis of Austin-Bagley, Judge Hand's opinion
endorsed an unwarranted extension of the government's authority to
compel testimony from a defendant solely because the defendant was
also the custodian of records. Austin-Bagley's analysis of the scope of
the privilege is irreconcilable with the Supreme Court's holding in
Curcio that the Fifth Amendment protection does not disappear when
a person assumes the role of custodian of records.134

connection with a scheme to sell alcoholic beverages, and during trial called an
individual defendant to produce records and testify as to their authenticity.
131. See United States v. Medlin, 986 F.2d 463, 468 (11th Cir. 1993)(To the extent a
custodian of records "will be called on merely to identify and authenticate the
documents he is required to produce—which the government argues in its brief is
the only testimony that will be sought from him—that argument is without
merit."); In re Grand Jury Proceedings (John Doe Co., Inc.), 838 F.2d 624, 626
(1st Cir. 1988)("We perceive no significant distinction between authentication
provided orally and the same provided by some other physical act: the key point
is that both methods are 'testimonial' for purposes of the fifth amendment.");
records "must not only produce the documents sought in the IRS Summons—he
must also provide authentication testimony as to those documents").

133. See id. at 128.
134. See id. at 123.
B. The Legacy of Curcio: “Auxiliary” Testimony and the Business Records Exception

The level of proof necessary to authenticate records for their admission at trial is low, and there are a variety of means to establish that the item is what its proponent claims. The Federal Rules of Evidence provide a list of illustrations for meeting the requirement, including proof of authenticity by the item’s “[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” In civil litigation, the presence of documents in a party’s files or the production of records during discovery can be sufficient to authenticate those documents. In United States v. Newton, the United States Court of Appeals for the First Circuit upheld, in a criminal prosecution, the trial court’s finding of authenticity regarding an unsigned, undated, typed document admitted in a criminal prosecution. The circuit court stated that the trial judge did not abuse his discretion by admitting the evidence over the defendant’s authentication objection because there was “external evidence of the truth of the statements in the document . . . introduced by the government.”

The question arises why the government would even ask for authentication testimony of the type apparently sanctioned in Curcio when there are a number of avenues available, aside from the investigative target’s testimony, that avoid the Fifth Amendment privilege question. The answer is that, at least in some cases, other forms of authentication proof may not be open. For example, while the Federal Rules of Evidence permit nonexpert testimony concerning the genuineness of handwriting to authenticate a document, now that so many records are stored on computer disks it may be impossible to authenticate a printed document or the computer file without relying on the creator of the item to testify that it is what it purports to be. Moreover, regardless of other methods of authentication, there is an incentive to have the investigative target provide authentication testi-
mony. If the government can compel a target to provide the information, then that person cannot contradict those statements at a later time without running the risk of being impeached or even charged with perjury. In effect, the government secures admission of the records by cutting off a potential objection by the defendant. 140

The possibility that the government will be unable to authenticate important documents is low. Only in rare cases in which the sole source of authentication information is the defendant would there be a question about the government's authority to compel testimony. If the prosecution's interest in compelling custodians to testify at the investigative phase was limited to just authentication testimony, then the Fifth Amendment privilege question would be of relatively minor importance to witnesses because their testimony would be unlikely to have much effect in a subsequent criminal prosecution. 141 The problem, however, is that the government has used Curcio's imprimatur to compel auxiliary testimony as the platform for asserting a broader authority to compel testimony concerning other evidentiary issues. In short, the government advocates an expansive definition of what is auxiliary to the act of production, trying to take Curcio's dictum far beyond its original context.

Not only must a document be authentic, but, because it contains statements that usually constitute hearsay, it must also meet the trustworthiness requirements of the rules of evidence in order to be admitted. 142 The prosecution's motive for compelling testimony from the custodian at the investigative stage is not merely to make "explicit what is implicit in the production itself," 143 but to have the custodian

140. See In re Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d 807, 812 (11th Cir. 1992)(enforcing subpoena to former bank chief executive officer for documents copied from bank’s files and removed to personal residence when the government already had copies of the corporate records on the ground that “[t]o allow a custodian to relieve himself of the burden of the collective entity doctrine simply by finding a ‘personal reason’ to abscond with the corporate documents is manifestly contrary to the rationale of Braswell”).

141. The nature of the corporate entity on whose behalf the custodian must testify would be crucial to determining whether providing authentication testimony would be harmful to the custodian. If the entity was a one-person corporation in which the defendant was the sole shareholder, then authenticating the documents by other means could be problematic because only a limited number of others would be able to testify about the records. See United States v. Blackman, 73 F.3d 1418, 1426 (9th Cir. 1995)(custodian of small law firm compelled to produce records and authenticate documents); United States v. Stone, 976 F.2d 909, 912 (4th Cir. 1992)(owner of “one-man operation” can be compelled to furnish records because he “chose the corporate form and gained its attendant benefits, and . . . cannot now disregard the corporate form to shield his business records from production”).

142. See, e.g., Fed. R. Evid. 802 (“[h]earsay is not admissible except as provided by these rules”).

provide the additional foundation on which incriminating evidence can be introduced to convict that witness in a later proceeding. The government seeks not just authentication testimony but the admission of records without further evidence beyond the words of the investigatory target. Moreover, it demands this testimony not for use in the investigation of the crime, but as a means to introduce evidence at the trial stage of the proceeding, when the witness is the defendant.

1. Compelling Evidentiary Testimony to Avoid Hearsay Problems

Records of business transactions usually are crucial to the prosecution of economic crimes because they provide circumstantial proof of the defendant's knowledge or participation in an illegal act. There are two primary methods of introducing into evidence at trial statements contained in corporate records. One is by showing that the statements are an admission by a party-opponent. The other is by showing that the documents constitute records of regularly conducted business activity. Under the first method, if the statement comprises an admission by the defendant, then it falls outside the category of hearsay, and the court usually admits it. The Federal Rules of Evidence provide that a statement constitutes an admission when made in either the defendant's individual or representative capacity, or when made by an agent of the defendant who is authorized to speak on the subject.

Because most transactional documents do not contain declarations attributable to the defendant, the more common method of introduction is under the business records exception to the hearsay rule. In order to meet the requirements of the business records exception, the government must show that the documents were created "at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the

144. See Fed. R. Evid. 801(d)(2). All evidence is subject to exclusion under Rule 403, which permits a court to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

145. See Fed R. Evid. 801(d)(2)(D). The proponent of the statement must show the following: "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534, 537 (2d Cir. 1992). See also United States v. Rioux, 97 F.3d 648, 660-61 (2d Cir. 1996)("[D]eclarant need not be the 'final decision maker' . . . for his statement on those matters to be deemed within the scope of his agency. Rather, he need only be an advisor or other significant participant in the decision-making process that is the subject matter of the statement.").
In order to establish that the documents are business records, the government must produce sufficient foundation testimony regarding the conduct of the business and its recordkeeping practices. The rationale for this exception to the hearsay rule is that businesses generally maintain accurate records of their activity, and therefore the court is safe in presuming the documents are reliable accounts of the underlying activity once the party offering the evidence meets the foundational requirements.

In most cases involving business records, especially those produced by a third party, a defendant does not challenge the admissibility of the documents because the government usually can call an employee to testify as to the regularity of creating and maintaining the organization's records. When the entity is involved in criminal activity, particularly when a defendant controls the organization or is its sole shareholder, there may be no employee available to verify the documents. In these cases, the government may not have ready access to the necessary proof of regularity in the collection and recordation of business activities to meet the threshold reliability requirement for the court to admit the records under the hearsay exception.

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146. FED. R. EVID. 803(6). The Rule defines "business" broadly to include any "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Id.

147. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.43, at 961 (1995) ("The exception rests in part on notions of trustworthiness. The regularity of business and recordmaking, and the routine involvement of the recordmakers in that task (which the exception requires) assure a kind of expertise and reduce risks of mistake.").

148. The government generally subpoenas the organization to produce the records, and a custodian designated by the entity produces them and, if necessary, can testify about the conduct of the business and maintenance of its records. The government can subpoena an agent of the organization as the custodian, and demand that the individual specified in the subpoena represent it in producing the records. See Dreir v. United States, 221 U.S. 394, 400 (1911)(witness may not assert the Fifth Amendment to resist producing records of corporation when subpoena addressed only to individual but records called for were those of the corporation and not personal); In re Sealed Case, 877 F.2d 83, 86 (D.C. Cir. 1989)(custodian named in subpoena to produce corporate records cannot resist subpoena on the ground that the corporation could designate another custodian); Henning, White Collar Crime, supra note 41, at 433 ("The determination of who may be a custodian rejects any formalism, and courts will not confine the designation of a custodian to the person selected by the entity subpoenaed.").

149. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.44, at 965 (1995) ("Ideally the proponent offers foundation testimony by the preparer and original source of the information, and sometimes these are one and the same person.").

150. See id. at 966 ("But where the foundation witness lacks even circumstantial knowledge, the record should not be admitted under the exception, and minimal acquaintance with 'how our records usually look' is not enough to satisfy the foundation requirements.") (quoting Belber v. Lipson, 905 F.2d 549, 522 (1st Cir. 1990)).
situation presents the greatest likelihood that the government will seek to compel the target of its investigation to provide the necessary testimony for admission of the records into evidence in a subsequent prosecution of the custodian individually.

2. **Calling the Defendant “to be a Witness Against Himself”**

   The Fifth Amendment privilege question raised by compelling testimony designed to establish the business records exception reaches the heart of the tension in *Curcio* between the custodian's personal right to invoke the privilege to resist testifying and the requirement that a custodian provide “auxiliary” testimony. In *In re Custodian of Records of Variety Distributing, Inc.*, the United States Court of Appeals for the Sixth Circuit upheld an order requiring a custodian of records to testify at a criminal trial about the creation and maintenance of records to establish that the corporate documents met the business records exception. The custodian was not a defendant in the prosecution for selling obscene material but refused to testify on Fifth Amendment grounds because he feared that the government would prosecute him later for supplying the allegedly obscene materials and use his testimony to connect him to the illegal transaction.

   The Sixth Circuit relied on *Curcio’s* dictum, regarding a custodian’s duty to provide auxiliary testimony, to hold that testimony about the conduct and recordkeeping practices of a business was identical to authentication testimony because it “merely made explicit what is implicit in the act of production itself.” The circuit court then asserted that testimony satisfying the business records exception would not be sufficiently incriminating to warrant invocation of the Fifth Amendment privilege, and that a corporation should not “be able to avoid the consequences of a subpoena . . . by designating as custodian of corporate records an individual who asserts that his knowledge that the corporation regularly keeps records in the course of its regularly conducted activities is incriminating.”

   *Variety Distributing’s* extension of the custodian’s duty to testify regarding the recordkeeping practices of the organization is questionable because the Sixth Circuit equated the admissibility of hearsay with authentication of records, failing to recognize the different issues

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152. See *id.* at 248. The defendants were a corporation and three employees charged with selling obscene videotapes, and the prosecution subpoenaed the companies that supplied the videotapes to the defendants. The custodian was an officer of one corporation that shipped videotapes to the defendants, and he asserted that he was the target of an obscenity investigation. See *id.*
153. *Id.* at 250 (citation omitted).
154. *Id.* at 251.
addressed by the two rules of evidence.\textsuperscript{155} Proof of one is not necessarily proof of the other, so it is not a fair reading of Curcio’s erroneous endorsement of compelling authentication testimony to include statements that furnish evidentiary proof related to the introduction of documents at trial under an exception to the hearsay rule.\textsuperscript{156} Yet, by lumping together authentication and the business records exception, apparently because both deal with the admissibility of evidence, the Sixth Circuit expanded the category of auxiliary testimony to include statements about the conduct of a business that were far removed from the custodian’s duty to produce records.

In addition to misunderstanding the difference between distinct rules of evidence, Variety Distributing assumed that by designating its target as a custodian, the government, by simply invoking Curcio’s dictum, could compel that person to provide oral testimony related in some way to business records. Recognizing such broad authority to compel testimony poses two threats to the Fifth Amendment privilege. First, if a custodian of records is never allowed to invoke the privilege to resist providing auxiliary testimony, then the government can compel that testimony at any point in the proceeding, regardless of when the custodian produced the documents or the relevance of such testimony at that stage of the proceeding. In \textit{In re Grand Jury Empaneled on April 6, 1993},\textsuperscript{157} the government, to satisfy the elements of the business records exception to the hearsay rule, subpoenaed the target of its investigation to testify before a grand jury about the recordkeeping practices of a corporation in which he was a vice president.\textsuperscript{158} The

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\item \textsuperscript{155} In the Federal Rules of Evidence, authentication and hearsay are dealt with by separate Rules. \textit{See} Henning, \textit{White Collar Crime}, supra note 41, at 438 (“A document may be authentic even though it does not meet the business records exception. Variety Distributing, however, ignores that distinction.”).

\item \textsuperscript{156} Variety Distributing tried to soften the blow of its decision by asserting that the custodian’s business records testimony could not be used directly against that person in a subsequent proceeding because Braswell’s evidentiary use protection applied. \textit{See} United States v. Ellwest Stereo Theaters, Inc. (\textit{In re Custodian of Records of Variety Distrib., Inc.}), 927 F.2d 244, 251 (6th Cir. 1991). The problem with this analysis is that, unlike authenticity, which is an issue for both the judge and the jury, the court alone determines admissibility of hearsay. \textit{See} Fed. R. Evid. 104(a) (“Preliminary questions concerning ... the admissibility of evidence shall be determined by the court.”). The Braswell protection keeps information from reaching the jury about the authentication of the records arising from the defendant-custodian’s act of production, although the jury is free to infer that because the corporation produced the records, the defendant must have known about them. Braswell does not preclude statements auxiliary to the act of production, so a custodian’s statements about regular business conduct in a prior proceeding could certainly be used against him for admission of those records because there is no direct evidentiary use that reaches the jury. \textit{See generally} Braswell v. United States, 487 U.S. 99 (1988).

\item \textsuperscript{157} 869 F. Supp. 298 (D.N.J. 1994).

\item \textsuperscript{158} The investigative target offered to turn over the records and identify them for the grand jury, but the government sought to enforce the subpoena for oral testi-
government relied on *Variety Distributing* for its assertion that "business records testimony is outside the scope of the Fifth Amendment because it will never entail further incrimination independent of the act of production." The government in *April 6 Grand Jury* read *Variety Distributing*'s language to support the proposition that a custodian has no Fifth Amendment privilege at any stage of a proceeding to resist testifying about records.

The business records testimony would be irrelevant to the grand jury's probable cause determination, however, since it is not bound by the rules of evidence. The government's motive, therefore, must have been to prepare for trial by compelling testimony at the investigative stage that would ensure the admission of the records into evidence at trial. The United States District Court for the District of New Jersey in *April 6 Grand Jury* rejected the government's argument on the ground that "the Sixth Circuit's ruling [in *Variety Distributing*] clearly expands Curcio and Braswell, under which the only oral testimony that has explicitly been sanctioned is mere identification and true authentication testimony." United States v. McLaughlin shows an interesting twist on the use of the custodian's act of production that is similar to compelling testimony regarding the documents. The government subpoenaed one of the defendants to produce corporate documents as a custodian for a closely held corporation. The subsequent production did not include any record of a bank account held by the corporation. The government then charged the custodian with tax evasion and conspiracy, alleging, *inter alia*, the custodian's failure to turn over relevant records. Moreover, the government introduced the custodian's incomplete production to show that the non-disclosure proved the defendant's intent to evade income taxes. The government argued that the failure to produce records as a custodian was not protected by

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159. *Id.* at 303.
160. *Id.* at 304. The district court rejected the government's broad argument that admissibility is the equivalent of authentication, stating that "the cases support the proposition that authentication testimony, a condition precedent to admissibility, can be compelled; they do not suggest that the admissibility of the documents under the exceptions to the hearsay rule is guaranteed." *Id.* at 305.
161. 126 F.3d 130 (3d Cir. 1997).
162. *See id.* at 133.
163. *See id.*
164. *See id.* at 132-33.
165. *See id.* at 133-34.
Braswell because that case only safeguarded the testimonial aspects of the actual production, not what the defendant failed to do in response to the subpoena.166 The Third Circuit rejected this approach as a distinction without a difference,167 holding that "the testimonial aspect of production is not limited to the act of handing material over to the government—it also may include the custodian's exercise of discretion over which material to produce and which to omit. Incomplete production may therefore be as communicative as complete production."168 McLaughlin demonstrated the government's use of the custodian's testimonial act (to convict the individual), which is similar to the way that compelled testimony would be used against a custodian of records, called to furnish information about documents. Either way, prosecutors try to evade the protection of the Fifth Amendment to introduce protected testimonial acts against corporate custodians in their individual capacities.

3. Assessing the Availability of the Fifth Amendment Privilege in Its Proper Context

Variety Distributing's expansive reading of the government's power to compel testimony to include statements establishing the business records exception169 was traceable to the Supreme Court's misapprehension in Curcio about the permissibility of compelling authentication testimony.170 A better understanding of Curcio that would undermine Variety Distributing's unwarranted extension of a custodian's duty recalls the particular procedural context in which the Supreme Court considered the Fifth Amendment privilege claim. The Court's apparent sanctioning of limited oral testimony auxiliary to the act of production related only to the investigative phase of the case.171 Curcio should be understood to require the custodian to testify before a grand jury only to make explicit to the grand jurors what was implicit in the production of the records. Curcio should not be read as sanctioning an additional means for the government to prepare for trial.172

166. See id. at 134.
167. See id.
168. Id.
171. See id. at 119 (involving refusal to answer questions asked by a federal grand jury).
172. The government in April 6 Grand Jury appears to have sought the business records testimony at the investigative stage to avoid a limitation on the grand jury's power, once it returns an indictment. See In re Grand Jury Empaneled on Apr. 6, 1993, 869 F. Supp. 298 (D.N.J. 1994); see also United States v. Sasso, 59 F.3d 341, 352 (2d Cir. 1995)(evidence obtained by grand jury subpoena issued after indictment may be used if sole or dominant purpose of gathering evidence
The Curcio Court failed to recognize the importance of the procedural context for determining the government's authority to compel testimony. The Court ignored the fact that what may not be incriminating before the grand jury, because of the lack of evidentiary and procedural protections afforded investigative targets, may incriminate the witness in a criminal trial. Variety Distributing compounded this mistake by citing Curcio as the controlling precedent for compelling evidentiary testimony related solely to the trial phase, based on the erroneous conclusion that such testimony was similar to a custodian's authentication of records at the investigative phase. The authority to compel additional testimony before the grand jury posed no realistic threat of incrimination to the custodian because evidentiary issues are irrelevant at the investigative stage. Curcio's acceptance of compelled authentication testimony was identical to Fisher's use of production to demonstrate the accuracy of the records without implicating the privilege because accuracy is irrelevant at the investigative stage. The actual authentication of evidence may be critical to introducing records at trial because that evidence may form a substantial portion of the government's circumstantial proof of the crime. The testimony would be incriminating and should be subject to the protections of the Fifth Amendment privilege at the trial stage.

Variety Distributing took a power of the government at the investigative phase and imposed it on the trial phase, expanding it along the way by broadening the concept of auxiliary testimony that falls outside the protection of the privilege against self-incrimination. April 6 Grand Jury demonstrated that the government will attempt to use the grand jury's ample power to compel testimony that can only be utilized at the trial stage. This attempt will be based on the misapprehension fostered in Curcio regarding the availability to custodians of the privilege against self-incrimination to resist providing oral testimony. Allowing the government to compel testimony that is irrelevant at the investigative stage, on the theory that the custodian can never assert the privilege, deprives a witness of the Fifth Amendment protection at the most important point of the proceeding: the adjudication of guilt in a public trial.

was investigation of other criminal activity); Payden v. United States (In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985), 767 F.2d 26, 29-30 (2d Cir. 1985)(prosecutor may not use grand jury for trial preparation). Abuse of the grand jury is a strong basis for a court to scrutinize closely the government's attempt to bypass the privilege against self-incrimination and broadly apply the Fifth Amendment protection.


174. The approach to the custodian's Fifth Amendment privilege in Curcio and Variety Distributing is faulty for another reason. The broad language in those cases did not limit the government's authority to compel testimony only to custodians who
The fundamental risk posed by *Variety Distributing*'s expansive analysis is that, by concluding that a custodian can never assert the privilege against self-incrimination for testimony deemed "auxiliary" to the production of records, the Sixth Circuit expanded the government's opportunity to call a defendant to the witness stand at trial. Enlarging the category of testimony that falls outside the privilege to include a key exception to the hearsay rule, the business records exception, increases the likelihood that prosecutors will look to the defendant to provide such information. Indeed, this already occurred in *Austin-Bagley*, when the prosecutor called one of the defendants, a corporate officer, to testify during the government's case-in-chief about the authenticity of business documents.175

actually produced documents. Instead, the analysis of the custodian's duty to produce records discussed the general unavailability of the privilege for any custodian which meant that a person who fell within that category could be compelled to provide auxiliary testimony concerning the records. In *In re Sealed Case*, 877 F.2d 83 (D.C. Cir. 1989), the court of appeals adopted a liberal qualifying test for custodians of records in a collective entity: "[W]e interpret 'custodian' to encompass any agent of the corporation who under ordinary principles of corporate law has custody or control over corporate documents." Id. at 86. See also Henning, *White Collar Crime*, supra note 41, at 433 ("The determination of who may be a custodian rejects any formalism, and courts will not confine the designation of a custodian to the person selected by the entity subpoenaed."). The government, then, could obtain its auxiliary testimony from the investigative target while securing the records from another custodian.

The imprecise language concerning a custodian's duty did not condition the government's authority to compel the testimony to those instances in which it subpoenaed a particular person, or even that it obtain the records pursuant to a subpoena ducem tecum. *Curcio* and *Variety Distributing* can be read to permit the government to seize records under a search warrant and then demand that a custodian, who may be the target of the investigation, testify before the grand jury to provide authentication and business records testimony about the seized documents. Although quite far afield from where *Variety Distributing* and *Curcio* began their analyses of the custodian's duty to provide testimony, those decisions sanctioned a broad license to compel oral testimony regardless of how the government obtained documents or the incriminating nature of the testimony. It is difficult to reconcile the language of the Fifth Amendment with this apparent authority to force testimony from an investigative target simply because of the person's relationship to a collective entity's records. The Fifth Amendment does not incorporate any limitation on the privilege according to the label of "custodian of records".

175. Under the Federal Rules of Evidence, the trial court can exclude the jury from hearing testimony by a defendant "when the interests of justice require, or when an accused is a witness and so requests." Fed. R. Evid. 104 (emphasis added). Moreover, a defendant's testimony on a preliminary matter does not subject the person to cross-examination on other issues, although the testimony can be used later in the proceeding for impeachment or as a prior inconsistent statement. Fed. R. Evid. 104(d). The rationale for permitting a defendant to testify about preliminary issues regarding the admissibility of evidence is to encourage the exercise of constitutional protections by allowing a defendant to challenge the government's actions without thereby waiving completely the protections of the privilege against self-incrimination. See Christopher B. Mueller & Laird C.
The foundation for a prosecutor calling a defendant to testify at trial is implicit in Curcio's dictum. If the government can compel a custodian to testify about the authenticity of records because the Fifth Amendment never applies to such testimony, then the government can call that custodian to testify at any point in the proceeding, including the trial. The fact that the custodian is the defendant is irrelevant, under Curcio's dictum, because the government calls the witness in the capacity of custodian, in which no Fifth Amendment privilege can be asserted for oral testimony auxiliary to a prior act of production.

After Braswell, however, the government's calling a defendant as a witness to authenticate documents violates the evidentiary use limitation applicable at trial when the government compels a custodian to produce records to a grand jury. Braswell's quasi-constitutional protection for custodians, however, only prohibits the government from making direct evidentiary use of the custodian's testimonial acts. One means by which the government might try to call a defendant as a witness and still meet the requirements of Braswell's evidentiary limitation would be to request an instruction to the jury that proscribes the use of the testimony. The instruction would inform the jury that the defendant's testimony is solely in a representative capacity for the purpose of meeting the requirements of the rules of evidence, such as authenticity, and that the jury should not consider it as proof of the defendant's knowledge or intent in committing the alleged crime. The instruction arguably preserves the basic protection discussed in Braswell, that the witness's acts in a representative capacity cannot be introduced against that person in an individual prosecution, while giving the government the benefit of having a defendant testify, in effect, against himself. Braswell's acknowledgment that the jury may infer the defendant's knowledge of the content of the records, and even the underlying transactions, based on the corporate representative's production of records, permits indirect use of the defend-

Kirkpatrick, Evidence § 1.12, at 53 (1995)(Rule 104(d) was designed "[m]ainly to permit criminal defendants to invoke protective doctrines without giving up completely their Fifth Amendment right not to testify."). If the government were to call a defendant to testify as custodian, concerning the creation and maintenance of the records, it would be incongruous to argue that Rule 104 permits such testimony because it protects a defendant's Fifth Amendment rights despite the compulsion to testify. Unlike the common situation in which a defendant may challenge governmental action on Fourth, Fifth, or Sixth Amendment grounds in order to suppress evidence, permitting the government to call a defendant would allow it to establish its case despite the protections of the Fifth Amendment at trial. An evidentiary rule that shields a defendant from the prosecutor's power should not be a surrogate for allowing the government to extend its authority to compel testimony at the investigative stage to the trial stage.

177. See id.
ant's testimonial acts. Unlike the situation in which the government grants a witness immunity for a statement, the custodian's act of producing records on behalf of the organization leaves open the possibility of some use of the representative act in a later prosecution.

The flaw in this approach is the assumption that the government can call a defendant to act in a "representative" capacity that is somehow separate from the prosecution of the individual. The labels applied to the person representing the corporation at the investigative stage, that permit compelling the production of records and auxiliary testimony, are not meaningful at trial when the principal protection of the privilege against self-incrimination is aimed directly at barring the government from calling a defendant as a witness against himself. Limiting instructions are not a substitute for the central meaning of the Fifth Amendment privilege. Even a concession by the government that the defendant could testify outside the presence of the jury would not mitigate the damage from being called as a witness to provide information to be used for a conviction.

It is doubtful that the courts deciding Curcio or Variety Distributing had in mind the possibility that the government might call a defendant as a witness during the prosecution's case-in-chief, perhaps because an intuitive sense of the core protection of the privilege against self-incrimination makes that scenario seem farfetched. The defendant's right to remain silent at least during trial appears sacrosanct under the language of the Fifth Amendment. Yet, the rhetoric employed in compelling a custodian to furnish auxiliary testimony operates on the premise that the Fifth Amendment privilege cannot be asserted because it is not available at the investigative stage of the proceeding. Therein lies the flaw in the analysis of Variety Distributing, that once denied the Fifth Amendment protection, the privilege can never be regained by the custodian. Curcio's principal holding was that a custodian of records did not waive the protection of the privilege against self-incrimination by agreeing to represent the collective entity. The witness' right to assert the privilege, therefore, should not be denied because a court can attach the formalistic labels of "custodian of records" to the witness or "auxiliary" to the type of testimony sought by the government.

178. See id.
179. See Delli Paoli v. United States, 352 U.S. 232, 247 (1957)(Frankfurter, J., dissenting)("The fact of the matter is that too often such [limiting instructions] against misuse [are] intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.").
Fisher and Braswell, the two most important recent decisions explaining the scope of the Fifth Amendment privilege, are best understood as denying or limiting the privilege only in the investigative context, when the government's interest in compelling the production of records is strongest. The Supreme Court's careless use of language about authentication in Curcio, Fisher, and Braswell, referring to evidentiary issues relevant only in the trial phase, should not obscure the fact that the restrictive interpretations of a custodian's Fifth Amendment privilege granted the government broad authority to compel testimony or the production of records only before the grand jury and not to prepare for trial. The Court did not create a system under which a person can be compelled to provide testimony during the investigative phase that is only relevant at trial on the ground that such testimony is never incriminating. Braswell's acknowledgment that a custodian must be protected from direct evidentiary use of the act of production in a subsequent criminal prosecution demonstrates that the scope of the Fifth Amendment privilege is not limited to a single opportunity to assert the constitutional protection. Fisher and Braswell never rejected the custodian's right to assert the privilege in a later prosecution. This approach to the Fifth Amendment privilege is consistent with Curcio's primary holding that the custodian did not forego the full protection of the Fifth Amendment upon assuming the role of representative of a collective entity.

The government's authority to compel auxiliary testimony should be limited to use of that information in the investigative phase of the case. The potential incrimination from the implicit authentication conveyed in an act of production is often minimal at that stage of the proceeding. A witness's status as a custodian should not undermine automatically the protection available to every person to prevent the government from forcing testimony that will be used at trial to secure a conviction. Curcio can be understood within the framework of Fisher and Braswell that permitted very limited assertions of the privilege against self-incrimination in the investigative phase of the case in response to a subpoena for records. Similarly, the Court's dictum in Curcio, that authentication testimony may be compelled, should only allow for use of that testimony during the investigation of the case.

If one accepts that Curcio grants the government the authority to compel auxiliary testimony at any time during a case, then taken to its logical boundary, the case would empower the prosecution to call a defendant to testify at trial as its own witness. Curcio cannot be taken to mean that the government has a license to compel a custodian to authenticate records at any point, including during the trial. The Fifth Amendment privilege should not be subject to simplistic labeling of the witness, as a custodian of records, that would permit the
government to vitiate the constitutional protection by compelling testimony at trial to which it is not otherwise entitled.