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**SUPREME COURT
OF THE UNITED STATES**

In the Matter of:)
RANDY BRASWELL,)
Petitioner,) No.87-3
v.)
UNITED STATES)

PAGES: 1 through 54

PLACE: Washington, D.C.

DATE: March 1, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 RANDY BRASWELL, :

4 Petitioner, :

5 v. : No.87-3

6 UNITED STATES :

7 Respondents :

8 -----x

9 Washington, D.C.

10 Tuesday, March 1, 1988

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at 10:51 a.m.

13 APPEARANCES:

14 MICHAEL S. FAWER, ESQ., New Orleans, Louisiana, on behalf of
15 the Petitioner.

16 ROY T. ENGLERT, JR., ESQ., Assistant to the Solicitor-General,
17 Department of Justice, Washington, D.C. for the
18 Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: You may proceed whenever
3 you are ready, Mr. Fawer.

4 MR. FAWER: Mr. Chief Justice, and may it please the
5 Court:

6 The issue in this case, stated simply, is whether the
7 principal of a one-man corporation, simply by virtue of the
8 fact that his status as its records custodian, can be compelled
9 to make self-incriminatory, tacitly testimonial disclosures; or
10 is he, like the custodian in U.S. v. Doe, to be afforded the
11 limited act of production privilege secured to all natural
12 persons under the Fifth Amendment?

13 The facts of the case are quite simple: the Internal
14 Revenue Service and the United States Attorney in the Southern
15 District of Mississippi began a grand jury investigation,
16 criminal tax investigation, of Randy Braswell. He was the
17 target of that investigation, and there is no issue as to that.

18 In August 1986, during the course of that
19 investigation, the subpoena duces tecum was served upon Mr.
20 Braswell as President of his corporation, of the one-man
21 corporation that he has called Worldwide Purchasing.

22 It was a broad-based subpoena virtually identical ^To
23 the one that is before Your Honors in U.S. v. Doe. It is found
24 at pages 6 and 7 ver batem in our Joint Appendix.

25 In response, we filed a Motion to Quash, asserting

1 our act of production privilege. The Government opposed,
2 stating that no corporate custodian has any act of production
3 privilege; with that issue joined, there was a brief
4 evidentiary hearing before the court in that district, and the
5 court found that Mr. Braswell did, in fact, conduct his
6 business as close to a sole-proprietorship, as one could see.

7 Nevertheless the court held, as the Government had
8 contended, that the act of production was not available to any
9 corporate custodian under the Fifth Amendment; and that they
10 relied on the case, the Lincoln case in the Fifth Circuit,
11 which so-held.

12 We, at that time refused to produce before the grand
13 jury -- we had a contempt citation against us; there was a stay
14 of the commitment under the contempt citation; and the Fifth
15 Circuit affirmed on the same grounds as had the ruling of the
16 D.C. Circuit -- a D.C. court, excuse me.

17 We did, of course, note in that context that there
18 was a split in the circuits as to whether or not the Bellis
19 decision of this Court was limited to the contents of records
20 of a corporation; as opposed to the testimonial -- the tacitly
21 testimonial aspects of the act of production.

22 Our position is quite simple. We feel that we are
23 entitled -- that Mr. Braswell is entitled to the same
24 production with respect to his records, the corporate records,
25 as is the records custodian in Doe. The only distinction

1 between the two is Braswell, Inc. chose to do business under
2 the corporate framework.

3 QUESTION: Well, that distinction has been recognized
4 since the time of Hale v. Henkel, hasn't it, in 1906. The
5 Court said it is a distinction of constitutional significance.

6 MR. FAWER: It is true, Your Honor, I think it is
7 fair to say, as this Court has said on -- at least, I believe
8 this Court has said, that they were addressing the question of
9 whether or not the contents of corporate records, as opposed to
10 the testimonial aspects of the Fifth Amendment, were in fact to
11 be privileged?

12 We do not dispute, nor did we dispute below, that the
13 Government has an absolute right to the contents of the records
14 of Mr. Braswell's corporation. We do not in any way deny that,
15 nor do we think it would be proper.

16 That proposition has been established at least as
17 early as Hale right through the Bellis decision. And I believe
18 Fisher and Doe do nothing to undercut it.

19 Our position is simply that, as to anything
20 testimonial, of whatever nature it may be; whatever form it may
21 take, this Court has always protected that type of disclosure.

22 And Mr. Braswell, although he is a representative of
23 a corporation, is at the same time a person of flesh-and-blood,
24 and he has the right with respect to his testimony to claim
25 protection of the Fifth Amendment.

1 QUESTION: And your claim here is that, by the act
2 of producing the records, the fact that he was the one who
3 produced them and not someone else would have had a tendency to
4 incriminate him?

5 MR. FAWER: That is correct.

6 QUESTION: I would suppose your position would apply
7 to any corporation -- or to any person who is the custodian of
8 the corporate records of anybody?

9 MR. FAWER: That is correct.

10 QUESTION: Of any corporation?

11 MR. FAWER: That is exactly our position. To put it
12 another way --

13 QUESTION: So it's the one-man corporation has
14 nothing to do with this case?

15 MR. FAWER: That is true, Your Honor. What happened
16 to be a one-man corporation; and in fact, below we candidly
17 made the argument that a one-man corporation should not under
18 the doctrine of Bellis and --

19 QUESTION: Well, let me -- your client was forced to
20 produce these records?

21 MR. FAWER: Yes.

22 QUESTION: And if he hadn't -- and if he hadn't
23 produced them, but a third person had, the fact that they were
24 corporate records and had been authenticated, could be used
25 against him?

1 MR. FAWER: Yes, in fact --

2 QUESTION: If he hadn't produced them; if somebody
3 else had?

4 MR. FAWER: Yes, if he was not involved in any way in
5 making those records available. And they had somebody -- if
6 the records, for example were -- if they had issued that --

7 QUESTION: Well, I know, but all the --
8 authentication does is to authenticate the fact that they are
9 corporate records?

10 MR. FAWER: Other people could authenticate -- well,
11 theoretically, could authenticate corporate records.

12 QUESTION: Well, he isn't any worse off if he has to
13 authenticate them. All that's been authenticated is that these
14 are corporate records.

15 MR. FAWER: It seems to me, Your Honor --

16 QUESTION: These are corporate records?

17 MR. FAWER: Yes. But we are not -- I don't think the
18 Court should look to whether or not the test under the Fifth
19 Amendment is not whether or not the Government to have an
20 independent means of being able to do it here to prove this
21 fact; in this instance, if you make him produce, then he will
22 be using his tacit admission against him. And that this Court
23 has always condemned.

24 QUESTION: Well, you're going to be using the fact
25 that these are corporate records against him?

1 MR. FAWER: We're going to be using the fact that he
2 produced a particular record. We don't know which record this
3 would apply to, because in the court below, we did not have a
4 hearing on the particular applicability of the act of
5 production doctrine in this case. Because once the Government
6 -- excuse me, Judge Barber ruled that it was not available to a
7 corporate custodian, that was the end of the matter.

8 We have asserted, and nobody has denied, that we are
9 -- we would be, incriminated by the introduction in this case.

10 QUESTION: You're asking us to overrule a case that's
11 some 80 years old, and I'm interested in just what sort of
12 incriminating -- to get into how a corporate custodian of a
13 one-man corporation would incriminate himself by producing, or
14 simply authenticating corporate records?

15 MR. FAWER: Two points, Your Honor. I must might
16 first point out -- I assume the case you are referring to is
17 Hale v. Henkel, whom you said a case that is --

18 QUESTION: Hale v. Henkel; Wilson in 1911; White in
19 1943 --

20 MR. FAWER: But it is important to note when you look
21 at Hale that technically what was done in Hale --

22 QUESTION: I'm not so much interested in the
23 hypothesis; that is, the introduction of my question itself;
24 and that is, how in this case, does a corporate custodian
25 incriminate himself by simply authenticating corporate records?

1 MR. FAWER: When Randy -- if Randy Braswell -- the
2 direct response to your question is, if Randy Braswell didn't
3 bring in records, when he turns those records over he is
4 representing these are the records that you've asked for.

5 That is in itself a representation which has
6 testimonial implications: he has -- this man has no financial
7 records other than the corporate records.

8 QUESTION: So he might incriminate himself because
9 he's lying about whether those are all the corporate records --

10 MR. FAWER: That's one possibility.

11 QUESTION: That would be a defense to anyone
12 responding to a subpoena: I may incriminate myself because I
13 may not be producing everything the subpoena calls for.

14 MR. FAWER: That's true.

15 QUESTION: That would be an astounding doctrine.

16 MR. FAWER: Well, no. It seems to me, Your Honor,
17 that everybody -- the only individual that I know of right now
18 where there is an issue as to whether or not there is an act --
19 there is an exception, with respect to the act of production
20 privilege, is the corporate custodian.

21 The inferences that can flow, in a Tax Court case
22 particularly, from the fact that you possess certain records;
23 or that you don't produce all the records; or that you have
24 possession -- or that certain records do or do not exist; are
25 the kind of facts that are used every day in a tax court

1 prosecution.

2 QUESTION: How would the Tax Court get these records?

3 MR. FAWER: How would the -- excuse me. Your Honor?

4 QUESTION: How could they get it other than the way
5 in this case?

6 MR. FAWER: Very simply. The way you get records any
7 time there is a privilege raised: you immunize, statutorily
8 immunize the man who has the privilege.

9 QUESTION: Why should he be immunized?

10 MR. FAWER: Because the Fifth Amendment protects him
11 from not incriminating himself testimonially.

12 QUESTION: Would that apply to any secretary of any
13 corporation?

14 MR. FAWER: If that is to whom the subpoena --

15 QUESTION: Well, how would you get them otherwise if
16 you didn't want to immunize?

17 MR. FAWER: You still get the records.

18 QUESTION: How?

19 MR. FAWER: You can get somebody else.

20 QUESTION: Who? Who?

21 MR. FAWER: In this corporation, I don't know that
22 there is anybody else.

23 QUESTION: That's what I thought. Well, all right,
24 that's what I thought.

25 MR. FAWER: But the same is true in Doe. The exact

1 same question would be raised by Your Honor in Doe.

2 QUESTION: Well, what would be about General Motors?

3 The same rule would apply?

4 MR. FAWER: If you use the direct --

5 QUESTION: Would you want the same rule apply?

6 MR. FAWER: Yes.

7 QUESTION: To General Motors?

8 MR. FAWER: Yes. If you --

9 QUESTION: So you couldn't get the records intact?
10 How would you get any corporate records?

11 MR. FAWER: So we understand -- you have a right to
12 those records; the Government has a right to the contents of
13 those records.

14 QUESTION: But you can't get them.

15 MR. FAWER: You can get them in two ways: you can
16 get them either by immunizing -- that narrow immunization as to
17 the testimonial implications of the production on the person
18 you served your subpoena on; if that's who you insist produces
19 them, or you find somebody else who does not have such a claim.

20 And you analyze it.

21 In the Doe case, it wasn't a corporation. One man
22 happened to have a larger business entity than does Randy
23 Braswell.

24 QUESTION: Why, that isn't even interesting.

25 MR. FAWER: Excuse me?

1 QUESTION: You don't even interest me at all.

2 MR. FAWER: The point, I think, Your Honor, that
3 we're talking about, in Fifth Amendment protection, it is not
4 limited to solely someone who has a sole proprietorship.

5 I would think that someone like Randy Braswell would
6 be of interest to Your Honor in the sense that he has a Fifth
7 Amendment privilege with respect to any kind of testimony, no
8 matter what type it may be.

9 And we all acknowledge -- I think this Court has
10 acknowledged clearly in Doe; in Fisher; in Curcio; and you
11 would go back into any -- way before that -- that the cases
12 make clear that testimonial, tacit testimonial admission is
13 protected under the Fifth Amendment.

14 And the only real question here is why should we not
15 afford that same privilege to someone who happens to be doing
16 business or holding corporate records. That's all. That's the
17 very narrow focus here.

18 And what we're saying is, if you don't afford Randy
19 Braswell the privilege, then you are going to deny him the
20 right to say, "I shouldn't have to incriminate myself by
21 producing these records.

22 And we are not asking in any way, in any doctrine or
23 revision of what the Court has done.

24 QUESTION: You are, in a sense. Because Doe would
25 cover your case if this weren't a corporation. At least I take

1 it that is what you say.

2 MR. FAWER: That is correct.

3 QUESTION: The Court has in the privilege against
4 self-incrimination has always drawn a line between an
5 individual and a corporation.

6 MR. FAWER: It has always drawn that line, but I
7 believe, I think it was Justice Brennan has indicated in a
8 number of cases, the line was always drawn with respect to
9 access to content, not testimony.

10 The line was drawn because of what Boyd had to say,
11 and the unhappiness of the Court over the past century of
12 Boyd's protection -- potential protection, of contents.

13 And then everything -- the collective entity doctrine
14 was a response to the contents, the privacy rationale
15 underlying Boyd. From Hale to Bellis, that's what you have:
16 consistent attacks; or a consistent doctrine that says, "If
17 it's corporate, we are not going to protect the contents. The
18 Government has a right to them."

19 What Fisher and Doe, but basically Fisher, does, it
20 says, "The nature of the entity makes no difference." We are
21 not going to protect the contents of business records at any
22 rate.

23 QUESTION: Well, Mr. Fawer, Fisher specifically made
24 reference to the collective entity rule, and I thought in a way
25 which indicated an attempt to preserve it.

1 The Government says to us that it may not make
2 evidentiary use of the fact that a particular individual within
3 the corporation performed the physical act of production. If
4 that's true, I don't see how you should be concerned about any
5 testimonial aspect; the Government says it has a right to use
6 the corporation's act of production to incriminate the
7 individual; but ought to use the fact that a particular
8 individual responded to the subpoena.

9 Why do you have a problem?

10 MR. FAWER: I have a problem because I think that
11 what the Government is asking you to do is to engage in a pure
12 fiction. We have no problem that in a --

13 QUESTION: Well, the use of the corporations is a
14 legal fiction --

15 MR. FAWER: Truly.

16 QUESTION: -- and this is a result of that.

17 MR. FAWER: But I do not know why this Court should
18 want to be party to using a patent fiction to deny a natural
19 person his rights under the Fifth Amendment.

20 Now why do I say it's a fiction?

21 QUESTION: The problem really is that the contents of
22 these records may be very incriminating.

23 MR. FAWER: We suggest to Your Honor, they may be.
24 But we have no right to hide behind those contents. You have
25 a right to -- I say, the Government has a right to those

1 contents.

2 QUESTION: I take it that part of the immunity you
3 would want is that it is unlawful for the Government to use the
4 act of production to show that he knew the documents existed?

5 MR. FAWER: That is part of it, Your Honor, yes.

6 QUESTION: So in the case of any corporation, the
7 officer who produces the documents, under your rule, cannot be
8 charged with knowledge of their existence in any prosecution?

9 MR. FAWER: He cannot be charged with knowledge of
10 the existence of the document, but what the document contains
11 can be used against him.

12 QUESTION: Well, not until they're authenticated.

13 MR. FAWER: Authenticated by him or someone else?

14 QUESTION: But knowledge of the documents is highly
15 relevant in most criminal prosecutions, we know that.

16 MR. FAWER: Yes, it is.

17 QUESTION: And that would apply to General Motors,
18 because some officers may have confidential knowledge of a very
19 secret transaction, and the only people that know about the
20 transaction are the ones that are producing the documents, and
21 your rule would require immunity from the use of the production
22 of the documents to show they knew they existed.

23 MR. FAWER: My rule --

24 QUESTION: That's your rule, isn't it?

25 MR. FAWER: If he is the only person -- if you need

1 to have him produce it.

2 QUESTION: Now, wait. If he's the only one or not.
3 All your rule would exclude is showing that he knew of it from
4 the fact of his production of it.

5 MR. FAWER: Exactly.

6 QUESTION: You would still be able to show that he
7 knew of it in other fashions.

8 MR. FAWER: Exactly.

9 MR. FAWER: Wouldn't you? You'd be able to show --
10 what about your being able to show that his signature was on
11 it? That you could show by the testimony of other people that
12 they were kept in his home; all sorts of things, right?

13 MR. FAWER: Every other inference; every other piece
14 of direct proof would be available. All you would be limiting
15 it to, the only thing you couldn't do is from the mere fact
16 that this person had brought them into court, that brought them
17 into the grand jury, that fact couldn't be used against him.

18 QUESTION: But until they're properly authenticated
19 by somebody the records are not admissible against him at all.

20 MR. FAWER: That is true, but they're are very --

21 QUESTION: Contents or otherwise, they have to be
22 authenticated.

23 MR. FAWER: Someone has to authenticate them. But to
24 take the typical case, I mean, surely in General Motors, we
25 really shouldn't be worried that in General Motors there's not

1 going to be anyone else but one person who could authenticate
2 the documents?

3 QUESTION: Yes, but --

4 MR. FAWER: But in Tax Court --

5 QUESTION: -- maybe only the representatives of
6 corporations know which ones they are and can pick out the one
7 who needs the immunity best. And how does the Government know
8 before they see the documents?

9 MR. FAWER: I do not think --

10 QUESTION: And in this case, you talk about
11 alternates, why couldn't your client have designated somebody
12 else to produce the documents on behalf of the corporation and
13 gotten the same protection?

14 MR. FAWER: We would have no problem should all --

15 QUESTION: Shouldn't the Government have accepted
16 that?

17 MR. FAWER: The Government, I think, would have
18 accepted that; but they might not have accepted at this point.
19 They have insisted that he produce.

20 Do I know whether they would have accepted the third
21 party bringing them in? I don't know. But I would suggest,
22 Your Honor, that if a third party were to -- if you were to
23 follow that mechanism, you'd still have to afford him the
24 protection.

25 QUESTION: Well, but say he hired his lawyer and his

1 lawyer produced the documents, says, "I represent the
2 corporation; I made the search commanded by the subpoena; and
3 here are the documents." Why wouldn't that protect your
4 client?

5 MR. FAWER: Justice Stevens, if I were Mr. Braswell's
6 private attorney at that point, and not some other lawyer, I
7 would tell Mr. Braswell he should still assert his privilege
8 and not rely on the possibility that that other lawyer would
9 assert an attorney-client privilege of some sort to protect Mr.
10 Braswell.

11 QUESTION: You mean you assume the attorney would not
12 act in his proper --

13 MR. FAWER: I don't assume that, but I don't want to
14 assume the contrary either. I have a right not to incriminate
15 myself, and if the Government can bring that attorney in, and
16 if that attorney decides for one reason or another, that he is
17 free to make that disclosure --

18 QUESTION: Well --

19 MR. FAWER: -- then I have lost.

20 QUESTION: I don't buy that. I think I presume
21 lawyers act as professionals. They're not going to run around
22 violating their client's confidences.

23 MR. FAWER: But I do not -- I normally -- and do at
24 this point share the same assumption that Your Honor does. But
25 we're dealing here with a constitutional privilege of some

1 magnitude in this case.

2 There is no question from our perspective that the
3 records that the tacit testimonial implications of production
4 could be meaningful to putting Randy Braswell in jail. That's
5 what's at stake here. And because of that, I'm not going to
6 make any assumptions such as, "if there is an attorney, he may
7 not be called to the witness stand to testify." Or if a third
8 party surrogate should be appointed by the court, all we ask is
9 that very narrow ability to be able to assert the Fifth
10 Amendment, preferably by means of a grant of immunity, because
11 that's -- then we don't have to rest on anyone's assurances
12 that they won't use it.

13 QUESTION: Does your grant of immunity say that the
14 Government will not be able to use this Defendant's production
15 of the fact of the production for any purpose, is that it?

16 MR. FAWER: The fact of the act of production, and
17 that any fact or any inference growing from the act of
18 production cannot be used against him in the court.

19 QUESTION: So to the extent that the act of
20 production amounts to authentication, it may not be used
21 against him. They're going to have to authenticate by some
22 other way.

23 MR. FAWER: Absolutely. Absolutely, Your Honor.

24 QUESTION: Well, why does the Government's concession
25 that it cannot use it, in sum, why does that fall short in your

1 view?

2 MR. FAWER: Your Honor, if you look at it, if you
3 read pages -- I ask the Court to carefully read pages 34 and 35
4 of the Government's brief. I don't know. It's a cross between
5 Alice in Wonderland and Kafka. They are saying -- and they
6 admit they can't use -- they cannot -- when Randy brings them
7 in, if he should bring them in -- they could not go into court
8 in the prosecution and prove that Randy Braswell produced them.

9 But they say, "Aha, he acted in a representative
10 capacity; and therefore, we can introduce that a nameless
11 individual brought them in -- wait, a nameless individual --
12 because he acted in a representative capacity, we can still use
13 it against him individually."

14 I don't understand the distinction. The potential
15 incriminating aspect of it is the same.

16 QUESTION: In a corporation, would you be making the
17 same argument if the subpoena had run against the corporation?

18 MR. FAWER: I would make the --

19 QUESTION: And the corporation sent up a
20 representative and the representative said, "This is going to
21 violate my Fifth Amendment?"

22 MR. FAWER: What, the representative said that? If
23 the representative had a right for whatever reason to claim the
24 Fifth Amendment --

25 QUESTION: Well, he's a custodian.

1 MR. FAWER: I have no problem with that custodian
2 making that assertion and claiming the Fifth Amendment.

3 QUESTION: Well, you subpoenaed the corporation and
4 the corporation says, "Well, anybody that we send up has a
5 Fifth Amendment claim."

6 MR. FAWER: I don't think the corporation can simply
7 say that. The corporation -- one thing is clear -- the
8 corporation does not have the Fifth Amendment privilege.

9 QUESTION: Oh? But anybody they send up will?

10 MR. FAWER: Well, that's for them to say. I don't
11 think a court should simply accept a corporation.

12 QUESTION: Well, if they send up somebody -- what if,
13 in response to this subpoena a man arrives -- a hooded man
14 arrives with a mask on? And no name or anything else? And he
15 says, "Here are the corporate records. The corporation has
16 sent me up to deliver these records in response to the
17 subpoena."

18 MR. FAWER: And the Government takes them?

19 QUESTION: Sure.

20 MR. FAWER: I have no problem, because I cannot see
21 --

22 QUESTION: Are they authenticated?

23 MR. FAWER: No. At that point? By whom? I mean a
24 hooded -- some hooded -- if they can subpoena, they know who
25 that name is.

1 QUESTION: The corporation has sent up the records.
2 And everybody agrees that the corporation did it. They set up
3 their records.

4 MR. FAWER: Two things: one, in a prosecution of the
5 corporation, it would make no difference whether -- it would
6 not affect Randy Braswell. The corporation has no Fifth
7 Amendment privilege.

8 Secondly, I don't see how that hypothetical, how
9 under those facts, anything could be used testimonially against
10 Mr. Braswell. I mean, I'd be happy if some faceless person
11 brought them into court, how is the Government -- what
12 courtroom is the Government going to be able to ask a judge or
13 a jury to infer anything testimonial against Mr. Braswell?

14 QUESTION: How can they use it? How can they use it
15 if they subpoena Mr. Braswell, and he brings up -- he just
16 comes and delivers the records? He's just responding to a
17 subpoena; he isn't testifying.

18 MR. FAWER: But this Court has always said that that
19 is testimony.

20 QUESTION: All right, but that's all he's done. Now
21 how's the Government going to use those records? They're going
22 to come into court and say, "These are the corporate records?"

23 MR. FAWER: No, they're going to have the records.
24 See, they cannot authenticate it through him. There's an
25 account -- the Government happens in this case to know that

1 there was an account.

2 QUESTION: I thought you said that the act of
3 production may authenticate the records?

4 MR. FAWER: I thought we were operating on the
5 assumption that we would not -- we were giving him -- we would
6 assert the privilege and that you would have an immunity as to
7 that.

8 If not, then it could not be used against him. I
9 thought you were saying --

10 QUESTION: Well, the one-man corporation, how are you
11 going to get anybody to produce records if this doctrine is
12 applied?

13 MR. FAWER: Your Honor, my position is, this case on
14 its facts, in terms of its practical difficulties, is no
15 different than Doe, none whatsoever.

16 QUESTION: Well then, maybe Doe was wrong?

17 MR. FAWER: I think Doe was right in that sense. I
18 mean, I think the act of production --

19 QUESTION: If you can't explain -- I'm only one of
20 nine, but if you can't explain how a corporation -- how a one-
21 man corporation's documents can be subpoenaed and authenticated
22 under this doctrine, you know, and I daresay, you'll lose more
23 than one person.

24 MR. FAWER: Well, let me explain it to you and still
25 keep some rebuttal time at the same time, Your Honor.

1 There is an accountant in this case. It's not on
2 the record. I'm representing, as in almost every corporation,
3 even a one-man corporation -- has an accountant. Randy
4 Braswell brings him in and he's immunized so that we can't use
5 the act of production against him; the contents can be used
6 against him; they get the accountant to say, "Are these the
7 records you saw during the years in question?"

8 "Yes, these are the records shown to me in the
9 corporation's office." And there's your authentication. End
10 of story.

11 QUESTION: Maybe the accountant doesn't have
12 authority to produce them if he's --

13 MR. FAWER: He only has to authenticate.

14 QUESTION: No, no, no. See, what I'm saying, they're
15 subpoenaing the records. What if the accountant doesn't have
16 custody of the records?

17 QUESTION: What if the accountant doesn't have
18 custody?

19 MR. FAWER: No, I'm saying you subpoena it from Randy
20 Braswell.

21 QUESTION: With immunity?

22 MR. FAWER: With immunity.

23 QUESTION: Oh, oh, oh.

24 MR. FAWER: With immunity -- you gave him the
25 immunity.

1 QUESTION: You don't know that he didn't even look at
2 the records.

3 QUESTION: Look, he has the immunity, and he's still
4 prosecuted a week later; a month later. Within the year, he's
5 indicted. He's now in court in Southern Mississippi, and they
6 called, you know, CPAX -- and they say "CPAX, you handled --
7 your name is on the tax returns for the years 1982 through
8 1985; did you look at the general ledger?"

9 "Yes."

10 "I show you Exhibit A. Is this the general ledger?"

11 "Yes it is."

12 Your Honor, I submit that it's authenticated. End of
13 story. And you have protected Randy Braswell, at least in
14 terms of the authentication issue that's been raised.

15 I would like at this point to preserve at least a few
16 minutes for rebuttal. Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fawer.

18 We will now hear from you, Mr. Englert.

19 ORAL ARGUMENT BY ROY T. ENGLERT, JR., ESQ.

20 ON BEHALF OF RESPONDENT

21 MR. ENGLERT: Thank you, Mr. Chief Justice, and may
22 it please the Court:

23 This case does involve corporate documents, not the
24 documents of an individual or a sole proprietorship. The law,
25 with respect to corporate documents, has been settled for more

1 than 75 years. Not only Hale v. Henkel in 1906, but more
2 important for our purposes, the Wilson and Dreier cases,
3 decided in 1911, made it clear that an individual may not
4 interpose his personal Fifth Amendment privilege as a basis for
5 resisting a subpoena for corporate documents.

6 That holding has been reaffirmed by this Court in
7 case after case in succeeding years.

8 QUESTION: Is that true even if production of the
9 documents would incriminate the person in a trial against that
10 person without reference to the corporation?

11 MR. ENGLERT: Yes, Your Honor. The Court has so-
12 stated regularly.

13 QUESTION: So that you are willing to try the case on
14 the assumption that Braswell might well incriminate himself by
15 reference to the knowledge or the existence of the documents?

16 MR. ENGLERT: We're willing to submit the case to
17 this Court on that assumption.

18 QUESTION: And you can use the fact that he produced
19 these documents against him to prove those matters?

20 MR. ENGLERT: Yes and no.

21 MR. ENGLERT: That's what page 34 of your brief says:
22 "yes and no." And I can't understand it.

23 MR. ENGLERT: All right: I think Justice White's
24 rather colorful hypothetical is helpful in understanding the
25 difference between what we say cannot be used, and what we say

1 can be used. The corporation produces these records; we are
2 entitled, and we think this Court's case is quite clear that we
3 are entitled, to make evidentiary use of the fact that
4 Worldwide Purchasing Corporation; and Worldwide Machinery
5 Corporation produced these records, for whatever evidentiary
6 significance that may have for authentication or anything else,
7 we can use that fact.

8 What we can't do is say "Not only did Worldwide
9 Corporation -- Worldwide Purchasing and Worldwide Machinery
10 produced these records; but Randy Braswell was the person who
11 handed them over.

12 Now it may be that we can infer on that basis --

13 QUESTION: What is it that prevents you from doing
14 that? You haven't given him statutory immunity.

15 MR. ENGLERT: It's not an immunity question, Your
16 Honor. It flows, we think, logically --

17 QUESTION: You're saying you can't use it. What
18 protection can you offer to Braswell's counsel that you will
19 not introduce that fact?

20 MR. ENGLERT: We think it flows logically from the
21 rationale of the White case decided in 1944, a rationale that's
22 been reiterated many times.

23 QUESTION: You mean you're telling us that if Mr.
24 Braswell's attorney in a subsequent prosecution objects to this
25 evidence, that it will be -- the objection must be sustained?

1 MR. ENGLERT: If he objects to the evidence that it
2 was Randy Braswell who personally produced the records, yes.

3 QUESTION: So that he does have the Fifth Amendment
4 privilege?

5 MR. ENGLERT: I don't think it's a Fifth Amendment
6 privilege, Your Honor.

7 QUESTION: What kind of privilege is it, then?

8 MR. ENGLERT: I think it's simply a question of
9 holding the Government to the underlying theory on which it
10 gets these documents.

11 QUESTION: What case do you cite for that
12 proposition?

13 MR. ENGLERT: For the underlying theory, I cite
14 primarily the White case decided in 1944. Well, since it's
15 quoted at pages 21-22 of our brief, that's a passage that was
16 repeated in the Curcio case; in the Bellis case; it's the
17 underlying theory, Your Honor -- the individual acts as agent
18 of the corporation, and not as an individual when he produces
19 the documents -- that's what the Court has said over and over.

20 And to the extent we're conceding anything, we're
21 conceding what we think is the logical consequence of that
22 underlying theory.

23 QUESTION: Well, I just want to make it clear: you
24 are stating that he does have a privilege against his own
25 incrimination; and you are conceding that these documents may

1 not be used against him for that purpose?

2 MR. ENGLERT: Your Honor, I wouldn't phrase it that
3 way, no.

4 QUESTION: Well, what protection does he have?

5 MR. ENGLERT: If the Government at trial asked the
6 question, "Isn't it true, Mr. Process-server, that Randy
7 Braswell was the man who handed you these documents?" And
8 defense counsel objected, I think the Court would have to
9 sustain that objection. It's a ground derived from this
10 Court's Fifth Amendment decisions, to be sure, but it's simply,
11 Justice White, it's simply holding the Government to the
12 underlying theory that this Court --

13 QUESTION: But that -- I don't really see your point.
14 It's -- how is the Government held to its underlying theory by
15 doing that?

16 MR. ENGLERT: Well, I think the best I can do is to
17 ask the Court to look at the quotation on pages 21 and 22 of
18 our brief from the White case. In that case, the Court said,
19 "Individuals acting as a representative of a collective group
20 cannot be said to be exercising their personal rights and
21 duties; nor to be entitled to their purely personal rights and
22 privileges, et cetera, in their official capacity where they
23 have no privilege against self-incrimination." The point of
24 that passage --

25 QUESTION: But this is the constructive immunity

1 doctrine that we declined to adopt in Doe.

2 MR. ENGLERT: I don't think so, Your Honor. I think
3 this is considerably less than constructive immunity.
4 Constructive immunity would mean that we couldn't use the act
5 of production -- anyone's act of production; the corporation's
6 act of production. What we're conceding is something much more
7 limited. We want to use the corporation's act of production
8 for whatever it's worth. We think we're entitled to it.

9 QUESTION: But you haven't followed the statutory
10 procedures for immunity. That's an extra statutory immunity
11 that you're now offering us -- or offering Braswell.

12 MR. ENGLERT: Your Honor, I must respectfully
13 disagree. I simply don't think it's the same thing as
14 immunity. I think it's like the cases in which the Court has
15 said the violations of the Fifth Amendment can't be exploited.
16 It's something that flows from the underlying doctrine.

17 QUESTION: What case from this Court -- you've just
18 cited us to this language from White and now I've read it over
19 again. It seems to me it says, the individual producing
20 records may incriminate himself personally, but if it's
21 corporate records, it doesn't make any difference.

22 I mean, that's in favor of the Government; not
23 against it. You're saying something, the Government has to
24 concede. What case is it from this Court that requires that
25 concession by the Government? What specific case?

1 MR. ENGLERT: No case, Your Honor.

2 QUESTION: Well then, why do you concede it?

3 MR. ENGLERT: We think it flows logically. If we're
4 mistaken, I'm sure the Court will tell us so.

5 QUESTION: But it seems to me it flows logically
6 because Braswell has a privilege. Suppose the issue in the
7 case is whether or not Braswell has ever seen the invoice?

8 "Mr. Braswell, have you ever seen this invoice?"

9 Can he decline to answer that? Or can you use the
10 fact that he produced the documents against him; and if not,
11 why not?

12 MR. ENGLERT: Again, our position, Your Honor, is
13 that we can use against Braswell the fact that Worldwide
14 Purchasing and Worldwide Machinery --

15 QUESTION: No. You stick with my hypothetical: "Mr.
16 Braswell, have you seen this document? Are you aware of its
17 existence? Have you ever seen it before?" Can you use the
18 fact that he produced that document to impeach him in the
19 answer to that question? And if not, why not?

20 MR. ENGLERT: The fact that he personally produced
21 the documents, the answer, I believe, is "no." I believe --

22 QUESTION: But on what theory?

23 MR. ENGLERT: On the theory that --

24 QUESTION: That he has a Fifth Amendment privilege:
25 that must be your only theory.

1 MR. ENGLERT: Well, Your Honor, again, I would
2 respectfully disagree. The theory is that it is not Randy
3 Braswell who performed that act of production; that it is the
4 corporation that performed that act of production.

5 QUESTION: How do you verify it? I mean, you have to
6 get some warm body up there to establish that the corporation
7 produced it; and who is going to say these are the
8 corporation's records if you don't put Braswell up there? I
9 don't see how you prove it?

10 MR. ENGLERT: The process server can verify that.

11 QUESTION: I don't know how you get Braswell on the
12 stand. Can't you claim the Fifth Amendment privilege to just
13 not get on the witness stand?

14 MR. ENGLERT: Sure.

15 QUESTION: Is he a defendant in this action?

16 MR. ENGLERT: Well, of course, this is a grand jury
17 matter, Your Honor.

18 QUESTION: I mean, you're assuming he's going to be
19 indicted, but I don't think you can put him on the witness
20 stand if he doesn't voluntarily go on the witness stand, he
21 waives his Fifth Amendment privileges.

22 MR. ENGLERT: That's correct.

23 QUESTION: If, in Justice Kennedy's hypothetical, he
24 were on the witness stand, we might well be able to ask those
25 questions.

1 QUESTION: Yes, but what if he decides, "I'm not
2 going to testify," he says, "Under the Fifth Amendment."

3 Then how do you authenticate?

4 MR. ENGLERT: The process-server, certainly.

5 QUESTION: Well, there was a response to the subpoena
6 -- there was a response to the subpoena that the corporation
7 sent its records up. That's exactly right. That's the
8 testimony we can put on.

9 QUESTION: Can you use that to show that he knew of
10 the documents?

11 MR. ENGLERT: To the extent that's a fair inference
12 from the fact that the corporation produced the records, yes.

13 QUESTION: Suppose he's on trial, and the question is
14 whether he knew of the documents? Can you use that? Can you
15 introduce the process-server?

16 MR. ENGLERT: Yes, as long as what the process-server
17 says is only that the corporation produced them. That is the
18 typical situation, Justice Kennedy, in which this Court has
19 addressed the precise question whether we can compel an
20 individual to produce these documents.

21 In part of the Bellis opinion, I believe it was in a
22 footnote, the Court, responding to Justice Douglas' dissent,
23 said, "Justice Douglas says this is the target. That's
24 typical. It is the usual situation in which the documents are
25 subpoenaed from a target of the investigation." He may or may

1 not end up a defendant, but there is obviously some
2 contemplation that he may end up a defendant, and the
3 longstanding doctrine is that the Government is entitled to
4 those records.

5 QUESTION: Well, if what you've said is true, I don't
6 see that there is very much ground between you and the
7 Petitioner here. Why are you so reluctant to give a grant of
8 immunity, which sounds to me is going no further than what you
9 say ensues anyway by operation of law?

10 MR. ENGLERT: Justice Scalia, I think there's a world
11 of difference between our position and the Petitioner's
12 position. I think Mr. Fawer would not agree with me that we
13 could use the corporation's act of production and any fair
14 inferences therefrom against Randy Braswell.

15 He would want Randy Braswell to turn over these
16 documents and then have complete immunity from our taking any
17 inferences from the testimonial content, if any, of that act of
18 production. And that can make all the difference in the world.

19 QUESTION: He wouldn't allow you to say even that the
20 corporation had produced it, if by the corporation, you mean
21 Braswell.

22 Whereas you would say you can go and say the
23 corporation had produced it; show by process-server that the
24 corporation responded to the process in this way? He would not
25 allow that?

1 QUESTION: That's how I understand his position.
2 Justice Kennedy also mentioned the problem of constructive use
3 in that I understand the Petitioner's position, they would want
4 us to be required to give constructive use immunity.

5 I'm sorry, not constructive use immunity -- statutory
6 use immunity, before we could get these documents. A long line
7 of cases has allowed us to get documents like these without
8 statutory use immunity and we think the Court should reaffirm
9 those cases.

10 QUESTION: If these were private records, you
11 wouldn't be able to get them by a subpoena, right? If he was
12 unincorporated?

13 MR. ENGLERT: If he was a sole-proprietorship, for
14 example; and he made an adequate showing of self-incrimination,
15 then we would have to grant statutory use immunity to get them;
16 that is the Doe case.

17 QUESTION: It seems very strange, doesn't it? Don't
18 you think that seems strange?

19 MR. ENGLERT: Well, Your Honor, we made the argument
20 in Doe that that was strange; that we should be able to get
21 those records as easily as corporate documents, and the Court
22 rejected it. There really has been a bright line drawn by the
23 Court's cases.

24 QUESTION: Well, the question is whether or not there
25 is a testimonial incident to the production, isn't it? In some

1 cases their testimony incidents that are relevant and others
2 that are not.

3 MR. ENGLERT: Well, Your Honor, we're submitting this
4 case on the assumption -- not the concession -- but the
5 assumption, that there could be a testimonial incident to this
6 act of production, as the Court held there was in Doe.

7 We think we win this case anyway. The lower courts
8 said we win this case anyway. Bellis and Fisher and Curcio and
9 Wilson and Dreier, all say we win this case anyway, in my view.
10 That is what the Court has said, is that, notwithstanding --

11 QUESTION: But if that's true, then your answer to
12 Justice Scalia's question would be there is no testimonial
13 compulsion when a private person is forced to produce the
14 documents?

15 MR. ENGLERT: No, Your Honor, I don't think the
16 doctrine turns on the lack of testimonial compulsion. The
17 doctrine, again, as we understand it, was best stated in the
18 White case, not saying that the individual -- not saying that
19 there is no act of compulsion; not saying that there is no
20 testimony; saying that individuals, when they act as corporate
21 agents, are not exercising their personal rights.

22 QUESTION: So the Fifth Amendment is essentially ---
23 your argument reads "Not simply shall be -- nor simply
24 compelled in any criminal case to be a witness against
25 himself." There's really a gloss on it; "Nor shall be

1 compelled in any criminal case as a witness against himself,
2 except when he is testifying in his capacity as an agent of a
3 corporation?"

4 MR. ENGLERT: I wouldn't put it that way, Your Honor.
5 A corporation --

6 QUESTION: But that's essentially what your doctrine
7 comes down to, right? He can testify against himself when he's
8 acting as a secretary of the corporation.

9 MR. ENGLERT: One could put it that way, but as
10 Justice O'Connor pointed out, corporations are fictional
11 entities. Somebody -- we know from Hale v. Henkel that a
12 corporation --

13 QUESTION: Well, Braswell is not a corporate entity
14 and he doesn't want to testify against himself.

15 MR. ENGLERT: No, but he wants Worldwide Purchasing
16 Corporation and Worldwide Machinery Corporation to not testify
17 against him by their act of producing documents.

18 QUESTION: He's perfectly content to let them do it
19 if they can do it through some other agent. He just doesn't
20 want them to do it through him.

21 QUESTION: Could you tell me once more why the
22 Government is unwilling to grant use immunity just to the
23 extent of the authentication -- production and authentication
24 of the records? In the typical case?

25 MR. ENGLERT: We're unwilling to do that, Your Honor,

1 because in some cases at least, there are components to the act
2 of production that are very important to us that we want to use
3 against the individual, not necessarily that Randy Braswell
4 produced the documents; but that the corporation had possession
5 and control of these documents; that they are the corporate
6 records.

7 QUESTION: Of course in most cases, I suppose, you
8 could always just subpoena the corporation?

9 MR. ENGLERT: Well, that's very problematic. It
10 really is. In small corporations, often the targets will be
11 the only people who know where the records are.

12 QUESTION: All right, suppose you subpoena a small
13 corporation and you just get no response?

14 MR. ENGLERT: That's the problem.

15 QUESTION: And then what are you going to do?

16 MR. ENGLERT: We can try to hold the corporation in
17 contempt; which may or may not work; they can always just
18 disband the corporation; which would make it awfully hard to
19 hold it in contempt.

20 We could try to hold the individual in contempt for
21 not cooperating; but of course, his response, if Petitioner
22 prevailed in this case, would be, "Well, I was just exercising
23 my Fifth Amendment rights. I don't have any duty to
24 participate in this."

25 QUESTION: But that's perfectly all right when it's

1 his diary you're trying to get. You just say, "Well, gee, I
2 guess we just can't get the diary.

3 And it's also perfectly all right if he hasn't
4 incorporated. You just shrug your shoulders and say, "Well,
5 that's what the Fifth Amendment says: we can't make this guy
6 turn it over. We have to find some other way to get it."

7 But here, when it's a corporation -- certainly the
8 larger the corporation is, the less likely this problem is to
9 arise, isn't it? For General Motors, it's no real problem.

10 MR. ENGLERT: No, I don't agree completely with that.
11 Let's suppose, just as an hypothetical example, that the
12 president of General Motors, and the president of Chrysler
13 agree to engage in price fixing. They would surely keep any
14 documentation of that to a minimum and keep it under lock and
15 key -- keep it secret from the rest of the corporation.

16 If we issued a subpoena to General Motors: "Please
17 give us all records that document discussions of prices with
18 Chrysler Corporation," I don't think the president would give
19 up those records. He knows we can't prove that they exist if
20 we don't get them.

21 QUESTION: Well, on that basis, it wouldn't do any
22 good to subpoena him. He'd just say -- he would just wouldn't
23 produce them. You don't know that they're there. Nobody knows
24 it.

25 MR. ENGLERT: At least we have the threat of contempt

1 against him, Your Honor, in that case.

2 QUESTION: Would you want us to go so far as to say
3 that, by becoming an officer in a corporation, you simply waive
4 your Fifth Amendment rights as to anything you might ever be
5 asked to produce?

6 MR. ENGLERT: As to any corporate records you may
7 ever be asked to produce?

8 QUESTION: Yes.

9 MR. ENGLERT: I think the Court has gone that far
10 many times.

11 QUESTION: So you think the law is that Braswell has
12 no Fifth Amendment rights because he formed a corporation, as
13 to any documents he might be asked to produce as a corporate
14 officer, even though there may be some testimonial incidents to
15 production?

16 MR. ENGLERT: Yes, and if Your Honor will indulge me,
17 I'd just like to read a couple of things this Court said in the
18 Curcio case, a case primarily relied on by my opponents, to see
19 just whether the Court has said that. The quote in page 17 of
20 our brief at the bottom of page 24, "The Court said that the
21 books and records of corporations cannot be insulated from
22 reasonable demands of governmental authorities by a claim of
23 personal privilege on the part of their custodian."

24 On the next page we quote the passage from page 128
25 of the Curcio decision, "A corporate or association records, by

1 their custodian, is readily justifiable, even though the
2 custodian protests against it for personal reasons."

3 QUESTION: Well, if that's true, then to go back to
4 the beginning, I don't understand why you make the concession
5 that you do on page 34 that for some purposes you can't use the
6 information?

7 MR. ENGLERT: Well, Your Honor, again, if the
8 concession is unwise, I'm sure the Court will tell us so. But
9 we do think the concession flows logically from the underlying
10 agency rationale of the doctrine, that the individual, although
11 waiver is one doctrine that's been invoked, all of the
12 undesirability of a de facto privilege for the corporation has
13 also been invoked, out of practical necessity, has been invoked
14 -- the Court has, we think primarily rested on the agency
15 rationale that in individual simply is not acting as an
16 individual when he produces documents.

17 Corporations have to act through human beings.
18 That's what was pointed out by the Court in the opinion in
19 Bellis. And it is because corporations have to act through
20 human beings, that we have to use what is admittedly a fiction;
21 that Randy Braswell is not "Randy Braswell" when he produces --

22 QUESTION: May I interrupt at this point? Your
23 subpoena was addressed to "Randy Braswell, President," then the
24 name of the corporation. The subpoena was served on him in his
25 capacity as a corporate officer rather than as an individual,

1 is that correct?

2 MR. ENGLERT: Yes.

3 QUESTION: Would it have been in compliance with the
4 subpoena for the secretary of the corporation to have brought
5 the documents to court and got on the witness stand and said,
6 "I've made a diligent search of the documents, and I speak on
7 behalf of the corporation, these are what you subpoenaed?"

8 MR. ENGLERT: I don't think that would have
9 constituted technical compliance.

10 QUESTION: Why not? If basically you're saying that
11 he is merely an agent of the corporation and the corporation
12 has responded through a different, duly-authorized agent, who
13 is willing to testify under oath that everything commanded by
14 the subpoena has been produced. Why wouldn't that be in
15 compliance with the subpoena?

16 MR. ENGLERT: Because the problems of who, within
17 corporations can actually lay his hands on documents?

18 QUESTION: Well, he's prepared to testify that he has
19 the authority. He's the custodian. It's not often true that
20 the president is the actual custodian of corporate documents.
21 Usually it's the secretary.

22 MR. ENGLERT: Justice Stevens, if that actually
23 happened, I think the Government would shout "Hurrah."

24 QUESTION: Well, it happens all the time, I mean, I
25 think often, very often, corporations respond to subpoenas by

1 bringing in some officer other than the particular one that was
2 designated in the subpoena.

3 MR. ENGLERT: Sure and we regularly accept that. I
4 was only trying to respond to your question.

5 QUESTION: And I'm really asking whether you have a
6 duty to accept that?

7 MR. ENGLERT: I think not, Your Honor, because there
8 is a problem with subpoenaing documents from one individual --

9 QUESTION: But he's not an individual under your
10 submission.

11 MR. ENGLERT: -- than from one corporate officer who
12 may know of documents that are squirrelled away somewhere; and
13 as a ploy, has somebody else respond, and truthfully respond
14 that he's made a diligent search of every place in the
15 corporation where he knows that --

16 QUESTION: In other words, what you're saying is you
17 want to be able to ask the individual whether he has in fact
18 disclosed everything he knows about the corporate documents?
19 That's asking an individual rather than an officer of the
20 corporation when you put it that way.

21 MR. ENGLERT: Well, Your Honor, there we do run into
22 the Curcio case. We want the right to issue the subpoena to
23 the individual. We want the right to make that individual
24 comply with the subpoena.

25 QUESTION: On behalf of the corporation?

1 MR. ENGLERT: On behalf of the corporation. We have
2 that right under prior cases.

3 QUESTION: Why don't you call him to the stand on
4 behalf of the corporation: you know, just have the bailiff
5 say, "Call tot he stand the president of Braswell Corporation.
6 Do you swear to tell the truth?"

7 You're not cross-examining Braswell; you're cross-
8 examining the president of Braswell Corporation.

9 MR. ENGLERT: Well, Your Honor, we tried that in
10 1957.

11 QUESTION: It didn't work, did it?

12 MR. ENGLERT: Didn't work. The Court drew the line.

13 QUESTION: Why is that a rational line, if you think
14 that people have this bifurcated personality: there is
15 Braswell the person and Braswell the corporation?

16 MR. ENGLERT: Well, Your Honor, as I read the Curcio
17 case, in which we were trying to make the argument that that
18 was not a rational line and the Court disagreed with us, there
19 are pragmatic concerns at work in this area. Everything flows
20 from Hale v. Henkel; everything flows from the fact that Mr.
21 Fawer admitted many times, that we have a right to these
22 records.

23 The agency rationale that has built up -- the other
24 underlying rationales, which are reiterated throughout the
25 opinion in the Bellis case, all flow from the fact that we have

1 to be able to effectively get these documents. That has been
2 the Court's concern in case after case, is making the
3 Government's power to get these documents effective.

4 The Government, if you will, got "piggy" in the
5 Curcio case; it didn't try to make it's power to get the
6 documents effective; it tried to put somebody on the stand,
7 before the grand jury and disclose the contents of his own
8 mind, and the Court put its foot down.

9 QUESTION: The Fifth Amendment doesn't strike me as a
10 very effective provision. I mean, it doesn't seem to be
11 designed to allow the Government to get effectively all the
12 information it needs. I mean, you may, to be effective, need
13 to have the testimony of the individual, too. But the Fifth
14 Amendment says, is "That's too bad."

15 MR. ENGLERT: Well, of course, Your Honor,
16 constitutional doctrines often impede Government effectiveness;
17 limitations on constitutional doctrines regularly aid
18 Government effectiveness. It's a pragmatic world out there;
19 and this Court has recognized that in its cases.

20 And that, I think, is what is going on in the Curcio
21 case and in the various other cases in which the Court has
22 reiterated this well-established doctrine.

23 QUESTION: Mr. Englert, what is the significance at
24 the end of the subpoena where it stated that, "In the
25 alternative, you are commanded to deliver the subpoena

1 documents to the agent," and you don't have to do any more than
2 that?

3 MR. ENGLERT: Well, that's of course, very
4 significant, Justice Marshall. That's very significant,
5 because it serves to --

6 QUESTION: Well, that's why you haven't mentioned it?

7 MR. ENGLERT: Well, I'm sorry about that, but the
8 point is, that we're not seeking to get testimony before the
9 grand jury the way the Government tried to get testimony before
10 the grand jury in Curcio. We're trying to get these documents;
11 we're trying to make sure that we can get these documents in an
12 effective way, and our underlying worry in these cases, and the
13 underlying worry that the Court has recognized, is that just
14 addressing a subpoena to a corporation isn't an effective way.

15 Again, the argument to which there is force -- we'll
16 admit that. That there's nothing different about making the
17 person act as agent when he produces documents, and making the
18 person act as agent before the grand jury, has force; but it's
19 one that this Court has rejected.

20 The Court rejected it in Curcio when we advanced that
21 argument, because of pragmatic concerns. Those pragmatic
22 concerns always had a place in the development of the doctrine
23 in this area; and we think properly so. A long line of very
24 distinguished Justices have signed on to all these opinions --
25 in 1911; in 1923; in 1944; in 1957; in 1974.

1 It's those decisions that we think conclusively
2 settle the issue in the Government's favor. And we would ask
3 the Court to reaffirm those decisions once again.

4 QUESTION: Let me ask you one more question before
5 you sit down?

6 In the Doe case, as I remember, there was a district
7 court finding that the act of production would have been
8 incriminating, and the court of appeals agreed with it.
9 There's a two court finding and in this Court basically we
10 accept those findings.

11 Were there any similar findings either way by the
12 district court in this case?

13 MR. ENGLERT: No, Your Honor. I might say on that
14 subject, Mr. Fawer I think may have misspoken. He said "No one
15 has disputed that the act of production would be incriminatory
16 in this case." That's not true. We dispute that.

17 But as I said to Justice Kennedy, for purposes of
18 submission to this Court, we're happy to have the Court assume
19 that there would be incrimination in this case, because we
20 think the issue is, "Does that matter?" And we think the
21 decisions of the Court say it doesn't.

22 QUESTION: Well, if the question becomes
23 incrimination in this case, the Government won't fare well, I
24 suspect, because, you know, you don't have evidence as to
25 whether or not it will incriminate. If there's a colorable

1 claim of incrimination under our cases, the Court has to
2 sustain it.

3 MR. ENGLERT: Well, Your Honor, the Fisher case
4 indicated a fairly narrow scope, I think, for this act of
5 production doctrine. The claim of privilege was defeated in
6 that case. And I think much of the underlying logic of Fisher
7 applies here, especially in light of what I understand to be a
8 concession by Mr. Fawer that we could authenticate these
9 records though an accountant or through other means than the
10 act of production.

11 Of course, that would be an issue to be addressed by
12 the courts below.

13 QUESTION: Let me ask one other question, if I may?
14 There are two ways in which the act of production might be
15 incriminated: one is just the fact of the act of producing;
16 secondly, by what the producing representative of the
17 corporation says when he gets on the witness stand: "Yes, I
18 made a diligent search," and so forth. Do you concede that
19 both of those are equally incriminating? Both aspects of the
20 act of production? You don't concede it either.

21 MR. ENGLERT: I think that both can be incriminating.

22 QUESTION: You concede just the mere physical act of
23 delivering the documents can be incriminating, even if he took
24 them in the office; says, as a note that, as Justice Marshall
25 called your attention to, say you just delivered the documents;

1 just dumped them off in the process-server's office; and left
2 them. Didn't sign anything or no receipt. Would that be
3 incriminating in your view?

4 MR. ENGLERT: On those facts alone, no. It could be
5 with some additional facts.

6 QUESTION: I thought it was only the act of
7 production that we're talking about in this case. We're not
8 talking about testimony on the stand?

9 MR. ENGLERT: That's correct.

10 QUESTION: You never --

11 QUESTION: No, we're talking about authentication,
12 though, aren't we? We're at least --

13 QUESTION: By the act of production.

14 QUESTION: -- that.

15 QUESTION: By the act of production?

16 MR. ENGLERT: Yes.

17 QUESTION: And we're talking also about the fact --

18 QUESTION: You're not saying anything about being on
19 the witness stand.

20 QUESTION: We're talking also about the fact that he
21 obviously knows of the existence of the document if he produces
22 them, aren't we?

23 QUESTION: What if he brings a whole --

24 MR. ENGLERT: Yes, to Justice Kennedy, although with
25 the same kinds of limitations I've given in previous answers.

1 QUESTION: What if he brings a whole batch of
2 documents; a whole batch of sets of corporate records and he
3 just plunks them down and he says, "Among these is the response
4 to your subpoena?"

5 MR. ENGLERT: That's a typical response and if we get
6 that, we're delighted.

7 QUESTION: It's not much use for authentication, is
8 it?

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.
10 Mr. Fawer, you have three minutes remaining.

11 ORAL ARGUMENT BY CHARLES FRIED, ESQUIRE,
12 ON BEHALF OF PETITIONERS

13 MR. FAWER: Very briefly, Your Honor, thank you.

14 Justice Marshall, in response to one thing you said,
15 the Government is not perhaps being totally candid about how it
16 would use that footnote. They say and maintain that no matter
17 who Randy produces them to, they can call that person to the
18 stand to say that he -- that buffer, I will call it; that
19 surrogate; got them from Randy and used that inference against
20 him.

21 Why do I say that's their inference? Because Mr.
22 Englert said they would do it in the Sealed case, the case you
23 took this issue on and then the case was mooted and then our
24 Cert petition was granted.

25 Look at footnote No.20 in the Government's brief in

1 the Sealed case: they say just that; that they feel free to
2 use the testimony to put on the stand the surrogate; say, "Who
3 did you get the documents from?"

4 The surrogate would say, "Randy Braswell;" they could
5 use the testimonial inferences from that against him. In
6 addition --

7 QUESTION: Did you disagree with that?

8 MR. FAWER: Yes, I disagree -- I think they should
9 not be permitted to do that.

10 QUESTION: They deny that in their brief right here.

11 MR. FAWER: Well, I don't know where they deny that.
12 I have yet to see a denial in this brief that they could not
13 use the production by Mr. Braswell.

14 QUESTION: The fact that it was Braswell who produced
15 them. I thought they say they couldn't use them.

16 MR. FAWER: There's -- we're going back to page 34.
17 What they say there is that, if Braswell produces, that he's
18 simply producing with his other act, called "representative
19 capacity," that they can use that act against him although they
20 cannot say on the record that the person, the flesh and blood
21 that walked in with the records, was the -- the content was
22 Randy Braswell.

23 I have tremendous problems understanding why they
24 can't, except we all know why they can't. It's what Justice
25 Kennedy was asking: the Fifth Amendment says they can't.

1 And what you really have here, they are somewhat --
2 it is an unrealistic approach to the realities of what goes
3 onin the courtroom.

4 QUESTION: You're saying if the Fifth Amendment
5 prohibits it, then when Randy Braswell tells his lawyer or
6 other agent to produce the document, he is testifying against
7 himself?

8 MR. FAWER: If they can put that person on the stand
9 to say that, yes they are doing that.

10 And -- I mean, Randy Braswell wants to voluntarily
11 say to his lawyer, without raising any privilege, "Here the
12 documents bring them up." Then there's nothing. There's been
13 no assertion of the Fifth Amendment claim. He needs to assert
14 the privilege.

15 Randy Braswell in this case has asserted that
16 privilege.

17 Now, I might point out something the Government
18 doesn't point out: the Federal Rules of Evidence Rule
19 801(d)(2) -- you know that that rule says that it is not
20 hearsay for somebody to testify in a representative capacity
21 and that representative capacity can be used against him in his
22 individual capacity. How do we deal with that? What does that
23 do to the fiction that the Government wants to palm off on the
24 Court?

25 The answer is simple: statutory immunity in this

1 case. And by the way, it's not going to -- I don't know of a
2 single -- the history -- I guess my time is up.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fawer. The case
4 is submitted.

5 (Whereupon at 11:51 a.m. the above-captioned case was
6 submitted.)

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REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-3
CASE TITLE: BRASWELL v. UNITED STATES
HEARING DATE: MARCH 1, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT.

Date: 3/1/88

Margaret Deely

Official Reporter

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