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Bellis v. United States

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RECENT DEVELOPMENTS

BELLIS v. UNITED STATES


The Supreme Court has recently ruled that a three-person partnership does not have a fifth amendment privilege with respect to its business records. It would appear from the Court's reasoning that regardless of how small the partnership, individual partners can no longer refuse to produce partnership records which tend to incriminate them, thus leaving the single proprietorship as the only remaining protected business entity. This article will focus on the historical roots of the fifth amendment privilege as it relates to the documents of organized entities and will analyze the reasons for the steady erosion of the privilege which culminated in the decision in Bellis v. United States, a decision neither logically necessitated by, nor consistent with prior decisions of the Court.

As will be pointed out, a test to determine when the privilege should apply had developed through the case law. This test focused on the degree of personal involvement between the individuals and the organization, rather than on the type of organization involved. Although the test has recently been confounded by the mechanical standard applied in Bellis, it is, in the opinion of the authors, still a viable means of determining the circumstances under which the basic constitutional protection of the fifth amendment will be either granted or denied.

I. THE HISTORICAL ROOTS OF THE PRIVILEGE AS APPLIED TO ORGANIZED ENTITIES

The common law courts drew no distinction between compelled oral testimony and the forced production of written documents. The fact that the documents being sought were kept in conjunction with a corporate entity was also of no consequence. The case of Rex v. Cornelius, in which it was alleged that certain justices of the peace had been unlawfully taking money for the

granting of licenses to a group of incorporated alehouse owners, was typical. The prosecutor investigating the culpability of the owners wanted to inspect the books of the corporation. The judge refused the prosecutor's request on the ground that the effect of such a ruling would be to require a witness to give evidence against himself. Not only did the court not draw any distinction between compelled oral and written testimony, but it assumed that the privilege protected the owners from being forced to produce records, even of a corporate nature, if they were personally incriminating.

The only qualification on the privilege was that the document be of a private, not a public nature. The very fact that they were incriminating, however, apparently led the court to view them as private. In Regina v. Mead, the prosecution requested the production of books which contained the corporation's election results, receipts and disbursements. The court held that the books were of a purely private nature and that to compel the production of these documents would be the equivalent of making a man produce evidence against himself in a criminal prosecution.

Rex v. Purnell is one of the first cases in which the argument of the state's visitorial power over a corporation was advanced in an attempt to justify the compelled production of corporate documents. A prosecutor wanted to inspect the books of Oxford University, believing that they would furnish evidence against its Vice-Chancellor. The government contended that because the King was a "visitor" of the University he had an absolute right to inspect the books, regardless of their incriminating nature. The defense reasoned that if the court were to allow inspection of the books, it would no longer be a court of justice but an aid to the inquisition of the state. The court rejected the argument that it should suspend its traditional standards for the required production of books.

5. This argument is often made in the United States. See Grant v. United States, 227 U.S. 74, 79-80 (1913); Wilson v. United States, 221 U.S. 361, 383-84 (1911); Hale v. Henkel, 201 U.S. 43, 74-75 (1906).
6. As defined by Black's Law Dictionary 1744 (rev. 4th ed. 1968), "visitor" means "an inspector of the government of corporations, or bodies politic." [citation omitted].
8. The four necessary requisites (as conceded by the Solicitor General for the Crown) for inspections of this nature were: first, that the books had to be public; second, that the
Thus the common law privilege against self-incrimination was almost absolute. The controlling factor in all these English cases was not the nature of the documents sought, nor the seriousness of the crime being investigated, but whether the documents were incriminatory to the person in possession. Even documents of a purely public nature, although not protected per se, were protected under the rule of *Rex v. Purnell.* There was no discussion as to the type of entity claiming the privilege, or of the capacity in which the documents were held. Consideration of these factors is a purely American innovation.

II. **United States v. Boyd**

The landmark American case concerning the privilege of self-incrimination as it relates to records and documents is *United States v. Boyd.* Boyd and Sons, a family partnership, was charged with depriving the government of its lawful duties on imports of foreign glass through the use of false invoices. The invoices were essential to the government’s case. The prosecution relied on the fifth section of the revenue law which required the defendant to produce in court his business books, invoices and papers. The penalty for refusal was that the charges were considered confessed. While holding this statute unconstitutional, the Court noted that it was similar to a section of the Judiciary Act of 1789, passed by the first Congress, which had withstood constitutional scrutiny. The Judiciary Act, however, limited the right to compel documents by referring to the ordinary rules of Chancery, which severely restricted the cases in which the production of documents could be required. The cardinal rule of the Court of Chancery was that it would not decree a discovery which might tend to convict the party of a crime or lead to forfeiture of his property. The Court held that the omission of this broad exception in the statute challenged in *Boyd* rendered the statute repugnant to the Constitution because the forced production of incriminating private books and papers was equivalent to compelling the party applying had to have an interest in them; third, that they had to be material to the suit then in the court; fourth, that the person in possession could not be forced to produce anything which would be incriminating to him. 96 Eng. Rep. 20, 23 (1748).

9. See text accompanying notes 4-8 supra.
10. 116 U.S. 616 (1886).
11. Act to amend the customs revenue laws, and to repeal moieties, Act of June 22, 1874, § 5, 18 Stat. 186.
13. Id. at 631-32.
one to be a witness against himself within the meaning of the fifth amendment.

The *Boyd* decision was the first American case to extend the fifth amendment privilege to forced production of private papers and documents. As at common-law, the type of business entity with which the papers were connected did not enter into the Court's determination. It was implicit throughout the decision that the invoices of this family partnership were indeed the private papers of the defendants who held them in a personal capacity.\textsuperscript{14} The fact that the documents sought were partnership records was not mentioned in the decision, nor was it suggested that there was any distinction between personal documents and those kept in conjunction with an organized entity. The *Boyd* Court's reliance on common-law doctrine was also reflected by its acceptance of business records such as invoices as personal when the possessor of such records would be incriminated by their production.\textsuperscript{15}

The holding in *Boyd* was specifically limited to the production of what the Court termed "private papers."\textsuperscript{16} *Boyd* should not be interpreted as ruling that records of any type of organization, no matter how large or small, are privileged as private papers.\textsuperscript{17} *Boyd* may be interpreted, however, as holding that records of a business are private and therefore protected when there exists a close personal identification between the individual and his organization. The *Boyd* analysis is a viable way of determining when an organization's "officers" should be granted or denied the privilege. The determination that the records at issue were private did not depend on the label put on the particular business entity involved. Rather, it seemed to focus, in a common-sense manner, on the nature of the relationship between the defendant and the organization, a family-owned-and-operated business. This is in marked contrast with subsequent Supreme Court decisions.

### III. THE DEVELOPMENT OF RESTRICTIONS

#### A. Corporations

*Hale v. Henkel*\textsuperscript{18} was the first case to establish that certain

\textsuperscript{14} This observation was made by the district court in United States v. Onassis, 125 F. Supp. 190, 208 (D.D.C. 1954).

\textsuperscript{15} 116 U.S. 616, 634-35 (1886).

\textsuperscript{16} Id. at 631-32.

\textsuperscript{17} See United States v. Onassis, 125 F. Supp. 190, 208 (D.D.C. 1954).

\textsuperscript{18} 201 U.S. 43 (1906).
types of organizations could not claim the fifth amendment privilege. A subpoena was issued commanding Hale, the secretary and treasurer of the corporation, to answer certain questions or to produce the papers and documents desired by the grand jury. Hale refused, citing as one of his reasons that the documents might tend to incriminate him. The Court held that Hale could not avail himself of the privilege because there was an immunity statute protecting him from future prosecution.

Hale then tried to invoke the privilege on the corporation’s behalf, claiming that compelling him to produce the documents would incriminate the corporation. The Court ruled, however, that an officer of a corporation cannot claim a privilege against the production of the records on behalf of the corporation, just as a third person cannot claim a fifth amendment privilege on behalf of another. Further, the Court gave several reasons why the corporation could not claim the privilege on its own behalf: first, because it received special franchises and privileges from the state; second, because it did business interstate and thereby invited visitation by both the state and the federal government; third, because a corporation is a creature of the state and is presumed to be incorporated for the public good.

The dissenting opinion of Justice Brewer, citing Chief Justice Marshall’s statement that “the great object of incorporation is to bestow the character and properties of individuality on a collective and changing body of men,” contended that a corporation was merely an aggregate of individuals who decided to use the corporate form as a tool by which to achieve their ends. It followed, therefore, that the corporation should be permitted to assert the fifth amendment privilege in its own right. If the corporation is treated as an individual for the purpose of the equal protection clause of the fourteenth amendment, he argued, then it should be treated similarly for the purpose of the fifth amendment. The dissent also challenged the government’s right to infringe upon a constitutionally protected right simply because an organization does business in an area regulated by the government, and it further rejected the argument that the government

19. Id. at 69-70.
20. Id. at 74-75.
22. 201 U.S. 43, 85 (1906) (dissenting opinion).
23. Id. at 84-85.
obtains the right of visitation merely because of the interstate nature of a business.\(^{24}\)

*Hale v. Henkel* did not rule that an officer of a corporation could not avail himself of the privilege against self-incrimination when the documents in question tended to be personally incriminating. It was only because there was an immunity statute exempting Hale from further prosecution that he was forced to turn over the documents. In deciding whether a corporate officer could claim immunity under the fifth amendment on the ground that the corporate books he was asked to produce tended to be personally incriminating, a district court one year later ruled in *Ex parte Chapman*\(^{25}\) that if the records disclosed a criminal offense and revealed a petitioner's complicity in it, he was entitled to refuse to produce such records before the grand jury. Prior cases which had denied the privilege when a corporation was involved, were distinguished on the basis of the fact that Chapman was claiming a personal privilege, and was not merely exerting a privilege on behalf of the corporation. He would be personally incriminated if the books of the corporation were produced. In *Ex parte Chapman* the significant factor was, as it seems to have been in *Boyd*, the ease with which one could identify Chapman with the corporation. As the general manager since its inception, he conducted all the business of the corporation. All the corporation’s books, records, and papers were in his hands and had been kept under his direction. Thus, on the basis of the intimacy of the relationship and the personal identification of Chapman with the corporate activity, the court was not compelled to distinguish between his private records and the records of the corporation. The question of whether an officer of one of the increasing number of large and impersonal corporations\(^{26}\) could claim such a privilege as well had yet to be decided by a court.

\(^{24}\) *Id.* at 86.

\(^{25}\) 153 F. 371 (C.C.D. Idaho 1907).

\(^{26}\) The typical business unit of the 19th century was owned by individuals or small groups; was managed by them or their appointees; and was, in the main, limited in size by the personal wealth of the individuals in control. These units have been supplanted in ever greater measure by great aggregations in which tens and even hundreds of thousands of workers and property worth hundreds of millions of dollars, belonging to tens or even hundreds of thousands of individuals, are combined through the corporate mechanism into a single producing organization under unified control and management.

Four years later the Supreme Court dealt with the issue in *Wilson v. United States*. A subpoena was issued to a corporation of which Wilson was the president for the production of corporate books containing letters and telegrams signed by Wilson and allegedly relating to criminal violations on his part. The accused challenged the validity of the subpoena and asserted the right of an officer of a corporation to refuse to produce documents that tended to incriminate him. The Court reiterated its holding in *Hale v. Henkel* that corporations themselves do not have a fifth amendment privilege, but went on to decide that an officer of a corporation is protected by the fifth amendment only as it pertains to the production of his private books and papers. The privilege, the Court held, did not attach to books of the corporation in his possession, which by virtue of their character are held subject to the examination of the state.

The dissenting opinion referred back to the English common law, pointing out that the privilege applied when the possessor of the documents would be incriminated if forced to produce them. It therefore followed, according to the dissent, that the privilege should apply to Wilson as he was under indictment for two related offenses and would be personally incriminated. Justice McKenna, citing Dean Wigmore in support of his argument, noted that:

> [w]here the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant though nominally that of the corporation, its disclosures are virtually his own and to that extent his privilege protects him from producing them.

The *Wilson* Court did not have to invoke the visitorial power of the state over corporations to uphold the subpoena for the papers involved there. The decision in *Boyd* had explicitly stated that the privilege was a personal one, and this protected only private papers. Whereas the *Boyd* Court could assume that the papers of a family partnership were private papers, no such inference could be drawn in the *Wilson* case. Wilson was but one member of the Board of Directors of a large corporation. There

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27. 221 U.S. 361 (1911).
28. Id. at 387 (dissenting opinion).
29. Id. at 390 (dissenting opinion), quoting WIGMORE ON EVIDENCE § 2259 (1st ed. 1904).
30. Wilson was the president of the United Wireless Telegraph Company, which had issued $10,000,000 of common stock and $10,000,000 of preferred and participating stock.
did not exist as intimate a relationship between Wilson and the corporation as existed in the Boyd family partnership. The Court could have simply based its holding on the absence of a close personal identification between Wilson and the corporation. As a result of not employing this simpler Boyd analysis, the decision in Wilson had the effect of promulgating an inflexible rule which would act to deny corporate officers the privilege against self-incrimination under all circumstances, and would impose as well acceptance of visitation by the government as a cost of incorporating.

Two years after Wilson the Court decided Grant v. United States, a case which highlights the shortcomings of the Wilson analysis. Documents were subpoenaed from Grant, the attorney for a corporation which had only one shareholder. Grant claimed that since the shareholder had personal title to the corporation, and the subpoenaed records had a far more personal application to him than did those in the Wilson case to Wilson, the sole shareholder should be granted the privilege. The die had been cast, however, and the Court merely affirmed its decision in Wilson, holding that the privilege never applies to the records of a corporation, regardless of the circumstances. Thus under the Court’s holding, a person who is distinguished from a sole proprietor only by the fact that he chose to incorporate his business, is denied a basic constitutional right afforded to the sole proprietor. Had the Court used the Boyd rationale and focused on the close relationship between Grant and the corporation, it could have found that the fifth amendment privilege applied to Grant. Under such an analysis the determining factor would have been that the records, though corporate in title, were in reality the personal papers of the sole stockholder and therefore protected.

The inflexible rule arising out of Grant and Wilson was undoubtedly a result of the Court’s concern with the problem of how to effectively control the large corporations which had begun to appear in the early part of the twentieth century. The concept of a visitorial power of government over corporations provided a

The company had stations, as well as ships, equipped with the company’s apparatus on both the Atlantic and Pacific coasts. This information was obtained from Poor’s Manual of Industrials 1911, Second Annual Number.

31. 227 U.S. 74 (1913).
32. Id. at 79-80.
33. See note 26 supra. See also United States v. White, 322 U.S. 694, 700 (1944).
Partnership Documents

convenient vehicle for justifying the denial of the fifth amendment privilege to corporate officers. The fact that it applied to the smallest corporations as well as the largest was but a small price to pay for this effective method of controlling those corporations whose steady growth made their regulation a matter of national concern. Although Wilson heralded an era of increasingly restrictive application of the fifth amendment's protection as it applied to business documents, Boyd still retained its vitality in relation to partnerships.

B. Unincorporated Associations

The next major curtailment of the fifth amendment privilege came in United States v. White, which involved a subpoena to an officer of an unincorporated association—a labor union. The officer claimed the fifth amendment privilege on behalf of the union and for himself on the ground that the documents could personally incriminate him. The courts were unable to use the theory of visitorial power since that concept is logically limited to corporations. In granting the privilege the court of appeals reasoned that labor unions, unlike corporations, are not creatures of the state, and thus are not subject to the state's visitorial power. It considered the documents to be the private property of the union members, who, if they had wanted, could have chosen not to keep any records at all.

The Supreme Court disagreed. It reasoned that the denial of the fifth amendment privilege to corporations in Wilson was based on the inherent and necessary power of the federal government to enforce its laws, an interest which prevails regardless of the type of organization involved. Thus, although the Court was unable to apply the Wilson rationale, it found sufficient justification for denying the privilege in the public necessity for effective

34. The economic power in the hands of the few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed beyond the realm of private enterprise—they have become more nearly social institutions.

Berle & Means, supra note 26, at 46.


37. 137 F.2d 24 (3d Cir. 1943).

37.1. Id. at 26.

38. 322 U.S. 694, 700-01 (1944).
regulation of union activities. The Court then turned to the task of articulating a test for distinguishing between those non-corporate organizations which could invoke the fifth amendment privilege and those which could not. It reasoned that:

Conclusions on this are not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege could not be invoked on behalf of the organization or its representatives in their official capacity.

In determining whether the union of which White was an officer represented more than the private or personal interests of its members, the Court itemized the factors which made it appear that it was a separate legal entity: like a corporation, the union's existence was perpetual, and not dependent on the life of any member; it operated under its own constitution and engaged in a multitude of business acts which clearly were not the private undertakings of its members; and finally, numerous substantive rights were granted to labor unions as separate functioning structures, such as the right to maintain strikes and to use a trademark. The Court thus concluded that White could not claim the privilege on behalf of the labor union because of its scope and impersonality and that further, he could not invoke the privilege on his own behalf because the documents were official union documents held by him only in his capacity as a representative of the union.

White was completely precluded from the constitutional protection which the fifth amendment was intended to provide because what the Court presented as two possible ways of invoking the privilege was, in effect, only one. Since the Court held that the organization was impersonal, it logically followed that White could not have been holding the documents personally. He was a

39. Id. at 700.
40. Id. at 701.
41. Id. at 701-02.
42. Id. at 703.
representative acting in his official capacity. Only if White had been able to show that the records were not those of the organization, but his own private (intimate) papers would he have been protected from their compelled production.\(^2\)

The \textit{White} Court attempted to strike a balance between the need for effective law enforcement in relation to an increasingly large sphere of business activity and the constitutional protection of individual citizens. The test which the \textit{White} Court developed, however, is confounded by so many variables that lower courts have had great difficulty in applying it.\(^3\) The Court, for example, supplied no guidelines for determining whether an organization is impersonal. Is impersonality to be measured by the size of the association's operations, the number of its members or the ratio of time given to group as opposed to personal activities\(^4\) by the possessor of the required documents? Whether an organization embodies purely private or purely group interests was posited as a key factor in the test. Yet most organizations, in fact, combine private and group interest.\(^5\)

The Supreme Court dealt with cases involving unincorporated associations whose officers attempted to assert the fifth amendment privilege on their own behalf four more times after \textit{White}.\(^6\) The Court failed to apply the test it had formulated in \textit{White}, and merely assumed in each of the cases that an individual acts in a representative capacity when he holds the records of an unincorporated association. In each of the cases the Court failed to inquire into the particular characteristics of the association, and whether it was subject to the same kind of regulation and benefits to which the labor union involved in the \textit{White} case was subject. Thus, what the \textit{White} Court deemed of critical importance—the case by case determination of whether an association was so impersonal that it could not be said to embody the purely private or personal interests of its constituents\(^7\)—appears to have been replaced by a mechanical application of case law in

\footnotesize{\begin{itemize}
\item \textit{White}, at 704.
\item See text accompanying notes 50, 55, 56, 69 & 75 infra.
\item 322 U.S. at 705-06.
\item See text accompanying note 40 supra.
\end{itemize}}
the area. These decisions clearly indicated that, henceforth, it would be assumed that, like corporations, unincorporated associations did not embody the personal interests of their constituents and therefore, their officers could not invoke a personal privilege with regard to documents held in conjunction with the association.

C. Partnerships

In the case of partnerships, there did not seem to be such an assumption. The criteria for determining specifically when the privilege would apply to partnerships, however, had yet to be developed, and this produced serious uncertainty in the lower courts.\(^4\)

The Supreme Court did not deal with the issue of the applicability of the fifth amendment privilege to documents held by a partnership for a long while after the *Boyd* case. Thus it was a district court, in *In re Subpoena Duces Tecum*,\(^5\) which first attempted to set some guidelines in this area. The case involved a subpoena directed at a small family partnership of six. The government argued that partnerships should be treated like corpora-

\(^{48}\) Whether the *White* test applied to corporations was decided in the case of *In re Greenspan*, 187 F. Supp. 177 (S.D.N.Y. 1960). The I.R.S. had summoned the production of the books and records of a corporation which had only one stockholder. Respondent argued that the test for whether the fifth amendment privilege should apply was whether or not the corporation embodies and represents the purely personal and private interests of the individual. As the holder of all the stock of the corporation he believed he was entitled to claim the privilege. The court, however, refused to “question the obvious fact that business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs, and other types of organizations. . . .” Id. at 179. Thus, although here there was complete identification between the individual and the corporation, the court overlooked the *White* test entirely and simply fell back on the fact of the incorporation in order to deny the privilege. But see Application of Daniels, 140 F. Supp. 322 (S.D.N.Y. 1956) where the prosecutor attempted to obtain the books and records of a Panamanian corporation which had never done business in this country and whose president, the petitioner, was the sole stockholder of the corporation. The government contended that by their nature, corporate books could never be held in a personal capacity and that therefore, the fifth amendment could not be invoked. The court stated that but for the extraordinary circumstances of this case, it would have followed the *Wilson* precedent. The visitorial powers could not be invoked since the enterprise was not incorporated in this country and further, the argument that effective policing and regulating of business entities requires the state to be able to inspect books and records also could not be sustained, since the corporation was not doing business in this country. Thus, the court would not accept as an irrebuttable presumption the premise that corporate records are always held in an official capacity and concluded that the petitioner was holding the books in his personal capacity, and further that he was entitled to claim the privilege.

\(^{49}\) See note 43 *supra*.

\(^{50}\) 81 F. Supp. 418 (N.D. Cal. 1948).
tions because, by their very creation, the partners lose their exclusive rights to their property and papers. Further, the government argued, the increased economic power of a partnership made it clearly distinguishable from the enterprise of an individual. The court recognized the partnership's claim of privilege because the partners' joint ownership of their papers was no less personal than that of an individual. The court reasoned that if the partnership had been large and impersonal, it might have reached a different result. In cases involving a small family partnership such as the one before it, however, where the only purpose was to conduct the personal business of the partners and divide and share profits and losses for their mutual benefit, the court concluded that the White test was not fulfilled.

In re Subpoena Duces Tecum is important because it developed some guidelines for determining whether a particular partnership met the White test. In addition, it warned that partnerships, which since Boyd had been assumed to have a personal privilege, could no longer claim such a privilege merely as a result of being a partnership as opposed to a corporation or an unincorporated association. Partnerships too had to pass the scrutiny of the White test.

Using the White test, lower courts have had no trouble denying the privilege to large partnerships. In determining the applicability of a claim of personal privilege, the courts have looked to the personal identification of the partners with the business as evidenced by their everyday control over partnership deci-

51. Id. at 421.
51.1 Id.
52. See United States v. Brasley, 268 F. 59 (W.D. Pa. 1920) which, following Boyd, held that partnership documents were protected by the fifth amendment.
53. The test has also been applied to limited partnerships. In United States v. Silverstein, 314 F.2d 789 (2d Cir. 1963), the court considered the applicability of the privilege to limited partnerships. Appellant was subpoeased to produce certain records of five limited partnerships which shared the same office. In each of these partnerships there were three general partners, all of whom were related to each other, and between twenty-five and one hundred forty-seven limited partners. The business ran into millions of dollars. The court held that the partnership in this case could not be said to represent the purely private or personal interests necessary under the White test, despite the fact that the three general partners were of one family. In fact the court based its decision on the similarity between this type of organization and a corporation, comparing the limited partners to shareholders in a small corporation and the general partners to the officers. It reasoned that since the state grants the privilege of limited liability to limited partnerships as it does to corporations, it is entitled to a quid pro quo, i.e., the unfettered right of inspection of the business records.
In *In re Mal Brothers Contracting Company*, the Third Circuit held that where a partnership had all the characteristics of a corporate enterprise, the papers sought were purely business papers, and the partners did not know anything about the accounting and bookkeeping of the business, the privilege should be denied. The particular partnership employed approximately two hundred people and had an annual payroll in excess of one million dollars. The court not only considered the size and financial status of the business, but also whether the partners claiming the privilege had a close personal contact with the records that were being subpoenaed. As in *In re Subpoena Duces Tecum* (and seemingly in *Boyd*), the court looked to the identification the accused had with the documents rather than the size of the organization involved.

The six partnerships involved in *United States v. Cogan*, were small general partnerships, each of which would dissolve upon the death of any one of its partners. The district court, in holding that the partnership documents were protected by the fifth amendment, stated that:

Neither counsel's researches nor ours have disclosed a case where a general partnership—with its life measured by the survival and adherence of the partners, with property, management, responsibility and fiduciary duty all organized in the traditional way—has been held to be within the principles of *United States v. White*.

The court warned, however, that not every enterprise labeled a general partnership would have the privilege:

> [p]artnerships with scores or hundreds of members, where the relationship is not and cannot be face-to-face, where there is an inevitable measure of bureaucratization, of defined "office" apart from particular incumbents, of permanence, "institutionalization," and action by designated agents in "representative capacities" [might not be protected under the *White* test].

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55. 444 F.2d 615 (3d Cir. 1971).


57. *Id.* at 173.

58. *Id.* at 174.
Partnership Documents

Apparently, a high degree of impersonalization was thought to be needed under the White test before the privilege would be denied.

The Supreme Court dramatically limited the scope of the privilege by enunciating a new test in Bellis v. United States. In Bellis, the petitioner, who was being investigated for tax fraud, was served with a subpoena directing him to turn over all the records of a dissolved three-person partnership of which he had been a member. In addition to the three partners, the firm had six other employees: two other attorneys, three secretaries and a receptionist. Petitioner argued that in view of the modest size of the partnership, it was unrealistic to consider the firm more than an embodiment of the personal legal practice of the individual partners. He further reasoned that because he had a direct and substantive ownership interest in the partnership records, he did not hold them in a representative capacity. In effect, Bellis argued that since the partnership represented merely the private and personal interest of its constituents, on the basis of the White "impersonality" test his records should be protected. The Court rejected the White test, stating that it was ineffective in determining whether the privilege should apply in the broad range of cases. It did, however, use the White decision in another sense, citing it for the proposition that "individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges." Acknowledging that the distinction between individuals acting in a representative as opposed to personal capacity is only relevant in the context of "organized institutional activity," the Court went on to formulate a test to determine what that kind of activity encompasses:

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60. The court of appeals in Bellis, 483 F.2d 961 (3d Cir. 1973), had presaged this further curtailment of the privilege by denying the three-person Bellis partnership the protection of the fifth amendment on the basis of the White impersonality test. Although this represented the minority view of the courts, there was evidently a growing confusion as to the extent of the privilege with respect to small partnerships. It is this confusion which may have led the Supreme Court to abandon the White test and to formulate a test which could be more uniformly applied.

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65. Id. at 92-93.
The group must be relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity.

On the basis of these formulations, the Court found that, though small, the Bellis partnership did have an established institutional identity independent of the individual partners. It represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice. It had existed for fifteen years and state partnership law imposed on the firm a certain organizational structure. State law, it was noted, generally regards partnerships as distinct entities for numerous purposes—they may, for example, establish separate bank accounts and file separate partnership returns for federal tax purposes.

In determining whether Bellis held the partnership records in a representative capacity, the Court observed that the subpoenaed documents were merely the financial records of the partnership, which were held subject to the rights granted to the other partners by state partnership law. Under state law they are partnership property and the petitioner's interest in partnership property is a derivative interest subject to significant limitations. Therefore, as to Bellis personally, it was reasoned that he held the records in a representative capacity and could not therefore claim the privilege.

Thus the Court laid to rest an assumption which had persisted almost unchallenged since Boyd—that small partnerships were private affairs, carrying with them the individual protections guaranteed by the fifth amendment. The Court did leave open the question of how it would deal with a small family partnership or with a partnership involving some other preexisting relationship of confidentiality among the partners. Yet if the Court's own standards were applied, the question of whether these types of partnerships can invoke the protection of the fifth amendment appears to be foreclosed, for the effect of its ruling

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67. Id. at 101.
68. A recent Tax Court case, Harry Gordon, 63 T.C. No. 7 (Oct. 31, 1974), has applied the Bellis standard to a two-person family partnership. The Tax Court held that the records of a two-person family partnership were not the private records of the petitioner, but rather the business records of an organized partnership. The court found that the Derby Turf Club, an organized gambling establishment, possessed an even greater institu-
is to deny the privilege to all partnerships that are subject to
typical state partnership laws.\textsuperscript{69}

The Uniform Partnership Act, which forty-one states\textsuperscript{69,1} have
adopted, makes no distinction between a small family partner-
ship and a three-person partnership. State laws are not concerned
with the kind of partnerships involved, but whether a partnership
exists at all. Certainly, the Court's rationale as to why Bellis
could not invoke the privilege is equally applicable to the smallest
of family partnerships. Following the Court's reasoning, it would
not seem to be necessary even to have a formal partnership agree-
ment, for it is the mere fact of entering into a partnership which

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\textsuperscript{69.1} The following states have adopted the Uniform Partnership Act: Alaska, Ari-
seems to impose the requisite independent institutional identity. The factor of longevity which the Court also relied on to determine whether there is organized institutional activity—the Bellis partnership had been in existence for fifteen years—is equally applicable to the smallest of family partnerships. In addition, the partnership law that deprives Bellis of a direct ownership interest in the records, and leads the Court to conclude that he held them in a representative capacity, affects small family partnerships in the same manner.

Justice Douglas, dissenting, argued that Boyd should have controlled, not because it had resolved the issue that all partnership records were protected, but because it established the proposition that there is no constitutional distinction between a man’s private (individually held) records and private records kept in conjunction with a partnership. Justice Douglas further contended that the White test, which the Court had developed to determine whether organizational records were personal, was still valid and could be used effectively to prevent a further dilution of a basic constitutional right. Using this test, Douglas pointed out that none of the aspects of impersonal activity, which the White Court had seized upon in denying the privilege to the officer of the labor union, were present in the Bellis partnership. The Bellis partnership was structured so that it would have dissolved automatically upon the death of any member and so that any partner could have bound the entire partnership in the conduct of its affairs. Each partner individually was a co-owner of all property. Legal liabilities arising from property owned by the partnership extended to the partners individually if the common partnership assets were exhausted. In highlighting the section of the Uniform Partnership Act which treats a partnership as an aggregate of individuals and not as a separate entity, Justice Douglas also cast doubt on the majority’s conclusion that the partnership had an established institutional identity independent of its members, and that Bellis held the records in a representative capacity. In essence, Justice Douglas reasoned that this

72. The majority agreed that Boyd did not decide the issue presented in this case. Id. at 95 n.2. The difference is, however, that Justice Douglas disagrees insofar as the majority states that the Boyd Court completely disregarded the fact that these were partnership records.
73. Id. at 105.
74. Id. at 103.
The majority in *Bellis* based its decision almost exclusively on the fact that state partnership laws gave the *Bellis* partnership enough structure for it to be considered an independent entity. Because all partnerships are subject to the same type laws to which the *Bellis* partnership was subject, it is difficult to avoid the conclusion that partners no longer have a privilege with respect to their partnership records. The proposed resolution of Justice Douglas would have avoided this result. The *White* test, which was the Court's initial attempt at defining the parameters of *Boyd*, would have continued to serve the purpose of delineating which organizations could claim the privilege and which could not. Although the lower courts initially struggled in trying to apply it, they devised standards for determining whether the privilege should apply which were consistent with the rationale for protecting private records and documents.

*United States v. Slutsky,* a 1972 district court case, is a good example of how viable the test can be. The partnership claiming the privilege there consisted of two brothers who operated a resort known as the Nevele Country Club. It had a payroll of one million dollars and four million dollars in gross receipts. The partners lived on the resort premises and personally managed it full-time. The two partners and their two sons were the only persons authorized to draw checks on the partnership. The government argued that the nature of the partnership in size, scope and impersonality warranted treating it as a corporation.

The court, applying the *White* test, disagreed, citing the fact that the partners gave their personal attention to the day-to-day business activities of the partnership; that all four persons who could draw checks lived on the resort premises; and that they were familiar with the firm's accounting and bookkeeping because they had only one full-time accountant and bookkeeper. The court concluded that, despite the size of its business, this partnership was not in the nature of a corporate entity. It contrasted the facts of this case, in which the partners gave their full

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attention to the day-to-day business activities of the partnership, with the facts in *In re Mal Brothers Contracting Company*, in which the partners were not involved personally in either the accounting or engineering part of the business.\textsuperscript{76} The court thus quashed the subpoena because the records sought were not "merely impassive and impersonal records of business events transacted between the firm and those with whom it dealt."\textsuperscript{77} They were personal within the meaning of *Boyd* and thus fell inside the ambit of the fifth amendment privilege.

The district court in *United States v. Slutsky*\textsuperscript{78} analyzed the actual relationship that existed between the partners and the documents to determine whether they were private records held in a personal capacity. Such a case by case examination of the relationship between the ownership group and the documents is necessary to be consistent with the origins and the purpose of the fifth amendment. In contrast, the *Bellis* analysis focused on state partnership laws to determine whether there was organized institutional activity, rather than on the reality and the details of the everyday functioning of the partnership. The issue of whether the records were in fact private was completely obfuscated. If the standards propounded in *Bellis* are followed, the death knell for partners claiming the privilege with respect to partnership records and documents will have been sounded.

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\textsuperscript{76} Id. at 1107-08.  
\textsuperscript{77} Id. at 1108.  
\textsuperscript{78} 352 F. Supp. 1105 (S.D.N.Y. 1972).