

The Arrival of Justice Gorsuch May Bring Opportunity to Reform the Collective Entity Doctrine

By Preston Burton, Bree Murphy
and Leslie Meredith

A little over 100 years ago, the Supreme Court declined to extend the Fifth Amendment privilege against self-incrimination to corporations responding to grand jury subpoenas for documents, establishing what has been termed the “collective entity doctrine.” *Hale v. Henkel*, 201 U.S. 43, 74-76 (1906) (corporate officer, who had been immunized in his individual capacity, attempted to assert Fifth Amendment right on behalf of his employer). Some Justices have expressed discomfort with the application of the collective entity doctrine to small corporations responding to grand jury subpoenas, and recent decisions by the Court have extended First Amendment rights to corporations that had previously been limited to individuals. These developments suggest that the Court, particularly with the arrival of Justice Neil M. Gorsuch, might be receptive to reconsidering the scope of the collective entity doctrine, a rule whose principal virtue seems to be that it is a bright-line, particularly in the context of small, closely-held corporations.

THE COLLECTIVE ENTITY DOCTRINE

From its inception, the collective entity doctrine has been premised on

Preston Burton is a partner, **Bree Murphy** is counsel and **Leslie Meredith** is an associate at Buckley Sandler. The authors wish to thank **Tariq El Baba** and the firm’s white-collar practice group for their assistance with this article.

two considerations: first, the notion that only natural persons can “testify” within the meaning of the Fifth Amendment’s self-incrimination privilege; and second, the fear that prosecuting corporations or other artificial entities would be all but impossible if they could claim the privilege in response to document subpoenas. See *Wilson v. United States*, 221 U.S. 361, 383-84 (1911); *Hale v. Henkel*, 201 U.S. 43, 74 (1906). Over the course of the 20th century, the Court expanded the doctrine, first by holding that corporate officers cannot invoke their personal self-incrimination privilege to avoid turning over corporate documents in their possession. *Wilson*, 221 U.S. at 379-80.

The Court subsequently held that the doctrine applied to other types of organizations, such as labor unions (*United States v. White*, 322 U.S. 694, 698-705 (1944)); partnerships (*Bellis v. United States*, 417 U.S. 85, 101 (1974)); and political parties (*Rogers v. United States*, 340 U.S. 367, 371-72 (1951)). In *Bellis*, for example, the Court invoked the collective entity doctrine to deny a custodian’s ability to assert Fifth Amendment rights even where the entity was extremely small (or even defunct) and the records sought were in the possession of a former partner, rejecting the argument that in such scenarios, it is unrealistic to separate the individual from the entity. See *Bellis*, 417 U.S. at 94-95.

As discussed in greater detail below, after the Court decided *Fisher v. United States*, 425 U.S. 391, 410-411 (1976) — which articulated, but declined to

apply, the act-of-production doctrine and affirmed the non-testimonial nature of pre-existing business records — the rationales underlying the collective entity doctrine have been called into question. (The act-of-production doctrine recognizes that the physical act of turning over responsive documents may itself have testimonial qualities.) In particular, tension has arisen between the bright-line rule and its capacity to impact the Fifth Amendment rights of individuals associated with closely held entities.

In *Doe v. United States*, 465 U.S. 605, 612-14 (1984) (*Doe I*), the Court recognized that a sole proprietor could invoke the act-of-production doctrine, deferring to the district court’s finding that producing records, in the context of a sole proprietorship, did raise colorable self-incrimination concerns. This decision recognized that individuals can be so closely associated with entities that the natural person/artificial entity distinction drawn by the collective entity doctrine, if applied to a sole proprietorship, would deprive the respondent of his Fifth Amendment rights. In doing so, the Court left intact the rule articulated a decade earlier in *Bellis* that rejected the ability of a former partner of a defunct three-partner law firm to assert a Fifth Amendment privilege in responding to a subpoena for the firm’s records, despite leaving open the question of whether the rule could apply to “small family partnerships.” See *Bellis*, 417 U.S. at 101.

Shortly after arguing *Doe I* on behalf of the government, now-Justice Samuel A. Alito, Jr., recognized this practical

shortcoming in a law review article, observing that the Court “has experienced great difficulty in articulating a durable rationale” for the collective entity doctrine. Samuel A. Alito, Jr., Documents and the Privilege Against Self-Incrimination, 48 *U. Pitt. L. Rev.* 27, 65-66 (1986).

The last time the collective entity doctrine was squarely before the Court, a 5-4 majority held that custodians of even small, closely held corporations “may not resist a subpoena for corporate records on Fifth Amendment grounds.” *Braswell v. United States*, 487 U.S. 99, 109 (1988). Justice Anthony Kennedy dissented, arguing that “the so-called collective entity rule” should not prevent corporate custodians from invoking their Fifth Amendment privilege to protect them individually from the incriminating effect of producing documents on behalf of the entity. *Id.* at 121. While the majority distinguished *Doe I* based on the fact that that case involved a sole proprietorship, not a closely held corporation, Justice Kennedy rejected this as a technicality, stating “the nature of the entity is irrelevant to determining whether there is ground for the privilege.” *Id.*

Justice Kennedy expressed concern that the individual custodian could be incriminated in his or her individual capacity as a result of having to produce documents on behalf of an entity and noted that even the government acknowledged that there are testimonial aspects “implicit in the act of production.” *Id.* at 125. He pointed out that in *Curcio v. United States*, 354 U.S. 118 (1957), the Court held that a labor union official could not be required to testify about the whereabouts of records that were not produced in response to a grand jury subpoena — deeming that sort of compelled testimony to cross the line and implicate the custodian’s individual Fifth Amendment rights. See *Braswell*, at 125-26.

For Justice Kennedy, *Doe I* protected the testimonial aspects of the custodian’s physical act of collecting and producing records just as much as *Curcio* protected the custodian’s actual testimony. *Id.* He dismissed fears about the purported interference with government

investigations that would result from recognizing a Fifth Amendment privilege for corporate custodians who are individual targets of such investigations, observing that “the text of the Fifth Amendment does not authorize exceptions premised on such rationales.” *Id.* at 129. He noted that the ability to assert the privilege would not exist in all cases (such as where the existence of the sought records is a foregone conclusion) and that the government could immunize the custodian’s act of production, limiting the supposed calamities that would ensue to their impact on just one individual.

More recently, in his concurring opinion in *United States v. Hubbell*, 530 U.S. 27 (2000), clarifying the scope of the permissible derivative use of materials and information provided by an individual who has been given act-of-production-immunity, Justice Thomas, joined by Justice Scalia, questioned Fisher’s limitation of Fifth Amendment privilege to only the act of producing documents as opposed to the incriminating effect of the contents of the records, inviting an opportunity in a future case to “reconsider the scope and meaning of the Self-Incrimination privilege.” *Hubbell*, 530 U.S. at 55-56 (signaling a willingness to return to the more expansive protections articulated in *Boyd v. United States*, 116 U.S. 616 (1886)).

CITIZENS UNITED AND HOBBY LOBBY

In contrast to the “natural person” versus “artificial entity” distinction undergirding the collective entity doctrine, two recent decisions in the First Amendment context have expanded the concept of corporate personhood and extended certain constitutional rights to entities. In both decisions, *Citizens United v. FEC* 552 U.S. 1278 (2010), and *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014), the Court focused on the impact that limiting corporations’ rights would have on the individuals who animate the corporations.

In *Citizens United*, the Court invalidated campaign finance laws that restricted nonprofit corporations from spending money to support political

candidates. Justice Kennedy’s majority opinion, joined by the Chief Justice and Justices Scalia, Thomas and Alito, was premised on the belief that the First Amendment protects associations of speakers, not just individual speakers. Therefore, limiting a corporation’s ability to spend money restricts the speech of the individuals who formed it. In *Hobby Lobby*, the Court ruled that closely held corporations could not be compelled to provide certain forms of contraception as part of their health plans due to the entities’ owners’ religious objections. Justice Alito’s majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy, held that because corporations protect individuals “associated with a corporation,” even for-profit corporations can assert free exercise rights to protect “religious beliefs.” The Court observed that “a corporation is simply a form of organization used by human beings to achieve desired ends,” and without human beings a corporation “cannot do anything at all.” *Hobby Lobby*, 134 S. Ct. at 2768.

On its way to the Supreme Court, the *Hobby Lobby* case passed through the U.S. Court of Appeals for the Tenth Circuit, where then-Judge Gorsuch joined the majority opinion that reached the same result as the Supreme Court. Judge Gorsuch wrote a separate concurrence foreshadowing the Supreme Court’s concern about the impact on the family that formed Hobby Lobby, lamenting that they were confronted with “a choice between exercising their faith or saving their business.” *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring).

Concerns about restriction of individuals’ rights via limitations on corporations through which they act drove the majority decisions in *Citizens United* and *Hobby Lobby*. These recent decisions suggest a meaningful opportunity to revisit the meaning of the Fifth Amendment privilege in the context of the impact on individuals operating small business entities responding to government subpoenas compelling production of their records. *Accord* Ramzi Abadou, “High

Court May Take on Corporate 5th Amendment Privilege” March 25, 2015, available at www.law360.com. The collective entity doctrine forces these individuals, particularly in a small corporation setting, to effectively forfeit their Fifth Amendment privilege under a fiction, exposed by Justice Kennedy in *Braswell*, that their actions are not testimonial or that they have somehow forfeited their Fifth Amendment rights through electing to conduct their business affairs via an entity, even where some of the impacted individuals may not have had any role in choosing such a business structure.

THE ROAD AHEAD

The collective entity doctrine requires corporations under investigation to offer up employees as custodial witnesses on behalf of the company and turn over their business phones, computers, and emails. The modern business records at issue are not just the sort of dry tax and foregone financial records at issue in the seminal collective entity doctrine cases. These types of records are often much more intimate records of individual employees' thoughts and communications, which can then be used against them individually. The testimonial effect of the production of these types of records by individual custodians in small business settings was precisely the concern identified by Justice Kennedy in his dissent in *Braswell*. (Beyond impacting employees, companies themselves are compelled to speak, too.)

The level of cooperation companies are now expected to display goes far beyond simply locating particular responsive documents. Today, companies are expected to conduct an internal investigation of the purported violation, turn over the results and serve up their employees as witnesses. Today's subpoenas are usually quite broad and force corporations to make extensive use of their custodians' personal knowledge in order to comply. The subpoena characterized in *Hale v. Henkel* as potentially too expansive would seem narrow and targeted by today's standards. See *Hale v. Henkel*, 201 U.S. at 79.)

Notably, Justice Kennedy is the sole remaining member of the Court that decided *Braswell*. He wrote the majority opinion in *Citizens United* and joined the majority in *Hobby Lobby*. His former law clerk, now-Justice Gorsuch, expressed his willingness to extend at least some heretofore individual constitutional rights to entities in his concurrence in *Hobby Lobby*. As such, the opportunity to revisit the blanket application of the collective entity doctrine seems timely.

Even assuming that the potential impact on the government's ability to investigate white-collar crime or regulatory violations is a valid consideration for the Court — a point disputed by Justice Kennedy in *Braswell* — the purported damage from limiting the collective entity doctrine seems unlikely to materialize for a number of reasons. As articulated in Justice Kennedy's dissent in *Braswell*, many corporations would not be able to assert a Fifth Amendment right under the foregone conclusion analysis described in *Fisher* and *Hubbell*, and the required records doctrine. See *Braswell* 487 U.S. at 121; *Schapiro v. United States*, 335 U.S. 1 (1948) (required records doctrine).

Additionally, many large and highly regulated corporations may be less likely to exercise an available Fifth Amendment privilege because of public relations or other business concerns, such as fear of losing government contracts; or, for large companies, the ability to have a disinterested custodian provide company records without impacting testimonial rights of potential targets arising from the act of production. However, for small and closely held companies or entities, granting the ability to assert an act-of-production or even, as Justice Thomas intimated, to potentially articulate a broader Fifth Amendment claim regarding the content of records, would have a significant effect on individuals affected by the act of responding to corporate subpoenas.

But even in those situations, as Justice Kennedy noted, the government enjoys the unique power to immunize custodians. *Braswell*, 487 U.S. at 129.

And, in appropriate cases, the government would only need to meet the very low probable cause standard to obtain a search warrant to obtain corporate records. The occasional frustration of the government's ability to proceed via subpoena seems a small price to pay for recognizing and protecting the constitutional rights of the affected individual employees or owners of the entities, particularly small entities where the testimonial aspects of producing records on behalf of the entity clearly implicate the individual's self-incrimination privilege.

CONCLUSION

In sum, recognizing a Fifth Amendment privilege for corporations — whether through wholesale abolition of the collective entity doctrine or by recognizing some limited exception for custodians of smaller corporations — would not foreclose meaningful white collar prosecutions, but it would restore protection of the Fifth Amendment rights of individuals that are sacrificed under the current bright-line rule. Given the lingering criticism of the rule's rationales and the Court's recent willingness to recognize First Amendment rights of corporations in order to protect the rights of individuals associated with the corporations, Justice Gorsuch's arrival on the Court may present a meaningful opportunity to revisit this doctrine.

