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Judge Jackson and the Act-of-Production Doctrine

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On Feb. 25, 2022, President Biden nominated Judge Ketanji Brown Jackson of the U.S. Court of Appeals for the D.C. Circuit to succeed Justice Stephen Breyer upon his retirement. Judge Jackson's nomination to become the 116th associate justice is historic not just because, if confirmed, she will be the first black woman to serve on the Supreme Court, but also because she is the first nominee with prior experience as a public defender.

Upon their respective nominations, this column reviewed Circuit Court opinions authored by then-future Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to gauge how each might approach criminal tax cases that come before the court. Most Supreme Court commentators agree that Judge Jackson's approximately 500 judicial opinions suggest she will be a reliable liberal vote to replace her former boss, Justice Breyer, for whom she clerked during the 1998-1999 term. Her judicial record, however, provides scant evidence regarding how she will approach cases that might affect tax practitioners: Judge Jackson did not author any substantive opinions on criminal tax matters in her eight years as a district court judge and she has not sat on any panels that decided criminal tax cases in her brief tenure on the D.C. Circuit.

In public filings associated with her nomination, however, Judge Jackson cited her representation of a former lawyer convicted of tax charges as one of the noteworthy matters she has worked on during her career. In *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006), Judge Jackson succeeded in persuading the court to vacate the conviction of Navron Ponds based on the government's improper use of documents obtained pursuant to a grant of act-of-production immunity. Although Judge Jackson's advocacy in *Ponds* does not necessarily foreshadow where she will land on cases that will come before the nation's highest court, her thoughtful approach to the complex constitutional issues presented in *Ponds* supports the view that criminal defendants of all stripes should welcome her appointment.

The Act-of-Production Doctrine

The Fifth Amendment provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." Under Supreme Court jurisprudence, this privilege against self-incrimination protects against compelled testimony; it does not proscribe the compelled production of every sort of evidence. In *Fisher v. United States*, 425 U.S. 391 (1976), the court held that "the Fifth Amendment would not be violated by the fact alone that [documents produced in response to a subpoena] on their face might [be incriminating], for the privilege protects a person only against being incriminated by his own compelled testimonial communications." The court recognized, however, that aside from the contents of the produced documents, compliance with a subpoena contains communicative aspects, such as confirmation of the existence, authenticity, and posses-

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sion of documents, and a determination that the documents are responsive to the subpoena. In *Fisher*, the court concluded that the act of producing documents was not sufficiently testimonial to trigger the Fifth Amendment because the existence and location of the records were a "foregone conclusion," and their production added little to the sum total of the government's information.

Following *Fisher*, courts have focused on whether the particular act of production was "testimonial" in light of what the government knew about the documents prior to issuing the subpoena. Thus, *in United States v. Hubbell*, 530 U.S. 27 (2000), *t*he court held that the act of producing over 13,000 documents in response to a broad subpoena was sufficiently testimonial to implicate the Fifth Amendment because "the collection and production of the materials demanded [by the subpoena] was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." In an 8-1 decision, the court rejected the government's "foregone conclusion" assertion and distinguished *Fisher*, noting that the prosecution team in *Hubbell* had not shown that it had any prior knowledge of either the existence or whereabouts of the documents ultimately produced. Chief Justice Rehnquist, the lone dissenter, argued that regardless of whether the government was aware of Hubbell's possession of the subpoenaed records, there would be no improper use of the immunized act-of-production as long as the prosecutor could make use of the information contained in the documents without any reference to the fact that the defendant had produced them in response to a subpoena—that is, beyond what the prosecutor would receive if the documents appeared in his office "like manna from heaven." Notably, the *Hubbell* majority explicitly rejected this "manna from heaven" view of the act-of-production doctrine.

'Ponds'

Navron Ponds was a criminal defense attorney who had represented a drug dealer named Jerome Harris. In connection with that representation, Harris' mother transferred a Mercedes Benz 500SL to Ponds as an in-kind payment for his services. At Harris' sentencing, the district court inquired about the Mercedes for forfeiture purposes, and Ponds concealed his possession of the car. Harris subsequently cooperated with the government and disclosed that Ponds had received the car in payment of his fees. In the course of an ensuing grand jury investigation, prosecutors issued a *subpoena duces tecum* requiring Ponds to produce documents as well as the Mercedes itself.

When Ponds relayed his intent to invoke the Fifth Amendment, the government limited the scope of the subpoena, primarily to records relating to his use of the Mercedes and financial relationship with Harris. After the government obtained an order granting him act-of-production immunity under 18 U.S.C. §6002, Ponds appeared before the grand jury and produced approximately 300 pages of documents, including records showing that the Mercedes was registered in the name of his sister.

Following Ponds' grand jury testimony, the government continued its investigation based on evidence developed through materials provided by Ponds. Ultimately, the government executed search warrants at Ponds' home and office, seizing documents and material that were used to secure an indictment charging Ponds with tax and wire fraud offenses. Pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), Ponds moved to dismiss the indictment unless the government could "demonstrate that the charges in this matter and the evidence it proposes to use … at trial [did] not derive directly or indirectly from [his] immunized testimony and production of documents."

The district court denied the *Kastigar* motion, concluding that *Hubbell* drew a sharp distinction between the testimony inherent in the act of producing documents and the contents of the documents themselves. It concluded that the government would not have violated Ponds' immunity even if it had used the contents of the documents, unless the defense could establish that the government used some testimonial aspect of the production of those materials to obtain subsequent search warrants or subpoenas. Thus, the

district court proceeded under the belief that Fifth Amendment protection only applied to the tacit communications about the existence, possession, and authenticity of the documents, and that Ponds was not entitled to relief because the government did not use the information in that manner.

Proceedings Before the D.C. Circuit

Following his conviction and sentence to 20 months in prison, Ponds appealed to the U.S. Court of Appeals for the D.C. Circuit. His appeal was assigned to Judge Jackson who had recently joined the appellate unit of the D.C. Federal Public Defender's office following her clerkships, stints in private practice, and government service as assistant special counsel to the United States Sentencing Commission.

In her briefs, Judge Jackson methodically examined the relevant Supreme Court decisions on the act-of-production doctrine, demonstrating that the district court had misapplied *Hubbell*, and was effectively returning to the repudiated "manna from heaven" rationale by focusing on the prosecution's use of the documents. She argued—and the D.C. Circuit agreed—that once a defendant's compelled production discloses sources of information that were previously unknown, the government is foreclosed from employing those documents completely. As Judge Jackson wrote in Ponds' opening brief: "Simply stated, the district court's preoccupation with assessing the extent to which the government used the testimony inherent in Mr. Ponds' act of production, as opposed to the contents of Mr. Ponds' documents, is based on a misunderstanding of *Hubbell* because *Hubbell* establishes that the use of one's mind to identify, assemble, and produce documents called for in a subpoena is 'testimonial,' and if it is only by virtue of that testimonial act that the government is alerted to the existence and location of the sources of information produced, then the government's subsequent use of the documents themselves is derivative of the testimony inherent in producing them, and therefore prohibited."

In an opinion authored by Judge Judith Rogers, the D.C. Circuit noted that the government "cannot make an end-run around the Fifth Amendment by fishing for a document that will answer a question for which it could not demand an answer in oral examination." It agreed with Ponds that "[w]hen the government does not have reasonably particular knowledge of the existence or location of a document, and the existence or location of the document is communicated through immunized testimony, the contents of the document are derived from that immunized testimony, and therefore are off-limits to the government." The panel held that prosecutors violated their immunity agreement with Ponds and vacated Ponds' conviction. On remand, Ponds pleaded guilty to a lesser tax charge and was sentenced to a term of probation.

Conclusion

In a written response to the Senate Judiciary Committee in connection with her nomination to the D.C. Circuit, Judge Jackson conveyed that she had wanted to have experience as a public defender because she "decided that serving in the trenches, so to speak, would be helpful." At 51 years of age, Judge Jackson will no doubt have a consequential impact on the development of the law and in particular on issues concerning criminal defendants, including defendants in criminal tax cases. Her future influence on criminal law and procedure might owe in some respects to her "helpful" experience representing indigent defendants. Although attempting to draw too much from such a limited sampling of information is often counter-productive, there can be no doubt from reading Justice Jackson's effective written advocacy that criminal defendants will benefit from the distinctive experience she will bring to the Supreme Court.

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