# THE FIFTH AMENDMENT ACT OF PRODUCTION DOCTRINE AND THE COLLECTIVE ENTITY RULE

## A Primer

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The Fifth Amendment act of production doctrine originated with tax return workpapers and traditional business records, i.e., paper documents. Today, it is seen more frequently in connection with cell phones and other electronic devices. The collective entity rule (or doctrine) limits the scope of the protections that the act of production doctrine affords.

Grand jury subpoenas duces tecum and IRS summonses are the classic vehicles for framing act of production issues. A motion to quash under Rule 17(c)(2), Fed. R. Crim. P., remains the standard procedural mechanism for attacking a grand jury subpoena. If that is unsuccessful, however, the subpoena recipient must resist production and be held in contempt to take an immediate appeal. (United States v. Ryan, 402 U.S. 530, 532 (1971).) As for IRS summonses, the procedure is to appeal from the district court's enforcement order; a finding of contempt is not necessary. (*See* Church of Scientology v. United States, 506 U.S. 9 (1992).)

The government can avoid act of production hurdles at the grand jury stage by obtaining an order of immunity for the act of production under 18 U.S.C. §§ 6002–6003. If the case proceeds to indictment, however, a motion to dismiss under *Kastigar v. United States* becomes imperative. (406 U.S. 441 (1972).) At a *Kastigar* hearing, the government bears the "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." (*Id.* at 460.) As will be seen, this is an extremely high, if not insuperable, burden for the government to overcome.

More recently, and particularly with respect to electronic devices, the government has had some success working around the act of production doctrine by executing search warrants for the subject devices and then obtaining an order under the All Writs Act (28 U.S.C. § 1651) compelling the owner to "decrypt" them (assuming that they are encrypted to begin with). Attacking such an order entails a very fact-bound analysis of the overall circumstances, however, because decryption by itself would normally be considered a testimonial act protected by the Fifth Amendment.

The act of production doctrine applies only to individuals, but under the collective entity doctrine, it does not apply to individuals subpoenaed or summoned in a representative capacity. However, there is a circuit split as to whether *former* employees or agents of an organization are subject to the collective entity doctrine, which the article also will address.

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### ORIGINS AND CONTOURS OF THE ACT OF PRODUCTION DOCTRINE

The act of production doctrine (sometimes referred to as the act of production "privilege") is a creature of the Fifth Amendment's privilege against self-incrimination. It applies to the compelled production of documents and other "things" by an individual, acting solely in an individual (nonrepresentative) capacity (with a qualification as to former employees of an entity).

The doctrine originated with the Supreme Court's 1976 decision in *Fisher v. United States.* (425 U.S. 391 (1976) (White, J.).) Its contours are largely defined by the Court's contrasting decisions in *Fisher* and *Hubbell*, decided 24 years later. (United States v. Hubbell, 530 U.S. 27 (2000) (Stevens, J.).)

The doctrine hinges on the concept that while the *contents* of preexisting documents are never subject to a claim of Fifth Amendment privilege (because their creation was not "compelled") (*see* United States v. Doe, 465 U.S. 605, 611–12 & n.10 (1984)), the compelled *act* of producing documents or other things in response to a grand jury subpoena or other compulsory process itself can be testimonial on the facts of a given case. This is because the recipient of the subpoena would be effectively testifying to the existence, his or her possession, and the authenticity of the documents or other materials that the subpoena calls for. (*See Hubbell*, 530 U.S. at 36.) The *Hubbell* Court likened a testimonial act of production to answering interrogatories. (*Id.* at 43.)

Depending on where the facts of a given case fall on the continuum between *Fisher* and *Hubbell*, the act of production is not always "testimonial" (and thus protected by a claim of Fifth Amendment privilege). The issue boils down to whether the existence of the documents in question (and the respondent's possession of them) was a "foregone conclusion" at the time of the subpoena's issuance, such that the respondent would merely be "surrendering" them as opposed to providing "testimony." This is referred to as the foregone conclusion doctrine.

In *Fisher*, the IRS was conducting tax examinations of two different individuals in two different districts and served civil summonses on their respective law firms for the workpapers of the taxpayers' accountants, which the taxpayers had provided to the lawyers representing them in the tax examinations. (*Fisher*, 425 U.S. at 394.) In each instance, the IRS knew that the lawyers had possession of the workpapers, such that the existence and location of the papers were a "foregone conclusion." (*Id.* at 411.) The taxpayers, by producing the papers through their lawyers, were not "testifying" about their existence or authenticity in any sense but were merely "surrendering" them. (*See id.*) Stated another way, the government was not using the contents of the taxpayers' minds against them, such that there was no Fifth Amendment privilege attached to the production of their documents. (*Cf. Hubbell*, 530 U.S. at 43.) Consequently, the Court ordered enforcement of the summonses.

*Hubbell* arose out of the so-called Whitewater investigation and ensuing prosecutions, led by Independent Counsel Ken Starr. Webb Hubbell (the former associate attorney general under President Clinton) was already serving a federal sentence for mail fraud and tax evasion when the Office of Independent Counsel served him with a grand jury subpoena duces tecum calling for the production of 11 categories of documents. (*Id.* at 30–31. The "rider" to the subpoena with the document descriptions is included as an appendix to the Court's opinion.) After receiving an order of formal immunity under 18 U.S.C. §§ 6002–6003 for the act of production, Hubbell produced over 13,000 pages of documents in response to the subpoena, which ultimately resulted in a new and unrelated prosecution for various tax-related crimes, mail fraud, and wire fraud. (*Id.* at 31–32.) The immunity order, however, turned out to be the government's downfall.

Before trial, the district court granted Hubbell's motion to dismiss under *Kastigar v. United States* (406 U.S. 441 (1972)), finding that his prosecution had resulted from an unconstitutional "derivative use" of Hubbell's act of producing the documents in response to the grand jury subpoena under the statutory immunity order he had received. (*Hubbell*, 530 U.S. at 31–32.) On appeal, the DC Circuit initially vacated and remanded the case. The court held that the district court had applied the wrong standard and that the Independent Counsel should have had the opportunity to demonstrate "with reasonable particularity" his prior awareness that the "exhaustive litany" of documents sought in the subpoena existed and were in Hubbell's possession on the day the subpoena issued. (*Id.* at 32–33.)

On remand, however, the independent counsel acknowledged that he could not satisfy the "reasonable particularity" standard that the DC Circuit had prescribed, and the parties entered into a conditional plea agreement that was contingent upon the Supreme Court's disposition of the case. The Court granted certiorari "to determine the precise scope of a grant of immunity with respect to the production of documents." (*Id.* at 33–34.)

Writing for the Court, Justice Stevens accepted the district court's characterization of the subpoena as a "fishing expedition," with the government unable to show that the existence of the subpoenaed materials and their whereabouts were a "foregone conclusion" at the time of the subpoena's issuance. (*Id.* at 32, 42, 44–45.) As Justice Stevens put it, "[Hubbell's] assembly of [the documents responsive to the subpoena] was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." (*Id.* at 43.) "It was unquestionably necessary for [Hubbell] to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena," which made his act of production testimonial. (*Id.*)

The Court specifically rejected the independent counsel's argument that Hubbell's act of producing ordinary business records was insufficiently "testimonial" because the existence and possession of such records by any businessman are a foregone conclusion under *Fisher*. According to Justice Stevens, this argument misread *Fisher*. (*Id.* at 44.)

Because the government could not meet its heavy burden under 18 U.S.C. § 6002 (as construed in *Kastigar*) of showing that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources "wholly independent" of the testimonial aspects of Hubbell's immunized act of production, the Court dismissed the indictment. (*Id.* at 45–46.)

Broadly stated, then, *Hubbell* stands for the proposition that the government cannot prosecute an individual based on evidence obtained by means of a "fishing expedition" subpoena duces tecum, even when (or, in view of *Kastigar*, especially when) the individual's act of production has been fully immunized. Both the existence of the documents and the respondent's possession of them must be a foregone conclusion.

## THE ACT OF PRODUCTION DOCTRINE IN PRACTICE

There is not a great deal of reported federal appellate case law applying *Hubbell*, but there are four decisions in particular that illustrate how problematic the foregone conclusion requirement can be for the government.

In *In re Grand Jury Subpoena, Dated April 18, 2003*, the Ninth Circuit reversed the district court's order holding the respondent in contempt for failing to produce all documents in his possession "relating to the production or sale of Dynamic Random Access Memory (DRAM) components, including but not limited to, handwritten notes, calendars, diaries, daybooks, appointment calendars, or notepads, or any similar documents." (383 F.3d 905, 908 (9th Cir. 2004).) The respondent had filed a motion to quash the

subpoena and appealed from the district court's order holding him in contempt for failure to comply with it. (*Id.* at 908–09.)

Quoting *Hubbell*, Judge Canby concluded that responding to 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." And quoting from the DC Circuit's decision that the *Hubbell* Court affirmed, he observed that it is the "quantum of information possessed by the government before it issues the relevant subpoena" that is central to the foregone conclusion inquiry, and at the time the government served the subpoena at issue on the respondent, it had no reason to believe that he possessed the "myriad of documents" it sought. (*Id.* at 911.)

In *United States v. Ponds*, the defendant-lawyer had full statutory use immunity before his indictment on multiple charges, and he both produced documents in response to a grand jury subpoena and testified about them before the grand jury. (454 F.3d 313 (D.C. Cir. 2006).) At trial, he was convicted on all counts and appealed on the grounds that the government had made improper derivative use of his documents and testimony in preparing its case against him, which the government actually conceded "to some extent." The DC Circuit thus reversed Ponds's convictions and remanded the case to the district court to determine whether the government's impermissible use of the immunized evidence was harmless beyond a reasonable doubt. (*Id.* at 329.) Central to the court's analysis was its finding that the government had failed to establish its previous knowledge of the existence or location of most of the documents subpoenaed from Ponds. (*See id.* at 324–25.)

Writing for the court, Judge Rogers observed at the outset of her opinion that the case required the court to "address the breadth of that immunity for an act of production that, in its testimonial character, falls somewhere between the response to a fishing expedition addressed in [*Hubbell*], and the production of documents whose existence was a 'foregone conclusion' in [*Fisher*]." (*Id.* at 316.) This succinctly frames the defense lawyer's goal in an act of production challenge, i.e., falling closer to the "fishing expedition" end of the *Fisher-Hubbell* spectrum.

In *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, the Eleventh Circuit reversed the district court's order holding the respondent in civil contempt for refusing to decrypt and produce the unencrypted contents on the hard drives of his laptop computers and five external hard drives in response to a grand jury subpoena duces tecum. (670 F.3d 1335 (11th Cir. 2012) (Tjoflat, J.).) The government had reason to believe that the hard drives contained child pornography.

One wrinkle in this case is that the government obtained an order of immunity for the act of production under 18 U.S.C. §§ 6002–6003 *but* carved out the standard prohibition against derivative use. (*See id.* at 1338.) In addition to holding that the decryption and decoding of the hard drives' contents would be testimonial, the court also held that the immunity order was defective because its allowance of derivative use rendered it less than co-extensive with the Fifth Amendment privilege. (*Id.* at 1341, 1349, 1352–53.)

As to the foregone conclusion issue, the court found that the government had failed to show a "basis with reasonable particularity" for its belief that encrypted files even existed on the drives, that the respondent had access to those files, or that he was capable of decrypting the files. Consequently, the foregone conclusion requirement was not satisfied. (*Id.* at 1349.) Judge Tjoflat followed the "reasonable particularity" standard with regard to the foregone conclusion requirement that the D.C. and Ninth Circuits had previously adopted. (*Id.* at 1344 n.20.)

In short, this Eleventh Circuit decision likewise reflects that *Hubbell* creates a substantial barrier for the government in using evidence obtained from individuals by means of a grand jury subpoena duces tecum unless it already knows in advance (with "reasonable particularity") what the evidence is and that the respondent is in possession of it.

The Second Circuit's relatively recent decision in *United States v. Greenfield* is very fact-bound, but it is a case in which a court found that the government had failed to meet the foregone conclusion standard in the context of an IRS summons enforcement proceeding. (831 F.3d 106, 110, 128 (2d Cir. 2016).) "The question before us," Judge Calabresi wrote, "is whether the instant case is more like *Fisher* or *Hubbell*." The answer was *Hubbell*.

Concerning the government's knowledge of the existence and control of the sought-after documents, the Second Circuit followed the reasonable particularity standard; the government need not demonstrate perfect knowledge of each specific responsive document covered by the summons. (*Id.* at 116.) But on the other hand, the government must *know*, and not merely *infer*, that the subject documents exist, that they are under the taxpayer's control, and that they are authentic. (*Id.*) The "appropriate moment" for the foregone conclusion analysis is when the summons was issued. (*Id.* at 124.)

Finally, the Third Circuit's decision in *United States v. Apple Mac Pro Computer* is an electronic device case that went the government's way, with help from a plain error standard of review. (851 F.3d 238 (3d Cir. 2017).) The case began with a search warrant executed at the appellant's residence, which resulted in the seizure of an Apple iPhone and an Apple Mac Pro computer with two attached Western Digital external hard drives, all of which had been protected with encryption software. The officers subsequently seized a password-protected Apple iPhone 6 Plus as well. (*Id.* at 242.)

The ensuing recitation of the facts, while detailed, is important because it supplied the basis for the court's foregone conclusion analysis that landed in the government's favor.

After executing the search of the appellant's home, Department of Homeland Security agents then obtained a search warrant to examine the seized devices. The appellant (Doe) voluntarily provided the password for the Apple iPhone 5S but refused to provide the passwords to decrypt the Apple Mac Pro computer or the external hard drives. Despite Doe's refusal, forensic analysts discovered the password to decrypt the Mac Pro Computer but could not decrypt the external hard drives. Forensic examination of the Mac Pro revealed an image of a pubescent girl in a sexually provocative position, and logs showed that the Mac Pro had been used to visit sites with titles common in "child exploitation." The forensic examination also disclosed that Doe had downloaded thousands of files known by their "hash" values to be child pornography, but the files were on the encrypted external hard drives, not the Mac Pro itself. Accordingly, the files were inaccessible. (*Id.*)

Law enforcement officers also interviewed Doe's sister, who had lived with him during the relevant period. She related that Doe had shown her hundreds of images of child pornography on the encrypted external hard drives and that the external hard drives also included videos of children "engaged in sex acts with other children." In addition, Doe provided the password to access his iPhone 6 Plus but did not grant access to an application on the phone that contained

additional encrypted information. Forensic analysts concluded that the phone's encrypted database contained over 2,000 images and video files. (*Id.* at 243.)

Thereafter, a magistrate judge granted the government's application to issue an order under the All Writs Act, 28 U.S.C. § 1651, requiring Doe to produce his iPhone 6 Plus, his Mac Pro computer, and his two attached external hard drives in a fully unencrypted state (the Decryption Order). Doe did not appeal the Decryption Order to the district court but, instead, filed a motion to quash the government's application to compel decryption with the magistrate judge, arguing that his act of decrypting the devices would violate his Fifth Amendment privilege. (*Id.*)

The magistrate judge denied Doe's motion to quash and directed Doe to fully comply with the Decryption Order (the Quashal Denial). The court held that, because the government possessed Doe's devices and knew that their contents included child pornography, the act of decrypting the devices would not be testimonial for purposes of the Fifth Amendment privilege. The Quashal Denial stated that a failure to file timely objections could result in the waiver of appellate rights, but Doe did not file any objection and did not seek review by way of appeal, writ of mandamus, or otherwise. (*Id.*)

Doe and his lawyer subsequently appeared for the forensic examination of his devices, but he substantially disobeyed and resisted the Decryption Order. Consequently, the magistrate judge granted the government's Motion for Order to Show Cause Why Doe Should Not Be Held in Contempt and ordered Doe to appear before the district court to show cause as to why he should not be held in civil contempt. The district court conducted a hearing and held Doe in civil contempt, remanding him to the custody of the US Marshal until he fully complied with the Decryption Order. (*Id.* at 243–44.)

Because of Doe's failure to object below, the Third Circuit reviewed his Fifth Amendment challenge only for plain error. (*Id.* at 244, 246–47.) The court found that the Eleventh Circuit's decision in *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011* (670 F.3d 1335 (11th Cir. 2012) was distinguishable. In the Quashal Denial, the magistrate judge had found that any testimonial aspects of Doe's decryption of the devices were a foregone conclusion. The government had custody of the devices; before the seizure, Doe possessed, accessed, and owned all of the devices; and, most importantly, there were images on the devices that constituted child pornography. Thus, the Decryption Order did not violate Doe's Fifth Amendment privilege. (*Apple Mac Pro Computer*, 851 F.3d at 248.)

## THE COLLECTIVE ENTITY RULE

The viability of the act of production doctrine as a tool for defense counsel is substantially tempered by the "collective entity" doctrine. This doctrine applies when a subpoena recipient is subpoenaed as a representative of a collective entity (typically a corporation, but it could be any type of organization) and the subpoena demands the production of documents on behalf of the entity. In a line of cases starting with *Wilson v. United States* (221 U.S. 361 (1911)) and *Dreier v. United States* (221 U.S. 394 (1911)), and continuing through *Bellis v. United States* (417 U.S. 85 (1974)) and *Braswell v. United States* (487 U.S. 99 (1988)), the Supreme Court has consistently held that an individual cannot assert his or her personal Fifth Amendment privilege in response to a grand jury subpoena (or other compulsory process) directed to an entity for which the individual is a representative. To be clear, however, the collective entity doctrine does not apply to sole proprietorships. (United States v. Doe, 465 U.S. 605, 605–06, 608, 617 (1984).)

The Court's 1988 decision in *Braswell* stands as its most recent pronouncement on the collective entity doctrine. The Court was sharply divided, five to four. Chief Justice Rehnquist authored the opinion for the five-member majority, joined by Justices White, Blackmun, Stevens, and O'Connor. Justice Kennedy wrote in dissent, joined by Justices Brennan, Marshall, and Scalia—a somewhat unusual alignment at the time.

Petitioner Braswell was the sole shareholder of two active corporations. His wife and mother were directors and officers of the companies, but neither had any authority over the business affairs of either corporation. A federal grand jury issued a subpoena to "Randy Braswell" in his capacity as the president of both corporations, demanding the production of their books and records. (*Braswell*, 487 U.S. at 101.)

The issue presented on these facts was whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment. The Court granted certiorari to resolve a circuit split on the question. (*Id.* at 102.) The majority of the Court held that the Fifth Amendment privilege was not available to the custodian. (*Id.* at 100.)

In arriving at this holding, the chief justice traced through the Court's collective entity jurisprudence at some length. He concluded that the "plain mandate" of these decisions was that without regard to whether the subpoena was addressed to the corporation or to an individual in his or her capacity as custodian, such a custodian may not resist a subpoena on Fifth Amendment grounds. (*Id.* at 108–09.)

Braswell had argued that this rule fell in the wake of *Fisher v. United States* and *United States v. Doe*. According to Braswell, in response to *Boyd v. United States* (116 U.S. 616 (1886)), with its privacy rationale shielding *personal* books and records from compulsory process, the Court developed the collective entity rule, "which declares simply that corporate records are not private and therefore are not protected by the Fifth Amendment." "The collective entity decisions were concerned with the contents of the documents subpoenaed . . . and not with the act of production." (*Braswell*, 487 U.S. at 109.) The argument went on to posit that in *Fisher* and *Doe*, the Court moved away from the privacy-based collective entity rule and replaced it with a compelled-testimony standard under which the contents of business documents are never privileged, but the act of producing them may be. "Under this new regime, the act of production privilege is available without regard to the entity whose records are being sought." (*Id.* (quoting *In re* Grand Jury Matter (*Brown*), 768 F.2d 525, 528 (3d Cir. 1985) (en banc)).)

The chief justice agreed that the holding in *Fisher*—later reaffirmed in *Doe*—"embarked upon a new course of Fifth Amendment analysis." (*Id.*) It did not, however, render the collective entity rule obsolete because the "agency rationale undergirding the collective entity decisions, in which custodians asserted that production of entity records would incriminate them personally, survives." (*Id.*) More specifically, the Court had consistently recognized that the custodian of corporate or entity records holds them in a representative rather than a personal capacity. Artificial entities may act only through their agents and "a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government." (*Id.* at 109–10.)

"Under those circumstances," the custodian's act of production is not deemed a personal act, but rather an act of the corporation, and "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege." (*Id.* at 110.) The majority's decision turns completely on this agency rationale.

However, towards the end of his opinion, Chief Justice Rehnquist found that "certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity," such that the government may not introduce into evidence the fact that the records were produced by the particular custodian (as the government itself conceded). But this has no bearing on the admissibility of their contents; the government has the right to use the corporation's act of production against the custodian. Chief Justice Rehnquist cited no authority for this limited protection of the custodian, which suggests that the government's concession may have been critical. (*See id.* at 117–18.)

The Chief Justice rejected the suggestion that this limitation on the evidentiary use of the custodian's act of production was the equivalent of constructive use immunity barred under *Doe.* (United States v. Doe, 465 U.S. 605, 616–17 (1984).) Rather, it was a "necessary concomitant" of the notion that a corporate custodian acts as an agent and not as an individual when producing corporate records in response to a subpoena addressed to the agent in the agent's representative capacity. (*Braswell*, 487 U.S. at 118 n.11.) Notably, however, the Court left open the question of whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, "by showing for example that he is the sole employee and officer of the corporation," that the jury would inevitably conclude that he produced the records. (*Id.*)

Writing in dissent, Justice Kennedy deconstructed the majority opinion in a single paragraph:

> The Court today denies an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself. To reach this ironic conclusion, the majority must blur an analytic clarity in Fifth Amendment doctrine that has taken almost a century to emerge. After holding that corporate employment strips the individual of his privilege, the Court then attempts to restore some measure of protection by its judicial creation of a new zone of immunity in some vaguely defined circumstances. This exercise admits what the Court denied in the first place, namely, that compelled compliance with the subpoena implicates the Fifth Amendment self-incrimination privilege.

(*Id.* at 119–20 (Kennedy, J., dissenting).)

He further observed that none of the collective entity cases that the majority had cited presented a claim that the custodian would be incriminated by the act of production, as opposed to the contents of the documents. (*Id.* at 122.) And, referring to the *Doe* Court's holding that sole proprietorships are not subject to the collective entity doctrine, Justice Kennedy found that "the potential for self-incrimination inheres in the act demanded of the individual, and as a consequence the nature of the entity is irrelevant to determining whether there is ground for the privilege." (*Id.* at 124.)

As an example of how far the collective entity doctrine can reach post-*Braswell*, in *In re Grand Jury Subpoena Dated November 12, 1991, FGJ 91-5 (MIA)*, the Eleventh Circuit applied the doctrine to compel the *former* chairman of the board and CEO of a *defunct* bank to produce copies of corporate records in his possession that he had caused to be copied for purposes of defending himself in various administrative, civil, and criminal proceedings arising from the bank's failure. (957 F.2d 807 (11th Cir. 1992) (per curiam).) The court gave short shrift to the appellant's arguments against the applicability of the collective entity doctrine on the unusual facts presented, relying heavily upon *Braswell*'s "representative capacity" rationale. (*See id.* at 810–12.)

However, the majority of a Second Circuit panel went the other way (as to former employees in possession of corporate documents) in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999.* (191 F.3d 173, 183 (2d Cir. 1999).) Judge Cabranes dissented. The court adhered to its pre-*Braswell* decision in *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983* (722 F.2d 981 (2d Cir. 1983) (*Saxon Industries*)), and held, in substance, that *Braswell*'s agency rationale could not apply to former employees because they are ipso facto no longer agents. (*In re Three Grand Jury Subpoenas*, 191 F.3d at 181.) The court expressly rejected the Eleventh Circuit's view but recognized a circuit split on the question of whether the collective entity doctrine applies to former employees. The Third and Ninth Circuits (and the Second) say not, while the Eleventh and DC Circuits hold that it does. (*Id.* at 183.) Almost 20 years later, the same circuit split remains on this issue.

Briefly stated, the Eleventh Circuit and the DC Circuit appear to focus on the corporate ownership of the records, which somehow necessarily means that the former employee is holding them in a representative or agency capacity (despite the lack of agency). (*See In re Grand Jury Subpoena Dated November 12, 1991*, 957 F.2d at 810–13; *In re* Sealed Case *(Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991).)

On the other side of the split, the Third Circuit merely stated in dicta in a footnote that "a former employee, for example, who produces purloined corporate documents is obviously not within the scope of the *Braswell* rule." (United States v. McLaughlin, 126 F.3d 130, 133 (3d Cir. 1997).) The Ninth Circuit authority holding that the collective entity rule does not apply to former employees of a collective entity is a brief per curiam order following the Second Circuit's pre-*Braswell* decision in *Saxon Industries.* (Mora v. United States, 71 F.3d 723, 724 (9th Cir. 1995).)

In short, the "former employee" issue remains an open question in most Circuits and a worthy subject for Supreme Court review in an appropriate case.

## CONCLUSION

Since the *Hubbell* Court's elaboration upon the foregone conclusion requirement in 2000, the act of production doctrine has developed into a formidable shield for *individuals* subpoenaed or summoned for documents or other things (including electronic devices), depending on the circumstances. However, the collective entity doctrine makes act of production protection unavailable to individuals subpoenaed in a representative capacity, with an open question in most Circuits as to whether the doctrine extends to former employees.■