Bloomberg BNA

Criminal Law Reporter™

SELF-INCRIMINATION

Judge's Refusal to Enforce Broad Subpoenas in 'BridgeGate' Case Demonstrates Potency of Fifth Amendment Act-of-Production Privilege

BY DAVID SIEGAL AND JOSEPH LAWLOR

On April 9, a New Jersey Superior Court declined to compel compliance with subpoenas issued by a committee of the New Jersey Legislature investigating the so-called ''BridgeGate'' controversy surrounding the September 2013 closing of George Washington Bridge traffic access lanes in Fort Lee, N.J. In doing so, the court issued a significant decision concerning, among other things, the Fifth Amendment's ''act of production'' privilege—a complex and oft misunderstood branch of the Bill of Rights' prohibition against compelled self-incrimination.

David Siegal is a partner in the New York office of Haynes and Boone, LLP and co-chair of the firm's White Collar Criminal Defense Practice Group. His practice focuses on government enforcement defense and internal investigations, as well as sophisticated securities fraud and complex commercial litigation. He can be reached at david.siegal@haynesboone.com.

Joseph Lawlor, an associate in Haynes and Boone's New York office, assisted in the preparation of this article. His practice focuses on all aspects of commercial litigation and enforcement defense.

The ability to invoke one's Fifth Amendment right is a key tool in any criminal defense lawyer's kit. As the U.S. Supreme Court has established, the right prohibits both compelled testimony and requiring production of documents or other materials in a potential defendant's possession where the very act of making such production may have qualities of self-incrimination. This act-of-production privilege is not absolute, however, and is subject to limitations and exceptions that the committee argued apply to this case. This ruling thus constitutes an important affirmance of the application of the privilege to most situations in which a potential defendant is asked to supply documents.

Lane Closures Triggered Inquiry

In the wake of the BridgeGate controversy, the New Jersey Legislature created a committee to investigate the lane closures. The committee issued subpoenas duces tecum to Bridget Anne Kelly (Gov. Chris Christie's former deputy chief of staff) and William Stepien (another former deputy chief of staff of the governor), both of whom were implicated in the lane closures by e-mails previously produced by an official with the Port Authority of New York & New Jersey, David Wildstein. Around the same time, it became publicly known that a parallel criminal investigation was undertaken by the local U.S. Attorney's Office and that federal law enforcement authorities had attempted to contact both Kelly and Stepien. Kelly and Stepien refused to produce documents, invoking their Fifth Amendment act-of-production privilege. The committee sued in New Jersey Superior Court, Mercer County, to compel compliance with the subpoenas.

In its consolidated ruling in *N.J. Legislative Select Comm. on Investigation v. Kelly*, No. L-350-14, and *N.J. Legislative Select Comm. on Investigation v. Stepien*, No. L-354-14 (''*Kelly*''), the court held that Kelly and Stepien were protected by the Fifth Amendment and therefore not required to produce, among other things, e-mails and text communications relating to the lane-closing controversy sought by the subpoenas.

 ISSN 0011-1341

The Fifth Amendment provides: ''No person . . . shall be compelled in any criminal case to be a witness against himself,'' and the superior court explained that the U.S. Supreme Court has interpreted that language to extend to nonspeaking actions that may be said to have a ''testimonial'' aspect. This includes the act of producing documents in response to, for example, a grand jury subpoena seeking documents or things from a potential witness in a criminal case. See *United States v. Hubbell*, 530 U.S. 27, 67 CrL 343 (2000). Under this line of authority, the underlying documents or materials are not themselves subject to the privilege—the privilege protects against only the *act* of production, where that very act can be revealing of some fact that may be relevant to helping a prosecutor make a criminal case against the witness.

This act-of-production privilege, as the *Kelly* court explained, applies when (1) the production would be incriminatory (that is, where the witness would face a ''real and substantial'' threat of incrimination in a criminal case, derived directly or indirectly from the compelled production); (2) the production is compelled; and (3) the act of production itself is testimonial in nature. Given the publicly acknowledged existence of the federal criminal investigation concerning the same subject, and given that any documents produced could incriminate Kelly and Stepien (or lead to incriminating evidence), the court quickly determined the first two factors were satisfied, and focused on the heart of the matter: whether Kelly or Stepien's compliance with the subpoenas could be considered ''testimonial'' in nature.

According to the decision, the essential question in determining whether an act of production is testimonial is whether, ''at the time the subpoena was issued, knowledge of the existence, location, and authenticity of the subpoenaed documents was a 'foregone conclusion' to the government, and whether the witness would add 'little or nothing to the sum total of the Government's information' by complying with the subpoena.'' Put another way, if, by producing the materials in response to the subpoena, the witness would conceivably provide evidence—not already possessed by the government—that, for example, communications actually exist, or that the witness knew of or had control over certain relevant documents, or that the documents were authentic, then the act of production is testimonial and thus protected by the Fifth Amendment.

Inquiry Is Fact-Specific

The *Kelly* court noted that determining whether an act of production can be considered testimonial necessarily involves a very fact-specific inquiry, and it posited the existence of ''two ends of the spectrum'' in its review of the prior case law. On one end of the spectrum, the court found *Fisher v. United States*, 425 U.S. 391 (1976), where the Supreme Court upheld an order enforcing a subpoena seeking particular tax records because there was no question that the tax documents actually existed (and their existence and location were already known to the government when the subpoena was issued) and authentication of those tax records could be supplied by a third-party accountant.

At the other end of the ''spectrum'' described by the *Kelly* court is the decision in *Hubbell*. There the act-of-production privilege was successfully invoked in the face of a subpoena broadly seeking materials referencing all sources of money for that defendant and his family, for all records of time billed by him and expenses incurred by him, and all his calendars, diaries and phone records. According to the *Kelly* court, its ruling in this case was ''an exercise in determining where on that spectrum these subpoenas fall,'' which turned heavily on the broad scope of the requests for materials before it.

The subpoenas in *Kelly* sought, among other things, all communications or documents (in any form, including e-mails, texts and instant messages), whether business or personal, relating to the lane closings; all records of phone calls (from any type of device) relating to the closings; and all calendars and diaries. They also requested a physical turnover of all devices such as mobile phones and PDAs (although this last request was later modified to a request to preserve those devices).

In the *Kelly* court's view, the breadth of material sought from the witnesses necessarily implicated the privilege because, while the committee may have been aware of some relevant communications, the subpoenas clearly sought to discover *other* communications and evidence—the existence of which the committee was *not* yet aware. According to the court, the act of producing materials described by the subpoenas might very well supply evidence (in a self-incriminating way) that, for example, the witnesses made previously unrevealed e-mails or phone calls relating to the subject of the lane closings, or that relevant communications or phone records were in the witnesses' possession (a fact that, for example, may be used to prove the witness read those communications or knew their content), or that any produced materials were genuine or authentic (a fact necessary for successfully offering such materials in evidence at trial). For example, where the requests sought handwritten notes and appointment calendars (which presumably were created and possessed solely by Stepien and Kelly), the act of producing documents in response would be testimonial because it would tend to prove the authenticity of such items.

In an effort to equate its requests with those in the *Fisher* case, the committee argued that it was already aware of some relevant communications by these witnesses. The *Kelly* court rejected that argument, however, noting that the breadth of the committee's requests on their face demonstrated that it was engaging in a ''fishing expedition'' for additional evidence that it suspected, but did not know, might exist—which, the court concluded, is precisely the sort of production that would be ''testimonial'' if made. In addition, according to the court, by attempting to force the witnesses to respond to requests for materials that ''relate'' to the lane closings, the requests would necessarily require Stepien and Kelly to reveal their own thought process in identifying such material. So where a document might actually relate to the lane closings, even though not apparent facially—such as an e-mail from one to the other stating ''I did it''—a production of that document by Stepien or Kelly would in essence be a testimonial admission by the producing witness concerning the meaning of the contents of the document.

The *Kelly* court made clear that the government does not have to know or identify every single document covered by a request, but it must have knowledge of actual documents in existence and in the possession of the subpoenaed party. In dicta, the court hypothesized that if the subpoena had been limited to communications be-

  CRL ISSN 0011-1341

tween Stepien, Kelly and Wildstein, the government's request might have been sufficiently narrow because the government was already in possession of such documents. But under the subpoena as worded, its request for ''all documents'' related to the lane closings during the relevant time frame showed that the committee had little or no knowledge of any particular document.

The committee also argued that the ''required records'' exception applied, and thus the subpoenas should be enforced even if the existence, location and authenticity of the documents sought was not already a foregone conclusion to the government. The required-records exception, established by *Shapiro v. United States*, 335 U.S. 1 (1948), provides that documents that are required to be kept by law pursuant to an established regulatory scheme may not be withheld from production on a Fifth Amendment invocation.

The *Kelly* court rejected this argument as well, noting that, because that ''exception'' constitutes a carve-out to a fundamental constitutional right, it was important to construe the exception narrowly.

Specifically, the committee asserted that, under New Jersey regulations and policies generally applicable to state public agencies, Kelly and Stepien were required to retain e-mails touching on state business, and thus the materials sought should be deemed ''required records'' covered by the *Shapiro* ruling. But the *Kelly* court explained that the rationale behind the required-records exception is that a witness, ''through voluntary participation in a heavily regulated activity that involves regular government inspection or monitoring in order for regulation to be effective,'' has effectively ''waived the act-of-production privilege.'' Typically then, the required-records exception applies in industries or contexts that are the subject of routine regulatory oversight and review, such as, for example, insurance brokers who must keep escrow deposit records on file for inspection or holders of foreign banking interests who are obligated to keep certain information available for inspection.

Here, the court allowed that certain recordkeeping laws might be applicable to the documents sought (although it expressed doubt about that and noted that the subpoenas were in any event more broad than any law or guideline cited by the committee), but it was not willing to equate those generalized document-retention policies with the regulatory inspection and monitoring schemes at issue in the *Shapiro* line of cases. To do so would be to effectively deem all public employees to have waived their Fifth Amendment rights simply by becoming public employees, the court said. Citing law to the contrary affirming public employees' general retention of Fifth Amendment rights, the *Kelly* court found the required-records exception inapplicable to the case before it.

The court concluded by reminding the committee that it of course retains the ability to compel the witnesses' testimony and production of materials if it first provides them with immunity from prosecution.

* * *

Prosecutors are fond of saying that the contents of pre-existing documents are not covered by the Fifth Amendment. But what the Constitution does prohibit is the government compelling the turnover of such documents *by a would-be defendant* against his or her will, if in doing so the prospective defendant might reveal facts the government was otherwise not in a position to prove through independent evidence. Because the very ''act of production'' could supply important pieces to the puzzle of the government's criminal case against that person, the Fifth Amendment dictates that a person cannot be required to supply such evidence (unless he or she has been immunized).

The *Kelly* court's exhaustive 98-page ruling stands as strong support for that general concept and will undoubtedly be frequently cited by defendants and witnesses seeking to avoid potentially damaging disclosures in the shadow of a looming criminal investigation. The court also cogently cabined the required-records exception to a narrow band of circumstances—those in which established regulatory and monitoring regimes already require maintenance of specific documents—by rejecting the government's argument for broad application that, had it been endorsed, threatened to swallow the privilege whole. While prosecutors may take solace in language in the *Kelly* court suggesting that a ''spectrum'' exists that might permit the approval of somewhat narrower requests, on the whole the principles laid out in the opinion make clear that the act-of-production privilege will remain a mainstay of any criminal defense strategy.