

Newsweek

Will Taking the Fifth Save Christie's Sidekicks?

By Pema Levy | 4/22/14 at 4:32 PM

What do the emails of two of Chris Christie's closest confidants at the heart of the Bridgegate affair tell us about the part the New Jersey governor played in the scandal?

Too bad investigators can't get their hands on them to find out.

At least not without extensive legal wrangling around one of the most famous but least understood amendments in the U.S. Bill of Rights: the Fifth.

Bridget Anne Kelly and Bill Stepien, Christie's former deputy chief of staff and campaign manager, respectively, are invoking their Fifth Amendment right against self-incrimination in the investigation into the infamous lane closures on the George Washington Bridge in September.

The two aides featured prominently in emails published on January 8 showing their involvement in orchestrating and covering up the scandal. Kelly is responsible for the most famous quote from the debacle so far, in which she ordered up "some traffic problems in Fort Lee," setting off four days of gridlock there. In a later email, Stepien called the mayor of Fort Lee an "idiot."

As prime suspects, the two were slapped with subpoenas from the investigating committee of the state legislature, along with 16 other officials. While documents from the others, as well as Christie's office and his campaign's, are now trickling in to the committee, Kelly and Stepien will hand over nothing.

"I plead the Fifth" is a common idiom, a mainstay of courtroom dramas, even the subject of Dave Chappelle's famous "I Plead the Fif" sketch. But the Fifth Amendment is trickier than most people imagine. The protection against being a "witness against himself" does not just apply to verbal testimony but can in some circumstances protect someone against furnishing documents. This is what Stepien and Kelly are hoping will protect them from turning over their emails and other personal records related to the scandal.

It's a tricky legal concept because the Fifth Amendment protection refers to a testimonial act, like the act of speaking against oneself. But the documents the investigating committee -- and federal prospectors -- are interested in already exist. The Fifth Amendment does not protect those documents.

So lawyers for Kelly and Stepien are relying on a different legal argument: that the production of those documents is a testimonial act protected by the Fifth Amendment.

"But the very real possibility that his act of producing documents and things responsive to the subpoena might compel him to furnish a link in the chain of evidence that could be used to ensnare him in the ambiguous circumstances of a criminal prosecution -- and thus force him to become a witness against himself, in violation of his fundamental right against self-incrimination -- is a more than compelling reason to withdraw that instrument [the subpoena]," Stepien's attorney wrote in a letter to the legal counsel for the investigating committee on Friday, expressing Stepien's intention to invoke the Fifth Amendment in response to the committee's subpoena.

Kelly's lawyer likewise argued that the subpoena requires Kelly to use her own mind to produce the documents and that "such production carries a 'testimonial aspect' and is thus protected" under the Fifth Amendment.

The committee has not yet decided on a course of action in response to such defiance and will consult with their counsel about the best steps to take next against Stepien and Kelly, according to a source familiar with the situation.

Criminal law experts believe the Stephen and Kelly arguments are defensible and that a judge could quash a subpoena on these grounds if the committee asks a judge to enforce the subpoena.

"It's certainly a plausible Fifth Amendment claim that the production of the document is protected by the Fifth Amendment," said Jeffrey Bellin, a criminal procedure expert at William and Mary Law School in Virginia. Bellin sees a difference between investigators asking Stepien and Kelly for specific documents they already know exist, an instance in which it is hard to make a Fifth Amendment claim, and the broad subpoenas issued by the legislative committee, which include all manner of documents and communications relevant to the investigation. The committee is "saying, 'You go and find documents that are relevant to our inquiry and produce them to us,'" he said.

Since the U.S. Attorney's office is now investigating potential criminal activity in the scandal --

though Stepien and Kelly have not yet been subpoenaed by prosecutors -- the threat of becoming ensnared in a criminal case is not out of the question. The Fifth Amendment can only be used when there is a plausible risk that the testimony could result in criminal charges.

Stepien and Kelly aren't the first to invoke the Fifth in the Bridgegate scandal. David Wildstein, who resigned from his post at the Port Authority in December, helped coordinate the lane closures with Kelly then cover up the mess, according to the batch of emails released last month. When questioned by a state Assembly panel on January 9, Wildstein repeated some version of this phrase in response to every question: "Under the advice of counsel, I assert my right to remain silent."

But Wildstein, through his attorney Alan L. Zegas, has shown a willingness to talk about what he knows in exchange for immunity in any criminal investigation. As soon as Wildstein or anyone receives immunity -- and the threat of a criminal case goes away -- their Fifth Amendment right against self-incrimination goes away, too.

As the investigation progresses, and if prosecutors also demand documents from Stepien and Kelly, immunity is one avenue to get them to comply. But immunity isn't given lightly.

"Tactically for the prosecutor it's very dangerous" to give someone immunity," said Bellin, who formerly served as a prosecutor in the U.S. Attorney's Office for the District of Columbia. "If they give immunity to the wrong person, say the actual guilty person, and then that person tells them things that aren't true or doesn't really have any information about anyone else that shows any other crimes, they've botched the investigation."

"So it's a very hard dance to figure out who should get immunity and who should be the target," he said.

Prosecutors do not appear to have reached that stage in their Bridgegate investigation, as the subpoenas currently being contested are solely from the investigating committee.

There are other ways the emails could be made public. The investigating committee could ask a judge to compel the production of the documents -- essentially weigh their Fifth Amendment claims. If prosecutors go after Stepien and Kelly, they could also use a warrant to seize them, since the documents themselves -- unlike the act of furnishing them -- are not protected.

So far, the key emails remain beyond the reach of the investigating committee and prosecutors. But for how much longer depends on the ingenuity of those seeking to find an explanation for the shuttered bridge lanes that caused four days of unnecessary mayhem in Fort Lee.

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