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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MERCER COUNTY

CIVIL ACTION

THE NEW JERSEY LEGISLATIVE SELECT COMMITTEE ON INVESTIGATION,

Plaintiff,

v.

BRIDGET ANNE KELLY,

Defendant.

DOCKET NO. L-350-14

and

THE NEW JERSEY LEGISLATIVE SELECT COMMITTEE ON INVESTIGATION,

Plaintiff,

v.

WILLIAM STEPIEN,

Defendant.

DOCKET NO. L-354-14

OPINION

Decided: April 9, 2014

Reid J. Schar (Jenner & Block, LLP), admitted pro hac vice, argued the cause for plaintiff (Leon J. Sokol and Anthony S. Bocchi (Sokol, Behot & Fiorenzo), Anthony S. Barkow (Jenner & Block LLP) and Paul M. Smith, of the New York bar, and Jessica Ring Amunson of the District of Colombia bar, admitted pro hac vice, on the brief.).

Kevin Marino (Marino, Tortorella & Boyle, P.C.) argued the cause for defendant William Stepien (John D. Tortorella, John A. Boyle, and Erez J. Davy, on the brief).

Michael Critchley (Critchley, Kinum & Vazquez, LLC) argued the cause for defendant Bridget Anne Kelly.

Jacobson, A.J.S.C.

INTRODUCTION

This matter arises out of two verified complaints and orders to show cause filed by plaintiff, the New Jersey Legislative Select Committee on Investigations ("the Committee"), against defendants, William Stepien and Bridget Anne Kelly. The Committee is investigating the "BridgeGate" controversy that involves the closure of multiple traffic lanes leading to the George Washington Bridge in Fort Lee, New Jersey in September 2013 ("the lane closures"). A subpoena *duces tecum*, or subpoena for documents, was issued to each defendant by plaintiff as part of that investigation. After defendants responded to the subpoenas by raising objections, the Committee moved to compel the production of documents, but defendants maintained their refusal to comply, citing their privilege against self-incrimination and the Fourth Amendment's protections against unreasonable searches and seizures. The Committee initiated this action to obtain: 1) a declaratory judgment from the court that defendants have failed to comply with the subpoenas without justification, and 2) a court order compelling defendants to produce the documents requested in the subpoenas.

The issues raised by the Committee's application require the court to delve into complex areas of law that balance important individual constitutional rights with the investigatory needs of government authorities. The power to compel witnesses to produce testimony or documents has long been recognized as one of the government's primary methods to obtain information. Kastigar v. United States, 406 U.S. 441, 444 (1972); State v. Patton, 133 N.J. 389, 399 (1993). The Committee is certainly investigating a matter of public importance, and the usefulness of the requested materials to the underlying purpose of that investigation—to determine whether official misconduct or abuse of power occurred in connection with the lane closures—is evident.

Indeed, neither defendant has argued that the Committee's investigation is anything but a legitimate, tailored inquiry into a matter of public interest. Yet, the government's power to compel testimony has never been absolute. Enshrined in the Fifth Amendment to the United States Constitution, and recognized by New Jersey common law since the State was created, is the right of a witness to avoid being compelled to testify against himself or herself in a criminal proceeding. As the legal doctrines concerning the right against self-incrimination have developed over time, courts have frequently been sensitive to the investigatory needs of the government while nonetheless recognizing the ultimate importance of the right against self-incrimination, which "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty." Kastigar, supra, 406 U.S. at 444; Murphy v. Waterfront Com'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) ("[The Fifth Amendment privilege] reflects many of our fundamental values and most noble aspirations."). The importance of the privilege is paramount, because the government's compelling a person to incriminate himself or herself "cannot abide the pure atmosphere of political liberty and personal freedom." In re Pillo, 11 N.J. 8, 16 (1952) (quoting Boyd v. United States, 116 U.S. 616, 632 (1886)).

Although the right against self-incrimination most commonly applies to testimony in the form of answers to questioning by government authorities, courts have long recognized that individuals may also assert the right in response to a demand for documents. See Boyd, supra, 116 U.S. at 622. As discussed more fully below, both federal and state courts have developed self-incrimination doctrines applicable to subpoenas *duces tecum* that are complex and difficult to apply. The doctrines require an examination into whether the subpoenaed documents or the acts of producing those documents are "testimonial" in nature, which involves an analysis of the

"communicative aspects" of the documents or acts of production. The United States Supreme Court, in establishing the modern federal doctrine on the subject, noted that, while "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence," it applies "when the accused is compelled to make a testimonial communication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976). Moreover, application of what has become known as the act-of-production doctrine "depends on the facts and circumstances of particular cases or classes thereof." Id. at 410.

With only a few United States Supreme Court decisions as precedents, such case by case analysis in the unusual procedural posture of this case forces the court into largely uncharted waters. In the first decision addressing the act-of-production doctrine by the New Jersey Supreme Court following the pronouncement of that doctrine by the United States Supreme Court, Justice Handler noted in dissent that federal court decisions applying the doctrine have "earned substantial criticism and generated considerable uncertainty with respect to their justification, meaning and application." In re Grand Jury Proceedings of Joseph Guarino, 104 N.J. 218, 244 (1986) (Handler, J., dissenting). As noted by Justice Handler, a federal trial judge referred to applying the act of production doctrine under the Fifth Amendment as comparable to reading "tea leaves." United States v. Karp, 484 F. Supp. 157, 158 (S.D.N.Y. 1980). Nonetheless, this court must wade into these muddy doctrinal waters in order to decide the issues in these cases.

In an effort to avoid these doctrinal complexities, the Committee has also relied on an exception to the right against self-incrimination known as the "required records" doctrine. Under this exception, the Fifth Amendment privilege does not apply to records "required by law to be kept" pursuant to a regulatory regime. Shapiro v. United States, 335 U.S. 1, 33 (1948). The

Committee asks the court to view all the requested documents as required by law to be maintained by broad records-retention policies untethered to any particular State regulatory program. The Committee's invocation of this doctrine presents a matter of first impression as applied to public employees working for agencies with document retention obligations. In fact, the Committee has asked the court to stretch the doctrine to cover the facts of these cases without citing precedents in other jurisdictions that have applied the doctrine in this manner. Reviewing the applicability of this exception thus presents further challenges to the court.

In addition, although the doctrines that have developed on the federal level and in New Jersey have diverged in some respects, both doctrines in application balance the same concerns, address the same issues, and often result in the same outcome. The holdings of the main precedents on both the federal and State level have been interpreted and applied in many different ways and in many different circumstances, however. Not surprisingly, although the attorneys for all of the parties have relied upon many of the same case law precedents, each has interpreted the cases differently as a result of these difficult-to-apply prior holdings.

It is not only the complex doctrinal underpinnings of the Committee's legal arguments that have made resolution of these matters so challenging. The procedural posture of these cases is highly unusual, and the parties referred the court to no binding precedents dealing with the same array of issues, in terms of substance, jurisdiction, and the formulation of proper relief. The vast majority of cases where courts have considered a witness's ability to assert the right to self-incrimination in response to a subpoena for documents have arisen in the context of criminal grand jury investigations. However, in the cases before this court, the privilege has been asserted in response to *legislative* subpoenas issued by a committee inquiring into a matter of public importance, while a federal criminal investigation into the same subject matter is underway.

Moreover, in many of the case law precedents cited by both parties, such as United States v. Hubbell, 530 U.S. 27, 42 (2000), the issue of whether the self-incrimination doctrine had been properly applied was raised after the actual documents had already been produced pursuant to a grant of immunity. In the cases before this court, however, broad subpoena requests were met with similarly broad objections based on defendants' right against self-incrimination without defendants providing any documents. Moreover, while a grant of immunity would likely result in the desired production of documents, the Committee has not offered immunity to defendants and surprisingly has suggested that it may not have the power to grant immunity coextensive with the Fifth Amendment privilege against self-incrimination, as is frequently done in matters involving grand jury investigations. It nonetheless asks the court to compel the production of documents that the court has not viewed, and which may or may not incriminate the defendants. The defendants, on the other hand, wish to defeat the subpoenas without turning over any of the requested documents. With this background in mind, the court will undertake the challenging task of trying to resolve the Committee's applications in a manner that protects the defendants from compelled self-incrimination without unduly undermining the public interest served by the Committee's investigation.

FACTS

On September 9, 2013, the Port Authority closed two of three dedicated access lanes to the George Washington Bridge in Fort Lee, New Jersey. No advance notice or explanation was provided for the closures, and the lanes remained closed through September 13, 2013. The lane closures created massive traffic jams in Fort Lee that, among other things, slowed emergency responders and delayed school buses. They also sparked media interest and, on September 13, 2013, the Transportation, Public Works and Independent Authorities Committee ("the

Transportation Committee") in the State Assembly opened a legislative inquiry to investigate the reasons behind the lane closures.

Pursuant to that investigation, the Transportation Committee issued subpoenas *duces tecum* on December 12, 2013, to a number of Port Authority officials, including David Wildstein, Director of Interstate Capital Projects. Mr. Wildstein produced 907 documents in response to the subpoena *duces tecum*. On December 30, 2013, the Transportation Committee issued a subpoena to testify to Mr. Wildstein, scheduling him to appear before the Transportation Committee on January 9, 2014. On January 8, 2014, the Committee released twenty-two of the documents that were turned over by Mr. Wildstein. These documents included email and text message exchanges between defendant Bridget Anne Kelly, then serving as Governor Christie's Deputy Chief of Staff, Mr. Wildstein, and William Baroni, the Port Authority's Deputy Executive Director. In one of these emails, dated August 13, 2013, Ms. Kelly sent an email to Mr. Wildstein stating that it was "[t]ime for some traffic problems in Fort Lee." The twenty-two emails also included two email exchanges between Mr. Wildstein and defendant, William Stepien, discussing articles that appeared in the press following the lane closures. Mr. Stepien had previously served as Governor Christie's Deputy Chief of Staff, leaving that position on April 26, 2013, to work for Governor Christie's re-election campaign. Mr. Stepien was therefore working for the campaign at the time these emails were sent.

Mr. Wildstein filed a motion to quash the subpoena to testify before the Transportation Committee in this court. This court denied the motion prior to the scheduled hearing. Mr. Wildstein then appeared at the January 9, 2014 hearing, but refused to answer questions, citing the privilege against self-incrimination. It is the court's understanding that the Transportation

Committee referred Mr. Wildstein's refusal to answer questions to the Mercer County Prosecutor, although the record in this case does not confirm that referral.

Public interest in the matter intensified following the release of the twenty-two documents on January 8. On that same day, the Chairman of the Transportation Committee, Assemblyman John Wisniewski, held a press conference addressing the matter. At the conference, Chairman Wisniewski made comments suggesting that the Transportation Committee would be seeking information from Bridget Anne Kelly and William Stepien. Chairman Wisniewski also made television appearances in which he stated that "laws have been broken" in relation to the lane closures. Following the press conference, Governor Christie, who had previously supported Mr. Stepien to become Chairman of the New Jersey Republican Party, asked Mr. Stepien not to seek the chairmanship. On January 9, 2014, Ms. Kelly was fired from her position with the Governor's office.

After the legislative session ended and the new session commenced on January 16, 2014, the Assembly and Senate each created select investigative committees to inquire into the lane closures and investigate any abuses of power. On the same day, Ms. Kelly was served with a broad subpoena seeking various documents relating to the lane closures.

As reported by the media and as provided to the court by Mr. Stepien, in an email to the press on or before January 23, 2014, a lawyer for the Christie campaign confirmed that federal prosecutors in New Jersey had issued subpoenas to Governor Christie's re-election campaign as well as to the state Republican Party as part of a preliminary federal inquiry into the lane closures. It was widely reported at the time that federal subpoenas were issued. This understanding was confirmed on February 1, 2014, when Reid J. Schar, Esquire, Special Counsel to the New Jersey Legislative Select Committee, confirmed that he had met with the United

States Attorney and that a federal investigation into the matter existed. In his official statement, Mr. Schar noted that he was comfortable that both investigations could proceed without the legislative inquiry impeding the federal investigation.

As a result of grand jury secrecy, the details of the federal investigation and the issuance of federal subpoenas cannot be confirmed in the record before this court. But the federal investigation has affected Mr. Stepien and Ms. Kelly personally, as evidenced by certifications of counsel submitted by both defendants. On January 17, 2014, FBI Special Agent Arthur Durrant telephoned Mr. Stepien on his cell phone. After Mr. Stepien notified the agent that he was represented by counsel, counsel for Mr. Stepien was contacted by Assistant United States Attorneys Rachel Honig and Lee Cortes, who unsuccessfully attempted to interview Mr. Stepien. In mid-February, other federal agents visited Mr. Stepien's home and questioned his landlord about his conduct and character, leaving behind business cards identifying themselves as criminal investigators. Ms. Kelly was also contacted by federal authorities. On January 10, 2014, an investigator for the United States Attorney's office attempted to contact her, her family members, and her attorney for questioning, also leaving behind a business card.

On January 27, 2014, both legislative bodies passed concurrent resolutions creating a joint special committee to investigate the matter, which they called the New Jersey Legislative Select Committee on Investigation, the plaintiff in this action ("the Committee"). The resolutions noted that they were creating a "special committee" of the Senate and General Assembly. The resolutions conferred on the Committee the powers to issue subpoenas and compel compliance with those subpoenas, pursuant to N.J.S.A. 52:13-1 to -13. The resolutions also specifically granted the Committee the authority to use the powers provided under N.J.S.A. 52:13-3, which states that no witness may refuse to answer questions on the basis of self-

incrimination, but that use immunity must be provided for any incriminating answers. The Committee was also given authority to exercise "any available remedies" to enforce the subpoenas it issues, and to make applications to the courts.

On the same day it was constituted, the Committee issued subpoenas *duces tecum* to both Ms. Kelly and Mr. Stepien, which subpoenas would replace and govern over any earlier issued subpoenas. The subpoenas requested the following information:

1. All communications of any kind, including, but not limited to, any correspondence, notes, documents, electronic mail transmissions, text messages . . . any and all "instant messages" or other electronically stored data or information . . . exchanged between you and any other person or entity, whether used by you in a business, personal or any other capacity, between September 1, 2012 and the present date regarding the reduction from three to one of the eastbound Fort Lee, New Jersey access lanes to the George Washington Bridge from September 9, 2013 through September 13, 2013.

2. All documents and records of any kind, including, but not limited to, any correspondence, notes, documents, electronic mail transmissions, text messages . . . any and all "instant messages" or other electronically stored data or information . . . exchanged between you and any other person or entity, whether used by you in a business, personal or any other capacity, between September 1, 2012 and the present date regarding the reduction from three to one of the eastbound Fort Lee, New Jersey access lanes to the George Washington Bridge from September 9, 2013 through September 13, 2013.

3. All documents of any kind whatsoever sufficient to show the date, time, originating and receiving telephone number, originating cell site and sector, and duration for all incoming and outgoing calls for any phone number associated with you in your personal capacity or in your capacity as an employee of the State of New Jersey, or any other capacity, between September 1, 2012 and the present date regarding the reduction from three to one of the eastbound Fort Lee, New Jersey access lanes to the George Washington Bridge from September 9, 2013 through September 13, 2013.

4. All documents of any kind whatsoever evidencing electronic mail communications sent via any and all personal computational devices in your possession, dominion, or control, including without limitation devices commonly known as 'desktops', 'laptops', 'smartbooks', 'tablets', 'smartphones', 'cellular phones', or 'iPads', whether used by you in a business, personal or any other capacity, relative to any and all communications between September 1, 2012 and the present date regarding the reduction from three to one of the eastbound Fort Lee, New Jersey access lanes to the George Washington Bridge from September 9, 2013 through September 13, 2013.

5. All video and audio recordings, and all voice mails, regarding the reduction from three to one of the eastbound Fort Lee, New Jersey access lanes to the George Washington Bridge from September 9, 2013 through September 13, 2013.

6. All calendars, day planners, notes, and/or diaries from September 1, 2012 to the present.

7. All smartphones, tablets, cellular phones, and personal digital or data assistants, or any other similar device used by you at any time from September 1, 2012 to the present, whether used by you in a business, personal or any other capacity

The subpoenas also requested "logs" of any documents/correspondence withheld from production on the basis of any claimed privilege or protection. Annexed to the subpoenas were a copy of the statutory provisions located at N.J.S.A. 52:13-1 to -13, which govern the powers and procedures of legislative committees, and the Code of Fair Procedures, N.J.S.A. 52:13E-1 to -10.

On January 31, 2014, counsel for Mr. Stepien submitted a letter to the Committee, advising that his client would not produce the requested information on the grounds that the production would violate Mr. Stepien's Fifth Amendment and Fourth Amendment rights. Counsel for Ms. Kelly submitted a letter to the same effect on February 3. On February 4, 2014, the Committee notified both Mr. Stepien and Ms. Kelly that it was narrowing its requests to address their concerns. In particular, the Committee modified the third request by requiring

telephone records between Mr. Stepien/Ms. Kelly and thirty-two specifically-named public officials, although after the modification the third request was no longer limited to the topic of the lane closures. The Committee similarly narrowed the sixth request to only calendar entries relating to those same individuals. The Committee also limited the seventh request by asking Mr. Stepien and Ms. Kelly to maintain their electronic devices during the course of the investigation, but not requiring that they be turned over at that time. The subpoenas were not withdrawn, however, and the Committee noted that it reserved the right to re-expand their requests at any time.

On February 6, 2014, counsel for Mr. Stepien and Ms. Kelly both notified the Committee that their clients would not comply with the modified subpoena requests. On February 10, 2014, the Committee held a hearing on the matter. The Committee voted that compliance with the subpoenas was "necessary and proper" to the investigation, and rejected the objections raised by defendants as invalid. The Committee also moved to compel production of the requested materials, and authorized Mr. Schar to take "all necessary steps to enforce the Committee's January 27, 2014 subpoena duces tecum, as modified on February 4, 2014." On February 11, 2014, Mr. Schar wrote to counsel for Mr. Stepien and Ms. Kelly, requesting compliance with the subpoenas by February 18, 2014. Mr. Schar also offered to review the materials *in camera* and suggested that defendants consider a document-by-document basis for determining whether there were any responsive materials for which objections could be withdrawn. Notably, however, Mr. Schar did not offer any form of immunity in return for the defendants' cooperation. The defendants did not comply with the subpoenas by February 18, 2014, nor have they complied since that time.

The Committee filed these actions on February 19, 2014, by submitting verified complaints and orders to show cause. In both cases, the Committee requests declaratory relief holding that defendants' assertions of privilege are improper, as well as a court order compelling defendants to produce the materials. The court issued the orders to show cause, which directed defendants to demonstrate why an order should not be granted declaring that they have failed to comply with the subpoenas without justification and compelling them to comply with the subpoenas. In an order entered on February 25, 2014, the court extended the time for counsel for Ms. Kelly to file opposition, and consolidated the two cases for the purposes of argument and decision.

Oral argument was heard on March 11, 2014. At the argument, counsel for the Committee raised issues concerning the Committee's authority to hold defendants in contempt and its authority to grant immunity that had not been fully briefed prior to the argument. Therefore, the court reserved decision on the Committee's applications and ordered the parties to submit supplemental briefs on those issues, which were timely filed. As part of its supplemental submission, the Committee attached more documents that had been produced to it during its investigation that had not previously been made available to the court, while acknowledging that the submission went beyond the court's direction for supplemental briefing.

DISCUSSION

Defendants claim that the subpoenas are deficient because they violate their Fifth Amendment privilege against self-incrimination, the New Jersey common law privilege against self-incrimination, and the Fourth Amendment's protection against unreasonable searches and seizures. The Committee argues that the subpoenas should be enforced because there are no

constitutional or common law impediments to compelling production of the requested information and documents.

I. Whether the Fifth Amendment Privilege Against Self-Incrimination Provides Sufficient Justification for Defendants' Failure to Comply With the Subpoenas.

The Fifth Amendment of the United States Constitution provides that, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend. 5. The privilege against self-incrimination is applied to the States through operation of the Fourteenth Amendment. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The privilege "represents a broad exception to governmental power to compel the testimony of the citizenry." Murphy, supra, 378 U.S. at 94; see also United States v. Oliver North, 910 F.2d 843, 853 (D.C. Cir. 1990) ("[A] predicate to liberal constitutional government is the freedom of a citizen from government compulsion to testify against himself."). The object of the Fifth Amendment is to "insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

The Fifth Amendment, in its typical application, "protects a person only against being incriminated by his own compelled testimonial communications." Fisher, supra, 425 U.S. at 409. In addition, and more relevant to these cases, courts have held that the act of producing documents in response to a subpoena may also be protected. Hubbell, supra, 530 U.S. 27; United States v. Doe, 465 U.S. 605, 612 (1984). Fifth Amendment protection applies when: 1) the production of documents is incriminatory (*i.e.*, the witness must face a real and substantial danger of incrimination as a result of producing the documents); 2) the production of documents is compelled; and 3) the act of production constitutes testimonial evidence. Hubbell, supra, 530 U.S. at 34–36, 38, 40.

A. Whether Defendants Face a Substantial and Real Danger of Incrimination.

While the Fifth Amendment privilege "must be accorded liberal construction in favor of the right it was intended to secure," the protection afforded to a defendant "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951) (citing Mason v. United States, 244 U.S. 362, 365 (1917)). Thus, as a threshold inquiry into the validity of an assertion of Fifth Amendment privilege, the court must be satisfied that the claimants are "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." United States v. Apfelbaum, 445 U.S. 115, 128 (1980) (citing Rogers v. United States, 340 U.S. 367, 374 (1951)). The privilege protects evidence that the witness "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar, supra, 406 U.S. at 444. Thus, courts have recognized that the privilege extends not only "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." Hoffman, supra, 341 U.S. at 486.

The inquiry into whether a witness's belief in the possibility of self-incrimination is reasonable is "for the court; the witness' assertion does not by itself establish the risk of incrimination." Ohio v. Reiner, 532 U.S. 17, 21 (2001). The Supreme Court has held that, "[a] danger of 'imaginary and unsubstantial character' will not suffice" to sustain a witness's belief that he or she faces the hazard of incrimination. Ibid (citation omitted). In addition, the privilege may be asserted by a witness even if the witness maintains his or her innocence as to the matter believed to be incriminatory. Ibid. A question to which a claim of the privilege is asserted "must be considered 'in the setting in which it is asked'" to determine whether there is a

reasonable basis for fearing incrimination. Zicarelli v. N.J. State Comm'n of Investigation, 406 U.S. 472, 480 (1972) (citing Hoffman, supra, 341 U.S. at 486).

The facts of the cases before the court are unique, and no party has directed the court to a precedential decision analyzing whether there could be a danger of incrimination under these particular circumstances. Here, the subpoenas were issued by a Legislative Committee that has no power to convict for any crime. In non-criminal cases such as the ones before the court, the Fifth Amendment bars any use of compelled self-incriminating testimony in subsequent *criminal* cases, because the "sole concern" of the Fifth Amendment is "to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." Kastigar, supra, 406 U.S. at 453 (quoting Ullmann v. United States, 350 U.S. 422, 438–39 (1956)); Id. at 444 (the privilege may be asserted in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.").

The subpoenas that were issued in these cases are extremely broad, and no documents have been produced by the defendants. Thus, the court is not currently in a position to rule on individual pieces of evidence or individual acts of production to determine whether or not they are incriminatory. It is possible that, ultimately, the production of many of the requested materials in these cases would not be incriminating and would not lead to incriminating evidence. At this early stage of the proceeding, however, the only question that can be answered by the court is whether the defendants are currently in the "zone of danger" in terms of a subsequent prosecution. In re Grand Jury Subpoena Dated April 18, 2003, 383 F.3d 905, 913 (9th Cir. 2004) ("If the testimonial production would be incriminating, the motion to quash should be granted unless the government secures an immunity order."); United States v. Balsys, 524 U.S. 666, 672 (1998) (witnesses must "reasonably believe" that "the information sought, or

discoverable as a result of [their] testimony, could be used in a subsequent state or federal criminal proceeding."). In other words, the threshold question is whether defendants are generally in danger of a criminal prosecution and whether they reasonably believe that evidence produced pursuant to the subpoenas could be used against them in that prosecution.

The unique facts of these cases reveal a prospect of a criminal investigation that is not merely hypothetical. It is clear that a federal investigation has been launched that at least in part is currently investigating the same subject matter that is being investigated by the Committee: the lane closures. Both defendants fear that evidence they produce to the Committee in response to the subpoenas could be used by the United States Attorney to incriminate them in a federal criminal action. The subpoenas in these cases seek information from defendants relating to the lane closures on the George Washington Bridge, and the federal investigation appears in part to be focused on the same subject matter. Moreover, the defendants in these cases have been involved at least to some degree in that investigation. As discussed above, Mr. Stepien received a phone call from a federal agent seeking an interview, and agents visited his landlord, identifying themselves as criminal investigators. Similarly, Ms. Kelly and her family were contacted by federal investigators for questioning. Committee Chairman Wisniewski has made several comments to the press suggesting that the conduct that formed the basis of the lane closure controversy could be criminal under both federal and state law, and implicating Mr. Stepien and Ms. Kelly in that conduct. For example, Mr. Wisniewski singled-out Mr. Stepien during the January 8, 2014 press conference as a person who warrants further investigation.

Under New Jersey law, "official misconduct" is a crime involving a public servant who, with the purpose to benefit himself or injure another, "commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is

unauthorized or he is committing such act in an unauthorized manner." N.J.S.A. 2C:30-2(a). It is possible that either Mr. Stepien or Ms. Kelly could be prosecuted for such conduct as a result of the documents requested by the subpoenas, either as principals or accomplices. Although the specific charges being investigated by the federal authorities are unknown, the federal criminal code incorporates State criminal offenses and authorizes the federal government to prosecute them. Assimilative Crimes Act, 18 U.S.C. § 13. Thus, the federal authorities may be investigating Mr. Stepien and/or Ms. Kelly for violations of New Jersey criminal law pertaining to official misconduct, as well as for any federal criminal offenses. Indeed, Mr. Stepien and Ms. Kelly could face prosecution for official misconduct in either State or federal court, and the conduct that could form the basis for the prosecutions is exactly the type of conduct being investigated by the Committee.

Under these circumstances, it is reasonable for Mr. Stepien and Ms. Kelly to fear that they currently face the hazard of prosecution in the concurrent federal investigation. The Committee's subpoenas here request all communications, documents, and phone records relating to the lane closures. Although the Committee attempted to modify the requests, it only modified the requests for telephone records, calendar entries, and electronic devices, and even the modified requests for telephone records and calendar entries remain broad. It is clear that, at the very least, the act of producing some of the documents could provide a "link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman, supra, 341 U.S. at 486; Hubbell, supra, 530 U.S. at 42 ("It is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories *could* provide a prosecutor with a lead to incriminating evidence or a link in the chain of evidence needed to prosecute.") (emphasis added); see also N.J.R.E. 502(c) (stating that a matter may incriminate

even if it is a "clue to discovery" that could constitute either an element of a crime or a circumstance that could be part of the basis for a reasonable inference of a crime). Although there is no evidence that Mr. Stepien or Ms. Kelly are themselves targets of the inquiry, it is unlikely at this stage that the subjects of the investigation would be public knowledge. Moreover, "[a] witness may properly invoke the privilege when he reasonably apprehends a risk of self-incrimination, though no criminal charges are pending against him." In re Corrugated Container Anti-Trust Litig., 620 F.2d 1086, 1091 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981). Indeed, "once incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute." United States v. Sharp, 920 F.2d 1167, 1171 (4th Cir. 1990).

The Committee argues that Chairman Wisniewski's comment to the media stating that "laws have been broken" does not present a hazard of incrimination because the Legislature has no authority to prosecute for criminal behavior, because Chairman Wisniewski is but one of twelve Committee members, and because his comments did not specifically refer to Mr. Stepien or Ms. Kelly. Although the comments of Chairman Wisniewski alone are not sufficient to create the hazard of prosecution, the comments certainly contribute to the defendants' "reasonable belief' that evidence they produce could be used against them in a criminal proceeding. As previously noted, a question to which a claim of the privilege is asserted "must be considered 'in the setting in which it is asked.'" Zicarelli, supra, 406 U.S. at 480 (citing Hoffman, supra, 341 U.S. at 486). The context of these subpoenas for documents include a concurrent federal criminal investigation into substantially the same subject matter as the Committee's investigation, which has sought information from Mr. Stepien and Ms. Kelly. Mr. Wisniewski's comments certainly suggest that Mr. Stepien and Ms. Kelly reasonably fear prosecution.

Since a federal investigation touching on the same subject matter is currently active, and since that investigation has involved the defendants personally to some extent, Mr. Stepien's and Ms. Kelly's fear of releasing incriminating evidence is not a "mere imaginary possibility," nor is it "trifling." Rogers, supra, 340 U.S. at 375; Apfelbaum, supra, 445 U.S. at 128; Hoffman, supra, 341 U.S. at 488 (holding that defendant faced the prospect of real and substantial incrimination even when "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s]cannot possibly have such tendency' to incriminate.") (citation omitted). Under these circumstances, the defendants reasonably believe that evidence produced pursuant to the subpoenas could be used in a subsequent criminal proceeding against them.

B. Whether the Subpoenas Unconstitutionally Compel Testimonial Evidence.

The heart of this matter is whether Mr. Stepien and Ms. Kelly are justified in asserting the privilege against self-incrimination because their acts of producing the requested documents would be testimonial. As noted above, the Fifth Amendment typically protects a witness's testimony from being used against him or her, but a separate "act-of-production" doctrine has been developed by the courts that, in some circumstances, allows a witness to avoid a subpoena to produce documents on the basis of the Fifth Amendment.

The Fifth Amendment to the United States Constitution protects against the use in a criminal proceeding of compelled self-incriminating evidence that is testimonial. The application of this seemingly simple rule to subpoenas *duces tecum* has changed dramatically since the United States Supreme Court's first major treatment of the subject in Boyd, supra, 116 U.S. at 632. In Boyd, a case decided in 1886, the Supreme Court held that the compulsory production of "private books and papers" is equivalent to an unreasonable search and seizure

under the Fourth Amendment, and also constitutes a violation of the Fifth Amendment's privilege against self-incrimination. Id. at 634–35. The Court essentially looked to the *contents* of the requested documents, and since they were "private" under the Fourth Amendment, found that compelling the subpoenaed party to produce the documents would violate that party's privilege against self-incrimination. Thus, under Boyd, the protection of the Fifth Amendment applied to a witness subpoenaed for document production only insofar as the witness possessed a cognizable privacy interest in the contents of the subpoenaed documents.

For almost a century, the Fifth Amendment was applied to subpoenas *duces tecum* under the privacy-centric standard set forth in Boyd. The doctrine was overhauled in 1976, when the Supreme Court reversed Boyd in Fisher, supra, 425 U.S. 391. After reviewing the case law developments since Boyd was decided, the Fisher Court concluded that the earlier decision had not "stood the test of time." Id. at 407. The Court shifted the focus of the analysis away from the privacy interest in the contents of the subpoenaed documents, and toward the testimonial components of the "act of production" required by a subpoena *duces tecum*. Since Fisher was decided, it is now well-settled as a matter of federal law that a witness cannot defeat a subpoena for documents by the mere fact that the *contents* of the documents contain incriminating evidence if the documents were voluntarily created by the witness, because the "compulsion" element would not be present. Id. at 409–10 ("The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else."). A witness may instead assert the Fifth Amendment in response to a subpoena for documents if the compelled *act of production* itself is testimonial in nature and leads to incriminating evidence. Id. at 410–12. To determine whether an act of production is testimonial, courts must ask 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. Id. at 411.

The Fisher Court recognized that determining whether acts of production are "testimonial" raises questions that "do not lend themselves to categorical answers." Id. at 410. Instead, application of the doctrine would "depend on the facts and circumstances of particular cases or classes thereof." Ibid. In his concurrence, Justice Marshall characterized the focus on the "testimonial aspects" of production, as opposed to the contents of the documents, as "technical and somewhat esoteric." Id. at 431 (Marshall, J., concurring). Justice Marshall nonetheless expressed confidence in "the ability of the trial judges who must apply this difficult test in the first instance to act with sensitivity to our traditional concerns in this uncertain area." Id. at 434 (Marshall, J., concurring). Subsequent to Fisher, however, lower courts have often found it difficult to apply the "act-of-production" standard, as evidenced by the fact that many of the precedents relied upon by the parties and cited by the court in this decision are reversals or partial reversals of lower court decisions. See United States v. Ponds, 454 F.3d 313, 320 (D.C. Cir. 2006); In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011, 670 F.3d 1335 (11th Cir. 2012); Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 910–11.

As will be explained in more detail below, the Fisher Court upheld a subpoena request that was narrow and specific. The most recent Supreme Court decision applying Fisher to a subpoena *duces tecum*, United States v. Hubbell, supra, 530 U.S. 27, found a defendant's assertion of the Fifth Amendment privilege justified in response to an extremely broad subpoena that amounted to a "fishing expedition" designed to employ the defendant as a witness against

himself. The holdings of these two cases may be viewed as two ends of a spectrum, with many subsequent lower court decisions falling somewhere between the conclusions of the Fisher and Hubbell Courts, depending upon the level of testimonial communication inherent in a particular act of production. The resolution of the Committee's complaints filed against Mr. Stepien and Ms. Kelly seeking enforcement of the subpoenas is an exercise in determining where on that spectrum these subpoenas fall.

Under the Fisher doctrine, an act of production may be testimonial because the act itself has "communicative aspects of its own." Specifically, the act could communicate that: 1) the documents exist; 2) the documents are under the defendant's control; or 3) the documents are authentic. Id. at 410–12. The Committee bears the burden of establishing that the presence of these "communicative aspects" was a "foregone conclusion" at the time it issued the subpoenas. See U.S. v. Bright, 596 F.3d 683, 692 (9th Cir. 2010) ("For this foregone conclusion exception to apply, the government must establish its independent knowledge of three elements: the documents' existence, *the documents' authenticity* and respondent's possession or control of the documents. *The government bears the burden of proof and must have had the requisite knowledge before issuing the summons or subpoena.*") (emphasis added) (citations omitted). These "communicative aspects" will now be analyzed separately.

1. Existence and Possession of the Documents.

For the act of production to be testimonial, it must convey something of substance to the State; where the government already has the knowledge that would otherwise be conveyed, "the question is not of testimony but of surrender." Id. at 411 (quoting In re Harris, 221 U.S. 274, 279 (1911)). The primary concern of the Fisher doctrine is to ensure that government bodies issuing subpoenas *duces tecum* have prior knowledge that the documents exist before requiring

witnesses who face the prospect of incrimination to produce those documents. Hubbell, supra, 530 U.S. at 42. The government "bears the burdens of production and proof on the questions of . . . possession[] and existence of the summoned documents." Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 910 (citing In re Grand Jury Proceedings, Subpoenas for Documents, 41 F.3d 377, 380 (8th Cir. 1994)).

In Fisher, supra, 425 U.S. 391, the government requested tax records that were prepared by the defendants' accountants. Under the particular facts of that case, the Court held that the defendants could not assert the Fifth Amendment privilege because the act of producing the tax documents did not contain any of those "testimonial components" of communication. The main reasons for this conclusion were that the government already knew about the existence and location of the tax records, and the accountants could authenticate the records. Since the "existence and location of the papers [were] a foregone conclusion and the taxpayer [added] little or nothing to the sum total of the Government's information by conceding that he in fact has the papers," the turnover of the documents was a "surrender" of known evidence, rather than testimony. Id. at 411. Thus, the Fifth Amendment offered no protection to the taxpayers because the acts of production were not testimonial.

In United States v. Doe, supra, 465 U.S. 605, the Supreme Court again passed upon the act-of-production doctrine, but came to the opposite conclusion from the Court in Fisher. A grand jury investigation had been launched into allegations of corruption in the award of county and municipal contracts, and had targeted defendant Doe, who was the owner of several sole proprietorships. Id. at 606. The grand jury issued five broadly-worded subpoenas, one of which "demanded the production of a list of virtually all the business records of one of respondent's companies." Ibid. The other subpoenas requested telephone records, "all records pertaining to

four bank accounts," a list of business records belonging to another company, and all bank statements and cancelled checks of two of the companies. Id. at 606–07. The defendant filed a motion to quash these subpoenas, which the District Court had granted, except for documents required by law to be maintained, such as tax returns. Id. at 607–08, n. 3. On appeal, the Supreme Court noted that, "[a] government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." Id. at 612. The Court deferred to and upheld the factual findings of the District Court, which had held that the act of producing the documents would involve testimonial self-incrimination. Essential to the District Court's reasoning was that there was "nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control." Id. at 614 n. 11. On appeal, the Third Circuit Court of Appeals had concluded that, "the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself." Id. at 614, n.12. Affirming, the Supreme Court further noted that even if the government were to obtain the records from another source, the defendant's testimony would be needed to authenticate the records. Id. at 614 n. 13. In other words, the government failed to show that the existence, location, and ability to authenticate the documents were a "foregone conclusion," and the motion to quash the subpoenas was granted and affirmed. Ibid.

The case most relied upon by the defendants, and the most recent Supreme Court case on the issue, is United States v. Hubbell, supra, 530 U.S. 27. In that case, Webster Hubbell had pleaded guilty to charges of mail fraud and tax evasion relating to the Whitewater Development Corporation and was sentenced to 21 months in prison. Id. at 32. As part of the plea agreement,

Hubbell promised to provide the "Independent Counsel" appointed to investigate the matter with "full, complete, accurate, and truthful information" about matters relating to the Whitewater investigation. Ibid. While Hubbell was incarcerated, the Independent Counsel served him with a documents subpoena calling for the production of eleven broad categories of documents to a grand jury. The subpoena covered a period of three years, and broadly called for all documents referencing sources of money for Hubbell and his family, including identities of employers or clients, bills, statements, copies of all bank records for Hubbell and his family, all documents referring to time worked or billed by Hubbell, all documents relating to expenses incurred or disbursed during employment, all documents reflecting Hubbell's schedule of activities, including calendars, phone records, and diaries, and more.

Hubbell invoked the Fifth Amendment privilege in response to the subpoena. The prosecutor then procured an order directing him to comply with the subpoena in exchange for immunity. Hubbell, supra, 530 U.S. at 33. Nonetheless, the contents of the documents that Hubbell produced formed the basis of a grand jury indictment of him for tax-related crimes and mail fraud. That indictment was dismissed because the prosecutor's evidence supporting the indictment derived from the immunized records. On appeal, the Supreme Court addressed the scope of immunity as well as the applicability of the Fifth Amendment to subpoenas for documents. There, as here, the main point of contention between the parties was whether the act of producing the documents constituted "testimony." Id. at 39. The Court examined the text of the subpoena, and concluded that, "the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources." Id. at 41. The Court compared the breadth of the subpoena to a series of interrogatory questions, and found it undeniable that any answer could "provide a prosecutor with a 'lead to incriminating evidence,'

or a 'link in the chain of evidence needed to prosecute.'" As a result of the "fishing expedition" subpoena, Hubbell was required "to make extensive use of the 'contents of his own mind'" to identify the documents responsive to the requests. Id. at 43. The Court noted that the government had no prior knowledge as to the existence or location of the 13,120 pages of documents that were eventually produced by Hubbell. Id. at 44-45. The Court rejected the government's argument that a businessman's production of business records is not testimonial because his possession of those records is a "foregone conclusion." Id. at 44. The Court ruled that the documents could not have been produced absent a grant of immunity, and dismissed the indictment against Hubbell. Id. at 45.

The subpoenas issued to Mr. Stepien and Ms. Kelly request broad swathes of information, including emails, documents, communications, and phone records, relating to the lane closures. The defendants argue that requiring them to identify the documents that are responsive to the requests is impermissible under Hubbell because such action requires the use of the defendants' mental faculties and thought processes. The court agrees with the Committee that the defendants' characterization of the Hubbell doctrine is overly broad—a witness may not justifiably assert the Fifth Amendment merely because "thought" must be used to respond to the subpoena. Indeed, it is hard to imagine a subpoena for documents for which no thought is required to respond. In Hubbell, the problem with the subpoena was not *only* that it required Hubbell to use the "contents of his mind," but that it required him to do so to identify *hundreds* of documents that the government had *no* knowledge of prior to the issuance of the subpoenas. In Hubbell, "[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." Hubbell, supra, 530 U.S. at 44. The defendants have not cited a single case where it was *only* the thought required by the

witness that rendered the witness's act of producing evidence testimonial. The use of thought in identifying responsive documents to a subpoena request is not, by itself, sufficient to constitute a testimonial act.

But the Committee's argument, premised upon the purported *lack* of thought process required to respond to the subpoenas in these cases, also misses the mark. At oral argument, counsel for the Committee emphasized the Hubbell Court's use of the phrase "*extensive* use of the contents of his own mind" to distinguish that case. Id. at 45 (emphasis added). According to the Committee, since the subpoena requests are topically-limited to the lane closures, neither Mr. Stepien nor Ms. Kelly must make "extensive" use of their minds to identify documents responsive to the subpoena requests, which brings these cases out of the purview of Hubbell. But the focus of the Supreme Court, and of other federal courts applying the act-of-production doctrine, has never been solely on whether the *witness* must use his or her thought processes to identify and locate the responsive documents. Indeed, the thought process of a witness, no matter how complex, would have zero communicative value if the government is already aware of the existence, location, and authenticity of the requested documents. In that situation, "the question is not of testimony but of surrender." Fisher, supra, 425 U.S. at 411.

Although lower courts have found it challenging to apply this doctrine, the underlying concern of the cases dealing with broad subpoena requests has always been to ensure that the *government's* purpose in issuing the subpoena is not to engage in "fishing expeditions" against witnesses that could result in the production of incriminating evidence. See Ponds, supra, 454 F.3d at 320 ("Whether an act of production is sufficiently testimonial to implicate the Fifth Amendment, therefore, depends on the government's knowledge regarding the documents before they are produced."). When the government is unsure whether documents exist or where

documents are located, as in Hubbell and Doe, a broad subpoena requesting "any and all" documents is essentially employing the witness to assist the government in discovering new information. Doe, supra, 465 U.S. at 614 n.12 (quoting the appellate court) ("The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself."). An act of production in that scenario is communicating to the government that the documents are in the witness's possession, and that the witness knows of their location. This testimonial communication goes far beyond the mere "use of thought" that both parties suggest is the key factor to determine whether an assertion of the privilege against self-incrimination is appropriate.

Indeed, some courts have interpreted the phrase "contents of the mind" in the Supreme Court's opinions as referring to the distinction between evidence that is testimonial and evidence that is purely physical, nontestimonial evidence, such as a subpoena for a key to the lock of a strongbox containing documents:

> [T]he [United States Supreme] Court has marked out two ways in which an act of production is not testimonial. First, the Fifth Amendment privilege is not triggered where the Government *merely compels some physical act, i.e. where the individual is not called upon to make use of the contents of his or her mind.* . . . . Second, under the 'foregone conclusion' doctrine, an act of production is not testimonial—even if the act conveys a fact regarding the existence or location, possession, or authenticity of the subpoenaed materials—if the Government can show with 'reasonable particularity' that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a 'foregone conclusion.'
>
> [Grand Jury Subpoena Duces Tecum Dated March 25, 2011, supra, 670 F.3d at 1345–46 (emphasis added)].

Where broad documents subpoenas are issued, courts repeatedly focus on the government's prior knowledge of the documents under the "foregone conclusion" doctrine. In Hubbell, the Supreme Court evaluated whether the subpoenas constituted a "fishing expedition" by focusing on their breadth and scope as well as on the government's lack of prior knowledge about the subpoenaed documents. Notably, this concern out-weighed the Court's focus on whether the witness must use "thought" in responding to the subpoena. Indeed, the primary difference between Fisher, in which the subpoena was upheld, and Hubbell and Doe, in which the subpoenas infringed upon the Fifth Amendment, was that in Fisher, due to the government's prior knowledge, the existence and location of a set of documents relating to defined topics was "a foregone conclusion." In Hubbell and Doe, the government only speculated that the recipient of the subpoena had responsive documents, which was found to be inadequate to abrogate the recipient's privilege against self-incrimination. Moreover, in Hubbell and Doe the witnesses' use of the contents of their minds to identify documents was not dispositive.

Federal cases decided after Hubbell that reached the issue of whether an act of production conveys the existence and/or possession of the requested documents, and involving broad requests for those documents, have repeatedly turned on the government's prior knowledge that subpoena recipients are extremely likely to have the documents. A leading precedent that the court and counsel reviewed extensively during oral argument is Ponds, supra, 454 F.3d 313. There, the court upheld two subpoena requests covering broad categories of information, even though the government did not have particular knowledge that each and every document in both categories existed. However, critical to the court's reasoning was that the government had demonstrated prior knowledge of at least *some* of the documents in each requested category. In one category, for instance, the subpoena requested "any and all correspondence" between the

witness's law firm and the courts and prosecutors, but the government was obviously aware of those communications because it was a party to the correspondence. The subpoena also requested documents referring to the "payment of legal fees," but the government knew of the high likelihood that fees had been paid because it had already seized a legal retainer agreement. Id. at 325. Therefore, the Ponds court concluded that the existence and location of some of the subpoenaed documents met the "foregone conclusion" standard. Ibid. Notably, however, the court in Ponds also rejected a number of other subpoena requests for which the government possessed *no* prior knowledge of the existence of the requested documents. Id. at 325–327. For example, the court rejected the government's argument that the existence of documents relating to a Mercedes Benz car that the government believed might be subject to forfeiture was a "foregone conclusion," even though the government knew that the vehicle was in the witness's possession, because the government could not justify the subpoena based on "broad assumptions about car ownership." Id. at 325. Of relevance to the cases before this court is that this subpoena was limited to a single topic and yet was found subject to the Fifth Amendment.

Another leading precedent is Grand Jury Subpoena Duces Tecum Dated March 25, 2011, supra, 670 F.3d 1335. There, the government requested that the witness produce all encrypted hard drives for investigation into whether the witness possessed child pornography, even though the hard drives contained "twenty million" files. Id. at 1347. The Eleventh Circuit Court of Appeals found that this request implicated the Fifth Amendment. The court held that, "Fisher and Hubbell . . . still require that the Government show its knowledge that the files exist," and concluded that the subpoena could not be sustained because the government had no actual knowledge that any illegal files existed. Id. at 1348–49. This recent precedent confirms that the central inquiry in the Fisher/Hubbell analysis, with respect to whether an act of production is

testimonial because it communicates possession, is the government's knowledge of the existence of the actual documents requested at the time the subpoena is issued.

A similar analytic approach was utilized by the Ninth Circuit Court of Appeals in Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d 905. There, the court found a subpoena too broad under the Fifth Amendment even though it was limited to documents related to price-fixing in connection with the sale of Dynamic Random Access Memory, which was the subject of a federal antitrust investigation. Id. at 910–11. The court based its holding on the fact that, "the government possessed insufficient information to make the existence or possession" of the requested documents a "foregone conclusion." Id. at 910. The government had argued that it had extensive knowledge of the defendant's price-fixing activities as a result of interviews with witnesses and the defendant's own incriminating statements, but the court confirmed that, "it is the government's knowledge of the existence and possession of the *actual documents*, not the information contained therein, that is central to the foregone conclusion inquiry." Ibid. (emphasis added). Although the government was not required to show the existence of every single document in order to enforce the subpoena, it was required to "to establish the existence of the documents sought and Doe's possession of them with 'reasonable particularity' before the existence and possession of the documents could be considered a foregone conclusion and production therefore would not be testimonial." Ibid. The court concluded that, the "breadth of the subpoena in this case far exceeded the government's knowledge about the actual documents that Doe created or possessed during his former employment and that he retained after he terminated his employment." Id. at 911. Thus, the motion to quash the subpoena was granted even though the subpoena was narrowly limited to the subject matter of the investigation, and even though the government had knowledge that the witness was connected to the price-fixing

investigation. The Committee cites this case in support of having this court enforce its subpoenas, noting that the Ninth Circuit stated that the government *could* have shown knowledge with respect to certain communications included in the broad subpoena requests. But that observation by the court was predicated upon the defendant's "substantial admissions" to the investigators regarding the existence of those documents. Ibid. Neither Mr. Stepien nor Ms. Kelly have made any such admissions.

As is clear from this court's review of the federal precedents, the decisions addressing broad subpoena requests fall somewhere on a spectrum. On one end of the spectrum is where the government has knowledge of the specific documents being requested, as in Fisher, where the existence of the documents was a "foregone conclusion." Fisher, supra, 425 U.S. at 411; see also United States v. Teeple, 286 F.3d 1047, 1051 (8th Cir. 2002) (taxpayer's production of documents was not testimonial because the government already knew he possessed the documents as a result of the taxpayer's previous admissions). At the other end of the spectrum is where the government engages in a quintessential fishing expedition by issuing a subpoena "for all documents" with no subject matter limitation, such as what occurred in Hubbell. The subpoenas issued to Mr. Stepien and Ms. Kelly by the Committee *are* topically limited, but are also extremely broad. This court must now turn to determining where upon this spectrum the subpoenas issued to Ms. Kelly and Mr. Stepien fall.

In these cases, the exceedingly broad scope of the subpoenas issued against Mr. Stepien and Ms. Kelly more closely resemble the requests found to be invalid in Doe and Hubbell than the request upheld in Fisher, which identified and requested specific tax records that the government already knew existed and had been created by Fisher's accountant. The Committee has requested "all documents," "all communications," telephone records, and "all electronic

communications" relating to the lane closures, extending as far back as September 1, 2012. The subpoenas also request all "voice and audio recordings" and all calendars and planners relating to the lane closures. The broad language used by the subpoenas suggested to the court that the Committee has little knowledge that *any* particular documents existed apart from communications between the defendants, Mr. Wildstein and Mr. Baroni that the Committee provided to the court in support of its application. See, e.g., In re Grand Jury Proceedings, supra, 41 F.3d at 380 ("[T]he broader, more general, and subjective the language of the subpoena, the more likely compliance with the subpoena would be testimonial."). The Committee's sole argument is that since it is in possession of documents that reveal communications between Mr. Stepien/Ms. Kelly and David Wildstein, further communications with an undetermined number of individuals about the lane closures *must be* in the possession of the defendants. In addition to the obvious logical fallacy of the Committee's argument—the existence of some communications between two people is not necessarily proof that more communications between those individuals about the relevant topic exist, that other communications between the defendants and *other* people exist, or that relevant information is located on calendar entries or stored on personal computers—the argument is not based on the law. Under Fisher, the "existence and location of the papers" must be a "foregone conclusion" and the witness must add "little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." Fisher, supra, 425 U.S. at 411. Although this test is difficult for an investigating authority to meet, the Supreme Court has deemed this stringent requirement necessary to give meaning and effect to the Fifth Amendment right against self-incrimination.

While it is true that, unlike the subpoenas in Hubbell, the subpoenas in these cases are topically limited to the lane closures, the key inquiry remains whether the Committee had

knowledge that the actual documents existed at the time it issued the subpoenas. Just because Mr. Stepien communicated about the lane closures with Mr. Wildstein *after the event happened*, for example, is not evidence that he is in possession of similar communications relating to the event. At best, the existence of more documents is the subject of reasonable speculation. And the fact that Ms. Kelly may have engaged in communication concerning the lane closures with Mr. Wildstein is not, in and of itself, evidence of the existence and location of a myriad of other communications, documents, and records involving Ms. Kelly and Mr. Wildstein, or Ms. Kelly and any other individuals. At oral argument, counsel for the Committee suggested that the few emails that were produced are proof that the defendants engaged in "routine discussions" about the lane closures with various individuals. Interestingly, counsel admitted that the Committee did not know with whom the defendants were having those conversations. To the extent that the Committee argues that it can reasonably be assumed as general knowledge that defendants would possess documents such as emails and text messages responsive to the subpoenas, a similar argument was squarely rejected in Hubbell. There, the government claimed that it was a "foregone conclusion" that Hubbell would possess the subpoenaed documents because "a businessman such as [Hubbell] will always possess general business and tax records that fall within the broad categories described in this subpoena." The Court rejected that argument as "overbroad." Hubbell, supra, 530 U.S. at 45. The Committee's call for a "totality of the circumstances" analysis to determine if the Committee knows that more documents exist, which was first raised at oral argument, is simply not supported by the case law precedents that have routinely rejected similar arguments premised upon such presumptions. See Ponds, supra, 454 F.3d at 325 (government could not request documents related to vehicle in possession of the witness based upon "broad assumptions" about car ownership, nor could it request "records of

employees" of the witness's law office even when it knew that the witness was an attorney with his own law office).

As noted by several federal Courts of Appeals, in applying the act-of-production doctrine subsequent to Hubbell a trial court's focus must remain on preventing the government from obtaining documents by subpoena over Fifth Amendment objections when the government has no reliable knowledge of their existence. See Ponds, supra, 454 F.3d at 325–27; Grand Jury Subpoena Duces Tecum Dated March 25, 2011, supra, 670 F.3d at 1348–49; Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 910–11. The subpoenas issued by the Committee request production of *all* documents and records relating to the lane closures. As in Hubbell, the acts of production required by the Committee are "tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." Hubbell, supra, 530 U.S. at 41. Thus, in these cases, the act of producing the requested information is precisely the type of "testimonial" conduct that the Supreme Court in Hubbell and Doe sought to prevent from being compelled by the government without a grant of immunity. This analysis applies even though the Committee's requests are *topically* limited to the lane closures and are limited temporally to the period between September 1, 2012 and the present. While there is no requirement that it have knowledge of "every scrap" of paper that it is requesting, Ponds, supra, 454 F.3d at 325, the Committee bears the burden of demonstrating prior knowledge of the existence and location of the documents to sustain a subpoena for documents when a Fifth Amendment objection is raised. Ibid. (government could not rely on fact that the witness possessed a car to request production of documents relating to car ownership). The Committee has failed in that burden here. The court thus finds that the subpoenas as written were intended to utilize the defendants as information-gatherers for the

Committee's own investigative purposes. See Hubbell, supra, 530 U.S. at 41 ("It is apparent from the text of the subpoena itself that the prosecutor needed respondent's assistance both to identify potential sources of information and to produce those sources."). While legislative committees in New Jersey have broad powers, Morss v. Forbes, 24 N.J. 341, 354 (1957), they do not have the authority to abrogate the Fifth Amendment absent a grant of use and derivative use immunity.

At oral argument, counsel for the Committee seemed to retreat from the breadth of the subpoena requests. Counsel focused his argument almost entirely on the requested email communications and text messages from Ms. Kelly and Mr. Stepien, often overlooking the fact that before the court are subpoenas requesting "any and all documents," as well as all voice mails, calendars, day planners, and diaries. But even the requests for emails and text messages are too broad under the standards set forth in Hubbell. The Committee has not shown that the existence of further communications from or to the defendants regarding the lane closures from any person is a "foregone conclusion." The Committee asks the court to adopt and apply the "reasonable particularity" test that was adopted by the District of Columbia Circuit, and the Ninth and Eleventh Circuits, rather than the "foregone conclusion" analysis. See Ponds, supra, 454 F.3d at 321; Grand Jury Subpoena Duces Tecum Dated March 25, 2011, supra, 670 F.3d at 1344; Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 910. This test would require the Committee to prove that it had knowledge showing a "reasonable particularity" that the documents existed when issuing the subpoenas. The Supreme Court has never adopted this test, preferring the "foregone conclusion" language in its opinions.[1] As many courts have recognized, however, the "reasonable particularity" test is not really a new legal standard, but

[1] The lower court in Hubbell had expressly applied the reasonable particularity test. However, the Supreme Court did not endorse that language, and used the "foregone conclusion" analysis in its opinion instead. United States v. Hubbell, 167 F.3d 552 (D.C. Cir. 1999), aff'd, 530 U.S. 27 (2000).

rather provides a way to apply the Supreme Court's "foregone conclusion" standard. Even if applicable, the test does little to change the analysis here. The test requires the government to prove its knowledge of the *actual documents* with reasonable particularity, and the Committee has simply not done that in these cases. Reasonable speculation that the documents exist does not rise to the level of reasonable particularity.

Counsel for the Committee also claimed at oral argument that since the complaints in these matters have been filed, the Committee has independently obtained more documents that allow it to prove with reasonable particularity the existence of more communications involving the defendants in connection with the lane closures. As part of the supplemental papers provided by the Committee in response to the court's order, the Committee produced more communications made between the defendants and various other individuals regarding the lane closures that it had obtained after issuing the subpoenas, even though the court never directed the production of such materials. However, as the Committee candidly acknowledges in its supplemental brief, the court's evaluation of the subpoenas in these cases turns on the Committee's knowledge at the time the subpoenas were issued. The question before the court is the validity of the subpoenas issued on January 27, 2014, and whether *those* subpoenas constituted fishing expeditions at the time they were issued. Thus, it is the extent of the government's knowledge at the time those subpoenas were issued that the court must consider. See Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 910 ("When deciding whether the government has met its burdens of production and proof, courts should look to the 'quantum of information possessed by the government before it issued the relevant subpoena.'" (citing Hubbell, supra, 167 F.3d 552); see also United States v. Rue, 819 F.2d 1488, 1493 (8th Cir. 1987) ("The relevant date on which existence and possession of the documents must be

shown is the date on which the [subpoena] is served, for it is at that time that the rights and obligations of the parties become fixed."). Moreover, the record only shows the existence of a handful of emails involving Mr. Stepien, Ms. Kelly, Mr. Wildstein, and Mr. Baroni at the time the subpoenas were issued. The emails and text messages may form the basis for more targeted subpoena requests in the future, but they fall far short of sustaining the Committee's argument that the existence and possession of the documents requested in the subpoenas were either a "foregone conclusion" or known with "reasonable particularity."

The Committee attempted to limit somewhat the scope of the subpoenas in letters to Mr. Stepien and Ms. Kelly, but since it reserved to itself the right to re-expand the scope of the subpoenas at any time, the purported limitation was neither permanent nor effective. But even assuming *arguendo* that the modifications were effective, the modifications do not save the subpoenas and still violate the standards set forth in Doe and Hubbell. The Committee limited its request for phone records and calendar entries to materials relating to thirty-two specifically-named individuals, including David Wildstein. Some of the documents already in the Committee's possession suggest that, at certain times, Ms. Kelly and Mr. Wildstein planned to have future telephone calls. As a result, the Committee may have reason to suspect that telephone records exist as to phone calls made between Ms. Kelly and Mr. Wildstein. But the modified requests go far beyond requesting that information. There is *no* evidence before the court that Ms. Kelly ever spoke on the telephone with or met with any of the thirty-one other named individuals, and there is *no* evidence that Mr. Stepien ever communicated by telephone or met with any of those individuals, including Mr. Wildstein.

If the subpoenas had been limited to seeking only correspondence between the defendants and Mr. Wildstein, they may have been sufficient under Fisher and Hubbell, because the

Committee already has possession of some such communications and therefore the existence of those communications is a "foregone conclusion." Similarly, as intimated above, a request for the telephone records of calls made between Ms. Kelly and Mr. Wildstein might constitute a sufficiently targeted request under the case law given the communications already in the Committee's possession that refer to anticipated additional communications. But again, the fundamental problem with the subpoenas is that they are overbroad. The subpoenas were never modified to limit the requests for documents, emails and other communications. The requests even as modified remain a fishing expedition, albeit a slightly more defined one by virtue of the fact that some of the requests were limited to thirty-two named officials. The act of producing the information in these cases would therefore convey that documents and other materials exist, and would confirm that defendants are in possession of the materials. Consequently, the subpoenas would require compelled testimonial evidence from Ms. Kelly and Mr. Stepien and thus run afoul of defendants' privilege against self-incrimination.

2. Authentication.

Even if the Committee could show that it had prior knowledge of some of the requested documents with reasonable particularly, that does not remedy the fact that Mr. Stepien's and Ms. Kelly's testimony may also be required to *authenticate* some of the materials sought by these subpoenas. Indeed, a separate basis for determining that an act of production is testimonial is if a witness's production of documents would require that witness's testimony to authenticate the documents at trial. See Fisher, supra, 425 U.S. at 412–13 n. 12. Under Fisher, authentication is yet another "testimonial component" of an act of production. See Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 912 (noting that authentication is a "prong" of the foregone conclusion analysis, and that in that case, production constituted authenticating testimony

because no one other than the witness could have authenticated "his handwritten notes, personal appointment books, and diaries."). In Doe, supra, 465 U.S. at 614 n.13, the Supreme Court explained that part of the basis for the valid assertion of the privilege against self-incrimination was the fact that, "if the Government obtained the documents from another source, it would have to authenticate them before they would be admissible at trial." Thus, "[b]y producing the documents, respondent would relieve the Government of the need for authentication." Ibid.

Moreover, the "authentication" that constitutes "testimony" under this doctrine is more than the mere identification of a document for later use at trial. Instead, the government bears the burden of proving that it is not "compelling the witness to use his discretion in selecting and assembling the responsive documents, and thereby tacitly providing identifying information that is necessary to the government's authentication of the subpoenaed documents." Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 912. The Eighth Circuit, reviewing a subpoena requesting "all original records" of a business owner regarding all financial transactions over four years, acknowledged that a response to that subpoena would authenticate the requested documents. In re Grand Jury Proceedings, supra, 41 F.3d at 381. The District Court had denied the witness's motion to quash, but the Eighth Circuit reversed. The Circuit Court explained that the authentication analysis turns on "who prepared the documents and who could vouch for their accuracy." Id. at 380. The court further noted that requiring the witness to comply with the subpoena would be problematic under the Fifth Amendment because "[c]ompliance with this broad language would require the witness to discriminate among documents, thereby providing identifying information that is relevant to the authenticity of the documents." Id. at 381. Not only would turning over the requested documents communicate the genuineness of those records, but it would also reveal "that some of the documents relate to

financial transactions." Id. at 380. Therefore, the court concluded that, "[t]he government cannot enforce the subpoenas without granting use immunity . . . or significantly narrowing the scope of the subpoenas." Id. at 381.

Largely relying on that decision, the Ninth Circuit reached a similar conclusion in Grand Jury Subpoena Dated April 18, 2003, supra, 383 F.3d at 912. The subpoena in that case had required the witness to produce "all documents '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.'" Ibid. The District Court had relied on the government's representation that the witness's testimony through production of the documents would not be needed for authentication, but the Ninth Circuit Court of Appeals disagreed. The court noted that the subpoena requested many documents that the witness created himself, and that it "required him to discriminate among the many documents he might possess, requiring him specifically to identify and produce to the grand jury those that related to the production or sale of DRAM." Ibid. The government had failed to demonstrate "how anyone beside Doe could sift through his handwritten notes, personal appointment books, and diaries to produce what Doe's attorney estimates may be 4,500 documents related to the production or sale of DRAM." Ibid. Thus, the court concluded that, "the government has failed to demonstrate that it can authenticate the documents so broadly described in the subpoena without the identifying information that Doe would provide." Id. at 913.

In these cases, there are likely some and perhaps many documents requested by the subpoenas that could be authenticated only by Ms. Kelly or Mr. Stepien. For example, any typed or electronic personal notes, calendar entries, etc. may require authentication by Mr. Stepien or

Ms. Kelly to prove that those records were actually created by the defendants. Therefore, providing such documents to the Committee would be testimonial under Fisher because such production would attest to the genuineness of those documents. To be sure, as counsel for the Committee asserted at oral argument, it is possible that many of the requested documents could be authenticated by third parties. In Fisher, the Court upheld the validity of the subpoena in part because the requested records were prepared by the witness's accountant, who could independently authenticate the records. Counsel for the Committee claimed, for example, that telephone records could be authenticated by the telephone service provider that stores the data. In addition, email communications *received* by the defendants relating to the lane closures were not prepared by the defendants and therefore those records could be authenticated by others, as in Fisher. See United States v. Puerta Restrepo, 814 F.2d 1236, 1239 (7th Cir. 1987) ("[A]uthentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did."). But whether certain acts of production may not require the authentication of Ms. Kelly or Mr. Stepien is an analysis that cannot be made at this stage given the lack of specificity in the subpoena requests.

And Ms. Kelly and Mr. Stepien would not only attest to the "genuineness" of the requested documents if they comply with these subpoenas. As in the Eighth and Ninth Circuit decisions discussed above, the very broad requests contained in the subpoenas challenged here call for a further communicative aspect of authentication. By identifying and producing documents relating to the "lane closures," Ms. Kelly and Mr. Stepien would be communicating that each produced piece of evidence in fact relates to the lane closures. At oral argument, counsel for Mr. Stepien raised a hypothetical to illustrate this point. He said that if an email was sent by Mr. Stepien stating, "I did it," such an email would on its face not convey what "it"

refers to and would not overtly relate to the lane closures. But if produced in response to the Committee's subpoena, such an email (which the court has no reason to believe actually exists) would clearly constitute a testimonial communication that incriminates Mr. Stepien. Given the breadth of the subpoenas and the length of time they cover (in excess of sixteen months), it is possible that some of the documents and communications requested of Mr. Stepien and Ms. Kelly would not facially relate to the lane closures, and that only the act of producing those documents would provide the Committee with information linking the documents to that topic. Again, while there may also be documents that *do* facially relate to the lane closures such that no similar kind of authentication would be required, at this stage of the subpoena process that question cannot be evaluated. Absent a grant of immunity, defendants cannot be expected to provide individual documents in order to evaluate whether the act of producing those documents would necessarily involve authentication, because such a scenario would violate defendants' rights against self-incrimination. See Maness v. Meyers, 419 U.S. 449, 463 (1975) (requiring a witness to rely upon a subsequent motion to suppress for protection of his right against self-incrimination would "let the cat" out of "the bag," with "no assurance whatever of putting it back.").

Interestingly, the Committee's modification of the request for telephone records was not limited to the topic of "lane closures," although the original subpoena requests for such data were topically-limited. At oral argument, counsel for the Committee argued that if it had limited the requests for phone records by topic, then the requests would have required even *more* testimonial communication from the defendants. That certainly would be the case. If the requests for phone records were limited to those relating to the lane closures, the defendants, by producing the records, would be communicating that each record related to the lane closures, which cannot be

discerned from the face of the phone records themselves. However, this point undermines the Committee's own position in these cases in two ways. First, the same argument applies to other documents, email communications, and text messages that do not overtly relate to the lane closures, as demonstrated above by the "I did it" hypothetical. Thus, the Committee's recognition that limiting the request for telephone records to the topic of lane closures would still compel testimonial communication implicitly acknowledges that other requests for information from defendants related to the lane closures could do the same. Second, the Committee's concern about the telephone records illustrates how little the Committee knows of the documents and records it seeks. Counsel for plaintiff suggested that the Committee is in a "difficult" position because it seeks the telephone records but cannot limit its request to the topic of lane closures without compelling testimonial evidence. But the only reason the Committee's position is "difficult" is because it has no actual knowledge that the records exist. That may often be the case in the early stages of an investigation, be it undertaken by a legislative or prosecutorial entity, but the difficulty does not condone abrogation of important constitutional rights.

3. Whether Defendants Justifiably Asserted "Blanket" Objections.

The Committee further argues that defendants are prohibited from making "blanket objections" to the subpoenas issued in these cases. According to the Committee, the defendants must make "document-by-document" claims of privilege. In support of this contention, the Committee cites cases holding that a taxpayer may not refuse to produce or file a tax form or respond to an IRS summons on self-incrimination grounds, but must instead appear and make specific objections to specific questions or to producing specific documents. United States v. Allshouse, 622 F.2d 53, 56 (3d Cir. 1980); United States v. Edelson, 604 F.2d 232, 234 (3d Cir. 1979); United States v. Allee, 888 F.2d 208, 212 (1st Cir. 1989) ("A blanket objection to the

issuance of an IRS summons based on the Fifth Amendment privilege against self-incrimination is not a viable defense."); United States v. Reis, 765 F.2d 1094, 1096 (11th Cir. 1985). These cases, however, are distinguishable from the present matters in two ways. First, they rest on the premise that a taxpayer who asserts a blanket privilege to a boilerplate IRS request for such documents has not shown that he is facing the hazard of incrimination. In regard to Mr. Stepien and Ms. Kelly, on the other hand, they reasonably fear incriminating themselves due to a pending investigation by the United States Attorney for the District of New Jersey. Second, the IRS summonses in those cases were generally targeted to a specific set of documents—namely, documents reflecting income for a specific time period, such as W-2 statements, which the taxpayer recipients of the subpoenas would reasonably be expected to have in their possession given the nature of the documents and the obligations of United States citizens to pay federal taxes. Here, there are no such targeted requests for similar documents. The only way for the Committee to learn what is in the possession of Mr. Stepien and Ms. Kelly is for them to produce the documents. To follow the Committee's argument would require the defendants to make testimonial acts of production in order to evaluate whether they in fact have the right to avoid making such testimonial acts of production. Thus, for them to assert the privilege on a document-by-document basis would eviscerate the privilege. Interestingly, a prosecutor in a subsequent criminal case would then be free to argue that the defendants waived their self-incrimination rights by responding to the subpoenas. Cf. Malloy v. Hogan, 378 U.S. 1, 11 (1964) ("If the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee.").

A blanket subpoena calling for a fishing expedition without the promise of immunity justifies a blanket response. See, e.g., Maness, supra, 419 U.S. at 475–76 (White, J., concurring) (refusal to respond to subpoena demand was justified because witness was not promised immunity). If the Committee had requested specific documents, then it would be reasonable to require the defendants to assert the privilege as to each document—just as a witness must provide specific answers to specific questions on a tax form. But with such broad requests for documents as the Committee set forth in its subpoenas without a showing that it had prior knowledge of the existence of such documents, a blanket assertion of the privilege against self-incrimination is reasonable in the absence of a promise of use or derivative use immunity. See Balsys, supra, 524 U.S. at 683 ("The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity 'would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee.'") (quoting Maness, supra, 419 U.S. at 462). If the Committee persists in seeking a blanket production in response to its broad requests, affording immunity to the defendants would accomplish its goal while respecting the important protections of the Fifth Amendment. See, e.g., In re Grand Jury Proceedings, supra, 41 F.3d at 380–81.

4. The Required Records Exception.

Finally, the Committee claims that the "required records" exception to the privilege against self-incrimination requires defendants to comply with the subpoenas and its motion to compel production of the requested documents. Under this exception, the Fifth Amendment privilege does not apply to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." Shapiro, supra, 335 U.S. at 33. The

Committee argues that under New Jersey laws and regulations and the Division of Archives Guidelines, Ms. Kelly and Mr. Stepien are required to retain all emails touching on state business until they are no longer of administrative value.[2] The Committee also argues that New Jersey records-retention policies satisfy the regulatory prong of the required records doctrine and cause defendants, former public employees, to sacrifice their right against self-incrimination.

The applicability of the required records exception to the facts of these cases again involves a clash between important individual constitutional protections and the ability of the government to obtain information to satisfy its investigatory needs. Exceptions to the fundamental right against self-incrimination, such as the required records doctrine, must be narrowly construed. See United States v. Andujar-Basco, 488 F.3d 549, 557 (1st Cir. 2007) ("[B]ecause the Fifth Amendment privilege against self-incrimination must be given liberal construction, any exceptions that undermine its protections should be applied narrowly.") (citation omitted); United States v. Spano, 21 F.3d 226, 229 (8th Cir. 1994) ("The Supreme Court has recognized that the required records doctrine is an *exception* to the assertion of the Fifth Amendment privilege against compelled testimonial self-incrimination.") (emphasis added). In light of the importance of the right against self-incrimination and the narrow construction that has been given to exceptions to that right, this court is troubled by the prospect of extending the doctrine to affect *all* public employees, particularly because the Committee has not referred the court to any precedent in any jurisdiction that applies the required records exception to public employees on the basis of a broad records-retention requirement.

[2] The Committee also cites an unpublished Law Division case that does not involve the privilege against self-incrimination for the proposition that personal emails touching on public matters must also be maintained under the statutes and Guidelines, although that case concerns the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, which is not at issue here. Secondary Parent Council v. Newark, No. ESX-L-6937-11 (Law Div. Dec. 19, 2012).

Notably, records-retention policies for public agencies are not part of a targeted, heavily regulated activity involving government monitoring or the record-keeping responsibilities of fiduciaries as has been the case where the doctrine has been applied to overcome self-incrimination concerns. See, e.g., Rajah v. Mukasey, 544 F.3d 427, 440–42 (2d Cir. 2008) (applying doctrine to evidence collected by immigration authorities pursuant to statutory regime requiring immigrants to maintain passports and other immigration documents); In re Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64, 68 (6th Cir.), cert. denied, 479 U.S. 813 (1986) (applying doctrine to a subpoena for odometer information, because an "essentially regulatory program" contained in a federal statute prevented tampering with or modifying odometer data); State v. Stroger, 97 N.J. 391, 408 (1984) (applying doctrine to trust account record-keeping requirements for lawyers imposed by court rules). Indeed, application of the doctrine to former State employees Kelly and Stepien would result in the abrogation of their individual rights against self-incrimination merely due to their prior public employment status. Yet, the right of public employees to assert the privilege against self-incrimination has repeatedly been upheld in other contexts. See, e.g., Uniformed Sanitation Men Assoc., Inc. v. Comm'r of Sanitation of City of New York, 392 U.S. 280, 284–85 (1968) ("[P]ublic employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination."); Garrity v. N.J., 385 U.S. 493, 500 (1967). At the same time, it is clear that a public agency or office itself could be subpoenaed for any documents in its possession as a result of the records-retention policy without raising the specter of violating an individual's constitutional rights. In order to analyze the applicability of this doctrine to the facts of these cases, the court must review the history, evolution, and previous applications of the required records doctrine.

a. Overview of the Doctrine.

The required records doctrine was established by the Supreme Court of the United States in Shapiro, supra, 335 U.S. at 33. In that case, the Emergency Price Control Act (EPCA) had required a licensee engaged in selling fruit and produce to maintain all sales records so that they would be available for inspection by government regulators. The petitioner in Shapiro was one such licensee, who was convicted of violations of the EPCA after he complied with an administrative subpoena issued under the EPCA "to produce 'all duplicate sales invoices, sales books, ledgers, inventory records, contracts and records relating to the sale of all commodities from September 1, 1944 to September 28, 1944.'" Id. at 4. The regulation implementing the EPCA had required petitioner to "preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts, or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation." Id. at 5. Petitioner claimed that production of the records, which were used in the prosecution resulting in his conviction, violated his right against self-incrimination. The Court rejected this argument, upholding the conviction and the subpoena after recognizing that such a record-keeping requirement is valid "when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." Id. at 32. The Court upheld the subpoena on the basis that, "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" Id. at 33. Since the requested records had "public aspects," were required

to be maintained, and the "transaction which it recorded was one in which the petitioner could lawfully engage solely by virtue of the license granted to him under the statute," the Court found that the compelled production did not violate the petitioner's Fifth Amendment privilege. Id. at 34.

The Supreme Court discussed the required records exception further in Grosso v. United States, 390 U.S. 62, 67–68 (1968). There, the petitioner challenged his convictions for failure to pay a wagering excise tax and tax evasion. Id. at 64. The petitioner argued that payment of the excise tax would have incriminated him in violation of the Fifth Amendment because those liable for payment of the excise tax were required to submit information to the tax authorities on a monthly basis on a special form pursuant to a statutory scheme regulating wagering. Id. at 64–65. The Court reviewed the required records doctrine established by Shapiro. According to the Court, that exception applies when the following conditions are satisfied: first, the purposes of the inquiry "must be essentially regulatory;" second, "information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept;" and third, "the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." Id. at 67–68. The Court concluded that the required records doctrine did not apply because the statute was targeted towards individuals suspected of criminal activities, and overturned the petitioner's conviction. Id. at 68.

The Fifth Amendment doctrine with respect to documents subpoenas has changed drastically since Shapiro and Grosso, and the application of the required records exception has likewise changed since then. Importantly, Shapiro and Grosso were decided many years before the Fisher doctrine was established, and therefore were premised on the notion, now outdated under federal law, that the nature of the requested documents must be examined to determine

whether or not a witness has a "privacy interest" in the materials under the Fifth Amendment. At the time Shapiro and Grosso were decided, the Fifth Amendment protected the *contents* of requested documents under the Boyd analysis, rather than acts of production. See Shapiro, 335 U.S. at 54 (Frankfurter, J., dissenting) ("If the records in controversy here are in fact *public*, in the sense of publicly owned, or governmental, records, their non-privileged status follows. No one has a private right to keep for his own use the *contents* of such records.") (emphasis added) (citation omitted). Since the *contents* of the documents were already available for inspection by the government through regulatory requirements, the witnesses could not claim the Fifth Amendment privilege because there was no expectation of privacy in those records. A passage from a treatise that was cited by the Shapiro Court explains the relationship between the early required records doctrine and the Boyd doctrine, which focuses on the contents of requested documents:

> The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, *the criminality of the entries exists* by his own choice and election, *not by compulsion of law*. The State announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to records required by law to be kept by a citizen not being a public official.
>
> [8 WIGMORE, EVIDENCE § 2259c (3d ed. 1940) (cited in Shapiro, supra, 335 U.S. at 35 n.46) (emphasis added)].

The relationship between the required records exception and Boyd was also noted by the Second Circuit, which referred to the exception as a "a response to the Boyd privacy rationale." United States v. Edgerton, 734 F.2d 913, 918 n.4 (2d Cir. 1984).

After Boyd was overturned in Fisher, the required records doctrine survived, although its application necessarily changed to comport with the evolution of Fifth Amendment law, focusing instead on whether a witness has waived the *act-of-production* privilege through voluntary participation in a heavily regulated activity that involves regular government inspection or monitoring in order for the regulation to be effective. See Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990). In Bouknight, which was not a required records case but applied many of the same principles of that doctrine, a court order required a mother to produce her previously-abused child. Producing the child would have been testimonial because it would attest to her control over the child, but the Supreme Court nonetheless required the mother to comply with the order. The Court explained that the child's "care and safety became the particular object of the State's regulatory interests." Id. at 559. Thus, the mother had "submitted to the routine operation of the regulatory system and agreed to hold [the child] in a manner consonant with the State's regulatory interests and subject to inspection by [the state agency]." Ibid. The mother had voluntarily "accepted the incident obligation to permit inspection." Ibid. Since the government's request was made for "compelling reasons unrelated to criminal law enforcement and as part of a broadly applied regulatory regime," the mother could not successfully assert the Fifth Amendment to resist the order to produce her child. Id. at 561. Although the Court never specifically mentioned the required records exception, this case has been relied upon by lower courts as an indication that the exception has survived the creation of the act-of-production doctrine. Spano, supra, 21 F.3d at 229 ("The Supreme Court [in Bouknight], while not directly relying upon the required records exception, recognized that the Fifth Amendment privilege against compelled testimonial self-incrimination is not absolute and

may be greatly diminished where invocation would interfere with state civil regulatory interests.").

Lower courts that have addressed the required records exception since Fisher have explained that the doctrine now applies to "acts of production" required by subpoenas *duces tecum*, rather than only to the contents of the documents, as in Shapiro and Grosso. See In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983, 722 F.2d 981, 987 n. 5 (2d Cir. 1983) ("The governmental requirement that they be kept implies an obligation to produce them upon the *government's demand*, which amounts to a waiver of any Fifth Amendment claim with respect to *the act of production*.") (emphasis added); Underhill, supra, 781 F.2d at 67 ("[I]n order to have meaning the required records exception must apply to the act of production as well as the contents of documents to which the doctrine applies."); In re Grand Jury Subpoena Dated February 2, 2012, 908 F. Supp. 2d 348, 353 (E.D.N.Y. 2012), aff'd, 741 F.3d 339 (2d Cir. 2013) ("[P]articipation in an activity that, by law or statute, mandates record-keeping may be deemed a waiver of the act of production privilege, 'at least in cases in which there is a nexus between the government's production request and the purpose of the record-keeping requirement.'"). Thus, the rationale of the exception under current Fifth Amendment precedents is that voluntary preparation of documents made pursuant to participation in a regulated activity constitutes a waiver of the act-of-production privilege because the government is already aware of the possession, existence, and authenticity of the documents by virtue of the record-keeping requirements. In choosing to engage in the regulated activity, such as a licensed profession or the banking industry, the individual chooses to accept regulatory oversight to further government programmatic goals. In re Grand Jury Proceedings, 707 F.3d 1262, 1275 (11th Cir.), cert. denied, 134 S. Ct. 129 (2013) ("[T]he 'obligation to keep and produce the

records are in a sense consented to as a condition of being able to carry on the regulated activity involved.' Further, '[i]n this respect, the mere response by production is no more a violation of the privilege against self-incrimination than requiring the creation of the record itself, for it is the record, presumably, that might incriminate.'") (citations omitted). In that sense, the focus is no longer solely on whether the requested documents have assumed "public" aspects, thereby removing any privacy interest in those documents. Rather, application of the doctrine looks to whether the witness has consented to production of the documents by voluntary participation in a regulated activity where the government regulatory program would be "frustrated" if individuals were permitted to invoke the privilege. See Rajah, supra, 544 F.3d at 442 ("The Fifth Amendment is not an impediment to the enforcement of a valid civil regulatory regime . . . . [I]f a person conducts an activity in which record-keeping is required[,] . . . he may be deemed to have waived his privilege with respect to the act of production.") (citation omitted); Spano, supra, 21 F.3d at 230.

b. Application of the Doctrine to Mr. Stepien and Ms. Kelly.

As noted, the Committee has asked the court to extend the required records exception to compel public employees to produce documents protected by the Fifth Amendment that were required to be maintained for administrative and not regulatory purposes. Such an extension would require the waiver of self-incrimination rights of all public employees solely by virtue of their public employment. The Committee has not cited to any precedential authority that supports such a sweeping rule that would completely abrogate the important constitutional rights of many individuals. Moreover, the only basis for imposing such a rule cited by the Committee is New Jersey's records-retention policies, which are designed primarily to assist public agencies with administrative needs and in complying with other statutory requirements, are general in

nature, and do not involve specific activities where individuals voluntarily assume record-keeping obligations as a condition for participating in a profession or regulated economic activity, as was the case in every precedent cited to the court that applied the doctrine. While a subpoena issued to a government agency or to a records custodian to obtain documents maintained by the *agency* pursuant to records-retention schedules would likely be sustainable, absent application of privileges, the Committee's subpoenas were targeted against public employees facing the hazard of incrimination, and the Fifth Amendment protects against *self-*incrimination in this context.

As discussed above, when determining whether to apply the required records exception to records-retention requirements for public employees, which is a matter of first impression in this State, the key question is whether, by virtue of a public official's employment, he or she has waived the act of production privilege and whether assertion of that privilege would frustrate a regulatory purpose. See In re Grand Jury Proceedings, supra, 707 F.3d at 1269 ("[V]oluntary participation in an activity that, by law or statute, mandates recordkeeping may be deemed a waiver of the act of production privilege because the obligations to keep and produce the records are in a sense consented to as a condition of being able to carry on the regulated activity involved.") (citation omitted). Under N.J.S.A. 47:2-3 and N.J.S.A. 47:3-26, the Division of Archives and Records Management (DARM) is charged with formulating standards, procedures, and rules for the maintenance of "public records." See N.J.A.C. 15:3-1.1 to -8.9. Under N.J.A.C. 15:3-1.1(a), state and local government agencies are required "to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and to provide prompt and timely access to the same." The regulations define "records" as papers or data made or required by law

to be received for "filing, indexing, or reproducing" by any officer of an agency, or documents "retained by such recipient or its successor as evidence of its activities or because of the information contained therein." N.J.A.C. 15:3-1.2. Under the regulations, DARM is given the authority to "promulgate such rules as may be necessary to effectuate the management of public records in a systematic and comprehensive fashion and to safeguard the State's documentary heritage." N.J.A.C. 15:3-1.3.

Each agency's retention schedules must be approved by the State Records Committee, and the destruction of any records is prohibited without prior approval. N.J.A.C. 15:3-2.1(a)(2), (b). Notably, the Committee has not presented the court with a retention schedule applicable to the Office of the Governor, and has instead relied on a document produced by DARM entitled "Managing Electronic Mail: Guidelines and Best Practices" ("Guidelines"). The Guidelines identify a number of different categories of emails that vary in terms of administrative importance, including "transient documents," "intermediate documents," and "permanent documents." A different retention policy is recommended for each category and the Guidelines repeatedly use the word "should" in reference to the recommended retention period. If an employee determines that an email is "transient," the email can be immediately destroyed.

The statutes and regulations cited by the Committee establish document retention policies for State agencies without establishing specific directives for public employees. The only pronouncement cited by the parties directly placing such obligations on individual public employees is contained in the Guidelines. But it is unclear whether the obligations set forth in the Guidelines could be considered "mandatory" considering how much discretion is vested in public employees who are responsible for applying the Guidelines.[3] Moreover, the Guidelines

[3] Moreover, the fact that defendants had so much discretion to retain or destroy the emails contributes to the communicative nature of the requested acts of production. By producing the documents, defendants would be

lack the force of law as they were not promulgated pursuant to rulemaking procedures. See Administrative Procedures Act, N.J.S.A. 52:14B-1 to -15. That the requested records be *mandated by law* to be maintained is a threshold element of the applicability of the required records exception, and the satisfaction of that element is, at best, unclear based on the Guidelines. The overtly discretionary requirements of the Guidelines are simply too thin a reed upon which to base a sweeping rule requiring the waiver of self-incrimination rights for all public employees.

Moreover, it is difficult to see how Mr. Stepien and Ms. Kelly have waived any right to the act-of-production privilege solely by virtue of the requirements placed upon *agencies* to maintain records. As detailed above, the post-Fisher cases have applied the required records exception to preserve the functioning of a comprehensive scheme regulating private conduct that involves government inspections or government monitoring for compliance. See United States v. Under Seal, 737 F.3d 330 (4th Cir. 2013) (required records doctrine applies to Bank Secrecy Act's recordkeeping provision which requires individuals with foreign banking interests to keep certain information available for inspection for five years); In re Grand Jury Subpoena to Custodian of Records, etc., 497 F.2d 218, 220 (6th Cir. 1974) (applying doctrine where law required insurance broker to maintain non-corporate escrow deposit records for inspection); Stroger, supra, 97 N.J. at 408–09 (required records exception applies to bookkeeping records that must be maintained for inspection by attorney pursuant to a Court Rule, because "it is clear that the recordkeeping requirements, and the attendant system of auditing, are *aimed at ensuring compliance*" with the ethics rules) (emphasis added). In these contexts, subpoena recipients may not rely on the privilege against self-incrimination because withholding the information

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communicating that they consider them important enough to retain. In contrast, when the required records doctrine applies, the records "are prepared so as to, and in fact do, speak for themselves." Stroger, supra, 97 N.J. at 405.

would frustrate a valid regulatory purpose. But here, in contrast, there is serious doubt as to whether the "requirements" cited by the Committee in these cases are truly regulatory in the Shapiro sense.

The purpose of the broad public records-retention policies promulgated by DARM is to provide a "framework for the management of public records of the State of New Jersey in a systematic and comprehensive fashion." N.J.A.C. 15:3-1.1. And, according to the Guidelines, they were announced with the intention to: 1) assist public employees in complying with the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, in their use of email, and to 2) promote "best practices to facilitate effective capture, management, and retention of electronic messages as public records." It appears from the language of the regulations and the Guidelines that they are both intended as an internal aid for state agencies to assist them in complying with OPRA, and not as one piece of a comprehensive regime designed to regulate clearly defined substantive conduct through regular-interval government inspection and oversight, as in the cases cited above. See, e.g., In re Siegel, 208 N.J. Super. 588, 592 (App. Div.), certif. denied, 105 N.J. 568 (1986) (holding that required records doctrine applies to records of jeweler required by State tax law to be available for inspection at any time; jeweler was required to maintain records as a "condition of doing business in New Jersey"). The records-retention requirements are intended only to preserve records, whereas the cases applying the Shapiro doctrine after Fisher have applied the required records exception to documents required to be maintained for some additional purpose that regularly exposes the documents to government scrutiny as a condition of doing business or participating in a regulated field. When individuals choose to undertake the regulated activity, the statutory or regulatory requirements notify them of the specific types of records that must be kept and the regulatory purpose of the record-keeping. The State's records-

retention policies simply do not operate in this fashion. Thus, it is difficult for the court to conclude that allowing Mr. Stepien and Ms. Kelly to assert the privilege against self-incrimination would frustrate a regulatory purpose, or that they voluntarily waived the right to object to producing self-incriminating evidence, which has been the focus of the post-Fisher precedents.

Indeed, to accept the Committee's argument would be to hold that all public employees "waive" the privilege of asserting act-of-production self-incrimination rights simply by entering public employment and engaging in business involving public affairs. Such a rule has never been developed or countenanced by the courts, and it is in direct conflict with the well-established principle that public employees are entitled to full protection under the Fifth Amendment. See, e.g., Garrity, supra, 385 U.S. at 500 ("[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."). In a line of cases beginning with Garrity, courts have repeatedly protected the Fifth Amendment rights of public employees who have not been compelled to incriminate themselves. United States v. Vangates, 287 F.3d 1315, 1320 (11th Cir. 2002) ("[A] public employee may not be coerced into surrendering his Fifth Amendment privilege by threat of being fired or subjected to other sanctions . . . and cannot be forced to choose 'between self-incrimination or job forfeiture.'") (citing Garrity, supra, 385 U.S. at 496, and Erwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985)). This principle has also been recognized in New Jersey. See, e.g., N.J.S.A. 2A:81-17.2a2 (guaranteeing use and derivative use immunity to public employees compelled to testify by threat of job loss); Mun. Investigating Comm. v. Servello, 200 N.J. Super. 413, 420 (Law Div. 1984) (granting motion to quash subpoena *duces tecum* issued to police officer, seeking production of materials compiled while working, on self-incrimination grounds). Relatedly, the

United States Supreme Court has held that a public employees' job retention cannot be conditioned on waiving the Fifth Amendment's safeguard against self-incrimination. Uniformed Sanitation Men Assoc., supra, 392 U.S. at 284–85. In light of these important policies, the Committee's argument that this court should expand the required records doctrine to deny virtually all public employees their rights against self-incrimination as a condition of public employment is constitutionally suspect. Such a far-reaching holding should not be premised upon records-retention *guidelines* that are intended to aid the internal functioning of government agencies, have not been adopted in accordance with rule-making requirements, and vest considerable discretion in public employees in regard to email retention.

Finally, the subpoenas request the production of "all documents" relating to the lane closures. Thus, the requests are far broader than demands for the turnover of emails relating to public administration or public policy, as the Committee suggests. Even assuming *arguendo* that the required records exception could apply to the emails produced while Mr. Stepien and Ms. Kelly were public employees, the fact that some of the requested materials *may* fall under the required-records exception is not a sufficient reason for the court to order defendants to comply with the overbroad subpoenas without a grant of immunity, particularly when the actual documents are not presently before the court. The court will not engage in redrafting the subpoenas, which are so facially overbroad that any "judicial surgery" would be unworkable. Moreover, the only support cited by the Committee for the proposition that defendants' *personal* emails must have been maintained is an unpublished Law Division decision that did not involve self-incrimination, but was decided in the context of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.[4] But OPRA's public disclosure requirements are subject to a number of statutory and common law privileges, such as the privilege for "inter-agency or intra-agency

[4] Secondary Parent Council v. Newark, No. ESX-L-6937-11 (Law Div. Dec. 19, 2012).

advisory, consultative, or deliberative material," which may have protected at least some of the requested emails from disclosure under that statute. N.J.S.A. 47:1A-9(b); Educ. Law Ctr. v. Dep't of Educ., 198 N.J. 274, 286 (2009) (quoting N.J.S.A. 47:1A-1.1). In addition, OPRA does not expressly abrogate the privilege against self-incrimination, and in fact explicitly preserves any privilege "established or recognized by the Constitution of this State, statute, court rule or judicial case law." N.J.S.A. 47:1A-9(b).

For these reasons, the court will not extend the required records doctrine to prevent Mr. Stepien and Ms. Kelly from asserting the Fifth Amendment's privilege against self-incrimination in response to the subpoenas served upon them by the Committee. The Committee retains the option, noted above, of seeking responsive records from the Governor's Office. Any emails produced by that office involving Ms. Kelly or Mr. Stepien would not be subject to their rights against self-incrimination since they would have been produced by a third party. Similarly, if the Committee has knowledge of responsive communications between defendants and any third party public official, the Committee could obtain the communications by issuing a subpoena against that third party public official without infringing upon the defendants' rights against self-incrimination.

II. Whether the New Jersey Privilege Against Self-Incrimination Provides Sufficient Justification for Defendants' Failure to Respond to the Subpoenas.

In New Jersey, "no person can be compelled to be a witness against himself." State v. Hartley, 103 N.J. 252, 286 (1986) (citation omitted). The New Jersey privilege against self-incrimination is broader than its federal counterpart. Guarino, supra, 104 N.J. at 229. Although the privilege is not enshrined in the New Jersey Constitution, it has been an "an integral thread in the fabric of New Jersey common law since our beginnings as a state." Hartley, supra, 103 N.J. at 286 (citing State v. Fary, 19 N.J. 431, 435 (1955)).

Although assertion of the federal right against self-incrimination is focused primarily on whether compelled evidence is testimonial, in New Jersey the primary focus remains on "the notion of personal privacy" that was first articulated by the United States Supreme Court in Boyd, supra, 116 U.S. 616. See State v. Strong, 110 N.J. 583, 594 n. 3 (1988). The New Jersey Supreme Court affirmed the privacy-centric approach to the privilege in In re Addonizio, 53 N.J. 107 (1968), when it held that an individual's personal financial records were privileged. After the United States Supreme Court decided Fisher and Doe, the New Jersey Supreme Court had occasion to reevaluate the State version of the privilege in Guarino, supra, 104 N.J. 218. The Court held there that, the "New Jersey common law privilege against self-incrimination protects the individual's right 'to a private enclave where he may lead a private life.'" Id. at 231 (citing Murphy, supra, 378 U.S. at 55). Under the New Jersey doctrine, a court must look to the "nature of the evidence" to determine whether it lies within that "sphere of personal privacy." Id. at 231–32. Thus, in the case of documents, "a court must look to their contents, not to the testimonial complusion [sic] involved in the act of producing them, as the Supreme Court has done in Fisher and Doe." Id. at 232. The Court expressly declined to follow the United States Supreme Court's rationale in Fisher and Doe, instead relying on the older statement of the law expressed in Boyd.

In Guarino, a grand jury issued a subpoena *duces tecum* against Joseph Guarino, seeking a broad array of his records relating to real property sales. The Court engaged in an exhaustive analysis of both Fisher and Doe, and found that under the federal doctrines, the contents of the records were not protected, and that the act of production doctrine did not allow Guarino to quash the subpoena because the prosecution offered immunity for producing the documents. Guarino, supra, 104 N.J. at 229. The Court then engaged in a lengthy discussion of the New

Jersey privilege against self-incrimination. The Court found that because the subpoenaed documents were solely business records, the contents were not protected under New Jersey common law. The Court explained that, "[t]he business records of a sole proprietor do not lie within that special zone of privacy that forms the core of the documents protected by Boyd and its progeny, and that are protected by the New Jersey privilege against self-incrimination." Id. at 232. Such records did not "contain the requisite element of privacy or confidentiality essential for the privilege to attach." Ibid. (citation omitted). According to the Court, "[i]n today's highly computerized, commercialized and regulated world, there is little expectation of privacy for such records that touch so little on the intimate aspects of one's personal life." Id. at 234. Since the types of records requested were typically "disclosed to a significant number of individuals," there was no valid claim of privacy and the documents were not privileged.

Unlike the requested records in Guarino, in these cases the subpoenas issued to Mr. Stepien and Ms. Kelly encompass personal information. The subpoenas request *all* correspondence, electronic or otherwise, and *all* documentation relating to the lane closures. Moreover, the subpoenas request telephone records, information about the personal schedules of Mr. Stepien and Ms. Kelly (through the request for calendars and planners), and production of personal electronic devices such as phones and computers that are likely to contain extensive personal information. In a footnote, the Guarino Court noted that if the subpoena had "invoked concerns of personal privacy" by requesting "personal comments, telephone numbers, or the like that would warrant protection, the result might be different." Id. at 232 n. 9. In addition, New Jersey courts' expansive concept of privacy underpinning the Fourth Amendment and its New Jersey equivalent informs this court's analysis of the extent to which the requested materials in these cases fall within the "sphere" of personal privacy. See, e.g., State v. Earls, 214 N.J. 564,

588 (2013) (reasonable expectation of privacy in location of one's cell phone); Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 324 (2010) (reasonable expectation of privacy in emails to attorney sent on work computer through personal Yahoo email account). These cases are an especially helpful guide in light of the fact that the United States Supreme Court in Boyd, the case providing the foundation for the entire "sphere of personal privacy" doctrine in New Jersey, considered and relied upon Fourth Amendment concepts in determining whether the requested information there was "private."

The Committee convincingly argues that the actual contents of the requested documents must be examined to determine whether the New Jersey privilege applies. According to the Committee, a request for all communications relating to the lane closures is not within the "sphere of privacy" because it relates to *official* business, not the intimate aspects of the defendants' lives, and the medium with which that information was conveyed is irrelevant. Guarino, supra, at 232 ("In the case of documents, therefore, a court must look to their contents."). It is certainly possible that a substantial amount of the requested documents would fall into the "official business" category. But it is the *breadth* of the subpoena requests in these cases that leads to the conclusion that the defendants were justified in invoking the privilege against self-incrimination. The subpoenas limit their requests to correspondences and documents related to the lane closures, but even that limitation may include purely personal information. For instance, the request would include contacts between Mr. Stepien and his family members simply discussing the lane closures in a non-official, purely personal capacity. The subpoenas also request all "documents" relating to the lane closures, but that request includes any personal notes written by Mr. Stepien and Ms. Kelly. Ms. Kelly, for example, has asserted that her work computer and work phone are no longer within her possession or control, which means that the

subpoena is requesting *primarily* information stored in her home or on her personal electronic devices. Such communications and documents fall within the realm of privacy protected by New Jersey's right against self-incrimination.

Other jurisdictions also clearly recognize a privacy interest in such materials. See United States v. Lucas, 640 F.3d 168, 178 (6th Cir. 2011) ("We recognize individuals have a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider . . . . And we know there is a far greater potential for the intermingling of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.") (citations omitted); United States v. Ganoe, 538 F.3d 1117, 1127 (9th Cir. 2008), cert. denied, 129 S. Ct. 2037 (2009) ("[A]s a general matter an individual has an objectively reasonable expectation of privacy in his personal computer."); United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008) ("[C]ell phones contain a wealth of private information, including emails, text messages, call histories, address books, and subscriber numbers. Zavala had a reasonable expectation of privacy regarding this information . . . A cell phone is similar to a personal computer that is carried on one's person; [precedent] indicates that mere possession of a cell phone gives rise to a reasonable expectation of privacy regarding its contents."); United States v. Warshak, 631 F.3d 266, 284 (6th Cir. 2010) (his "entire business and personal life was contained within the . . . emails seized. . . . Given the often sensitive and sometimes damning substance of his emails, we think it highly unlikely that Warshak expected them to be made public, for people seldom unfurl their dirty laundry in plain view.") (citations omitted).

Because the subpoenas issued to Mr. Stepien and Ms. Kelly request all personal correspondence, personal documents, and information stored on personal devices, the defendants are justified in invoking their State privilege against self-incrimination in response to the

subpoenas in these cases. At oral argument, counsel for the Committee suggested that the *defendants* must make a record-by-record and entry-by-entry showing that the telephone records and calendar entries requested by the February 4, 2014 modification letter are within the sphere of privacy. But to the extent that the Committee argues that defendants must comply with the subpoenas because *some* of the requested documents are not within their sphere of privacy, the argument fails for the same reasons explained by the New Jersey Supreme Court in the context of a witness's refusal to answer questions when appearing before the New Jersey State Commission of Investigation (SCI):

> A witness or defendant who is not granted immunity and is required to give incriminatory answers or make incriminatory statements, does incriminate himself. His protection arises only when a court rules that such answers or statements cannot be used against him in a subsequent criminal proceeding. The Fifth Amendment, though, protects against being compelled to incriminate oneself in the first place. Ippolito can be required to answer the particular questions only if the SCI first grants him immunity under N.J.S.A. 52:9M-17.
>
> [In re Ippolito, 75 N.J. 435, 443 (1978)].

Without the promise of use and derivative use immunity for documents that *are* within the sphere of privacy, the defendants cannot be expected to respond to these broad subpoena requests, particularly when their response could be interpreted as a waiver of self-incrimination rights by a prosecutor in a subsequent criminal proceeding.

The Committee also argues that there can be no expectation of privacy in the requested correspondence because the emails and text messages were viewed by a third party. In support, the Committee cites United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) ("Individuals generally possess a reasonable expectation of privacy in their home computers . . . . They may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail

that have already arrived at the recipient"), and Guest v. Leis, 255 F.3d 325, 333–36 (6th Cir. 2001). However, these cases involve privacy concerns in the context of the Fourth Amendment that developed in the federal courts over a century after the decision in Boyd. Under New Jersey's "sphere of personal privacy" doctrine, which remains steadfast to Boyd's holdings, even communications to third parties could contain thoughts, feelings, and expressions not intended for the public at large. In Guarino, for instance, the business records were not outside the sphere of privacy merely because they were disclosed to just one person—the court found that the records, by their nature, were disclosed to a "significant number of individuals." Guarino, supra, 104 N.J. at 324. Moreover, New Jersey case law in the search-and-seizure context is more protective than the cases cited by the Committee. Indeed, the New Jersey Supreme Court has noted that, in many contexts, "the New Jersey Constitution 'affords our citizens greater protection against unreasonable searches and seizures' than the Fourth Amendment." State v. Reid, 194 N.J. 386, 396 (quoting State v. Novembrino, 105 N.J. 95, 145 (1987)). The Court summarized the cases expanding the "privacy package" protected under the New Jersey Constitution to include information provided to third-parties, which is directly contrary to the federal cases relied-upon by the Committee. Id. at 396–97; see also State v. Hunt, 9 N.J. 338, 345 (1982) (reasonable expectation of privacy in phone numbers dialed even though those numbers are broadcast to the telephone company); Earls, supra, 214 N.J. 564 (holding the same in the context of information given to a cell phone provider); Reid, supra, 194 N.J. at 396 (reasonable expectation of privacy in Internet subscriber information even though information is exposed to third parties); State v. McAllister, 184 N.J. 17, 31 (2005) (same, for bank records, even though bank customers "voluntarily provide their information to banks.").

Additionally, the Committee argues that the defendants' right to invoke the New Jersey common law privilege against self-incrimination was waived insofar as they made communications to third parties. See N.J.S.A. 2A:84A-29 (voluntary disclosure of privileged material is waiver of the privilege). The Committee correctly notes that the cases cited above, such as Hunt, Reid, and Earls, have no bearing on whether the privilege itself was waived pursuant to this statutory provision. Those cases deal with disclosures to providers of information, such as telephone companies and internet service providers, whereas the requested written communications in these cases were made between individuals and were, presumably, completely voluntary. Thus, the Committee argues, the privilege against self-incrimination was waived as to those written communications. However, the Committee does not cite a single case holding that the privilege against self-incrimination can be waived in this way. Indeed, this particular privilege is unique in that its very purpose is to prevent disclosure of self-incriminating evidence specifically *compelled by the government* for the purposes of *criminal prosecution.* That interest is not obviated in any sense by merely disclosing incriminating information to a third party individual. It is difficult to see how an individual's making a communication to another individual could *voluntarily* waive the right against self-incrimination, with "knowledge of his right or privilege." N.J.S.A. 2A:84A-29.

Indeed, the only published case the court could find applying waiver under N.J.S.A. 2A:84A-29 to a claim of the self-incrimination privilege is State v. Bishop, 187 N.J. Super. 187 (App. Div. 1982). In that case, however, the defendant had waived the privilege by providing the incriminating testimony *to the government* by testifying as a witness in an earlier proceeding. The proper rule is that a private communication between individuals does not waive the privilege against self-incrimination because the communication is not made with "knowledge of" the

"right or privilege." Cf. In re Neff, 206 F.2d 149, 152 (3d Cir. 1953) (holding that defendant did not waive the right against self-incrimination by testifying before a grand jury, because the grand jury is not a "judicial tribunal."). Under this rule, the privilege was not waived simply because the defendants shared incriminating information with private persons. Of course, to the extent that the government seeks such records from those third-parties themselves, defendants would not be able to assert the privilege against self-incrimination. See, e.g., Stroud v. United States, 251 U.S. 15, 21 (1919).

As discussed above, the Committee attempted to modify the subpoenas on February 4, 2014, by way of letters sent to Mr. Stepien and Ms. Kelly. The Committee attempted to modify the requests for telephone records, calendar entries/schedule information, and electronic devices. With respect to telephone records and calendar entries, the Committee offered to accept communications and entries relating to thirty-two named public officials as opposed to communications with all individuals regarding the lane closures. However, the requests remain too broad for the court to order defendants to comply with them absent a concurrent grant of immunity. Under New Jersey law, the *nature of the evidence* must be examined to determine whether the privilege against self-incrimination may be asserted. Guarino, supra, 104 N.J. at 232. The request for telephone records, for example, specifically includes call records on *personal* cell phones, even after the modification. After the purported modification, there was no limitation in the requests for only those records of calls made pursuant to official public business. The Supreme Court has recognized a legitimate expectation of privacy in the context of home and office telephone records, and there is little reason not to extend that same analysis to the request at issue here. See State v. Mollica, 114 N.J. 329, 344 (1989) (holding that, in the context of an unreasonable search claim, a person's privacy interest includes "the people and places one

calls on a telephone, no less than the resulting conversations," and recognizing a privacy interest even in call records made from a telephone in a hotel room).

Similarly, the fact that the request for calendar entries was modified to include only those entries relating to thirty-two named individuals does not remediate the initial overbroad request. If the requests were limited to entries on workplace calendars, for instance, that are shared among colleagues, or viewable by supervisors, then it is likely that neither Mr. Stepien nor Ms. Kelly would have a viable claim under the New Jersey version of the privilege, because there would be no expectation of privacy in the entries. See Dir. of Office of Thrift Supervision v. Ernst & Young, 795 F. Supp. 7, 11 (D.D.C. 1992) ("The court recognizes that some partners or employees may calendar social events in their diaries, but many of these are work-related and the fact that a few personal items may appear in a work-related diary does not create a reasonable expectation of privacy over the entire diary."). But the request, even as modified, is not limited to such entries, and instead extends to *all* calendar entries that relate to the thirty-two named individuals. Such entries could have been made on a personal calendar kept in the home, or even on a personal cell phone or personal computer—all included within the "sphere of privacy" protected by the New Jersey privilege against self-incrimination.

The purported modified subpoenas did successfully remediate the problems with request number seven. That request had initially demanded the turnover of all the electronic devices belonging to Mr. Stepien and Ms. Kelly, including laptops, smartphones, and tablets used in a personal capacity. That initial request intruded into the "sphere of privacy" of the defendants as recognized by the case law precedents discussed above. However, the Committee withdrew the request, and instead simply asked Mr. Stepien and Ms. Kelly to maintain possession of those devices during the course of the investigation.

For these reasons, the defendants are also justified in asserting the privilege against self-incrimination provided by the New Jersey common law.

III. Whether the Subpoena Requests Violate the Fourth Amendment's Protection Against Unreasonable Searches and Seizures.

Both the United States and New Jersey Constitutions protect against unreasonable searches and seizures. Reid, supra, 194 N.J. at 396; U.S. Const. amend. IV; NJ Const., Art. I, ¶ 7. The defendants argue that the subpoenas, both in their original form and as modified on February 4, 2014, violate these constitutional protections because, according to defendants, they are unreasonably broad, invasive, and burdensome.

In Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946), the United States Supreme Court noted that, in the context of documents subpoenas, "the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." According to the Court, "the gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." Ibid. The Court explained the relationship between the "probable cause" and "reasonableness" requirements typically applicable to warrants, and the Fourth Amendment requirements for a subpoena for documents issued by the Legislature. The Court noted that "probable cause" is established by Congress's authorization of an investigation, and that the "reasonableness" standard, which "comes down to specification of the documents to be produced adequate . . . for the purposes of the relevant inquiry," governs the validity of subpoenas issued by validly-enacted legislative committees under the Fourth Amendment. Id. at 209. The subpoenas in Oklahoma Press requested "the books, papers and documents of the respective corporations" to which the subpoenas were addressed. Id. at 211 n. 48. Because the

investigation was authorized by Congress and because the request was directly relevant to the committee's inquiry, the Court held that "the specifications more than meet the [Fourth Amendment] requirements long established by many precedents." Id. at 210–11.

The Court further explored the application of the Fourth Amendment to a subpoena for documents issued by Congress in McPhaul v. United States, 364 U.S. 372 (1960). In that case, the House Committee on Un-American Activities (HUAC) issued a subpoena *duces tecum* in furtherance of its investigation into "whether 'there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof.'" Id. at 382. The Court held that, "[a]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." Ibid. (citation omitted). Since the scope of HUAC's inquiry was broad, "the permissible scope of materials that could reasonably be sought [under the Fourth Amendment] was necessarily equally broad." Ibid. The subpoena in McPhaul had called for "all records, correspondence and memoranda" relating to the subject matter of the investigation. Due to the broad nature of the inquiry, the documents were described "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit." Ibid. (quoting Oklahoma Press, supra, 327 U.S. at 210 n. 48). The Court recognized that a claim of undue burden could be raised in defense to the subpoena, but that the subpoena was facially valid under the Fourth Amendment. Id. at 382.

The Court clarified the Fourth Amendment "undue burden" defense to a subpoena for documents in See v. City of Seattle, 387 U.S. 541, 544 (1967). There, in providing an overview of the powers of administrative agencies to subpoena witnesses or conduct site inspections, the Court held that for an administrative subpoena to be sufficient, it must be "sufficiently limited in

scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." Id. at 544.

The New Jersey Supreme Court has adopted a similar analytic approach. In State v. Cooper, 2 N.J. 540 (1949), a subpoena for document production was issued to the Director of Public Safety of Trenton and officers of the Police Department, requesting "all documents, records, data, memoranda, reports, and 'observations in anywise touching upon, with respect to, or regard to the aforementioned murder and investigation.'" Id. at 556. The Court held that, "the subject of a *subpoena duces tecum* must be specified with reasonable certainty, and there must be a substantial showing that they contain evidence relevant and material to the issue." Ibid. The Court explained that, "[i]f the specification is so broad and indefinite as to be oppressive and in excess of the demandant's necessities, the subpoena is not sustainable." Ibid. This standard is very similar to the standard espoused by the United States Supreme Court in the context of administrative subpoenas in See v. Seattle, supra. The Cooper Court did not couch its holding in terms of the New Jersey Constitution, however, holding instead that the insufficiency of the subpoena violated the defendants' right to compulsory process under the Court Rules, which allowed a court to quash a subpoena for documents on the grounds of oppressiveness.[5] Subsequent cases applying Cooper have, nonetheless, utilized its holding to evaluate constitutional claims of unreasonable search and seizure raised in response to subpoenas *duces tecum*. See In re Tiene, 19 N.J. 149, 162 (1955); Greenblatt v. N.J. Bd. of Pharm., 214 N.J. Super. 269, 275 (App. Div. 1986); Application of Attorney Gen. of N.J., 116 N.J. Super. 143, 146 (Ch. Div. 1971). Thus, the standard set forth by Cooper is the appropriate standard to

[5] The Court Rules still provide that courts may quash a subpoena for document production if the requests are "unreasonable or oppressive." R. 1:9-2.

evaluate defendants' claims under the New Jersey Constitution's equivalent of the Fourth Amendment.

In these cases, it is clear that with respect to the first five requests in the subpoenas, there are no infirmities under either the Fourth Amendment or New Jersey's constitutional guarantee against unreasonable searches and seizures. The requests are broad, but they are all limited temporally and by subject matter. Most of the requests seek information relating to the lane closures, and it is clear that investigation of the lane closures is well within the authority of the Legislature. And the requests that are not limited topically have been modified—for example, the Committee limited its requests for telephone records to records pertaining to calls between the defendants and thirty-two public officials. Neither Mr. Stepien nor Ms. Kelly have raised objections to the production of documents relating to these first four requests either on Fourth Amendment grounds or under the New Jersey equivalent by arguing that production would be unreasonably burdensome or would produce irrelevant or immaterial evidence. Only counsel for Ms. Kelly argues that the fifth request—which calls for the production of voice and audio recordings relating to the lane closures made after September 1, 2012—violates the State and federal constitutional privacy protections because it "contains no defined date range." See Def. Kelly's Br., at 42. However, the fifth request is still limited to the subject matter of the lane closures, and the court does not find it to be unreasonably burdensome.

On the other hand, it is just as clear that the sixth and seventh requests, as originally written, were too broad to be sustained under either the Fourth Amendment or the New Jersey Constitution. The sixth request had called for *all* calendars, planners, notes, and diaries from September 1, 2012, to the present. The seventh request had called for *all* "smartphones, tablets, cellular phones, and personal digital or data assistants" used by the defendants in that same time

period. Under the Fourth Amendment, these requests were clearly invalid under the McPhaul standard because they were not limited to the subject matter of the investigation at all. These requests were also in violation of the New Jersey Constitution under the Cooper standard because they inevitably requested significant amounts of information that have absolutely no relevance to the lane closures. Thus, to the extent that the Committee reserved to itself the right to reassert its demands set forth in the sixth and seventh subpoena requests, the Committee may not enforce those requests as originally written because they clearly violate federal and State protections against unreasonable searches and seizures.

As noted repeatedly, the Committee attempted to modify the subpoenas on February 4, 2014. With respect to the sixth request, the Committee modified the request for calendars, notes, planners, etc. to demand only those specific entries relating to thirty-two named public officials. With respect to the seventh request, the Committee withdrew its requests to both Mr. Stepien and Ms. Kelly to produce their personal electronic devices, instead merely asking that both defendants maintain custody of their own electronic devices during the course of the investigation. Neither defendant argues that this request was unreasonable. Neither Mr. Stepien nor Ms. Kelly argues that the subpoena requests, as modified in these ways, violate the Fourth Amendment or its New Jersey equivalent. Instead, they argue that the modification is not effective because the Committee reserved to itself the right to reinstate the original requests. The court agrees that the letters sent to Mr. Stepien and Ms. Kelly did not effectively modify the subpoenas and, as noted above, the original sixth and seventh requests were deficient. If the Committee seeks to enforce the requests as modified in the future, though, it could do so without violating the Fourth Amendment or the New Jersey equivalent.

IV. Whether the Committee May Nonetheless Compel Defendants to Produce the Documents by Providing Use and Derivative-Use Immunity.

A. The Committee Has the Power to Offer Defendants Use and Derivative-Use Immunity.

The United States Supreme Court has long recognized that the government can compel testimony even over objections made by a witness that testifying would constitute self-incrimination as long as that testimony cannot be used against the witness in a subsequent criminal proceeding. See Kastigar, supra, 406 U.S. at 453; see also Lefkowitz, supra, 414 U.S. at 81–82 (noting that, "immunity statutes have 'become part of our constitutional fabric.") (quoting Ullmann, supra, 350 U.S. at 438). In Kastigar, the Court passed upon the constitutionality of a federal statute that granted use and derivative use immunity to compelled testimony when that testimony involved self-incrimination. "Use and derivative use immunity" includes immunization of witnesses from "the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." Id. at 553. According to the Court, the grant of immunity is required for there to be "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." Id. at 446. Examining the statute at issue, the Court concluded that "use and derivative use" immunity was coextensive with the protections offered by the Fifth Amendment. Id. at 453. Since the Amendment only protects against *self*-incrimination, the Court held that immunizing the witness from the use of any testimonial self-incriminating evidence provided pursuant to compulsion by the government is all that is required to avoid infringing on Fifth Amendment rights. Ibid. (citation omitted) ("The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts."). The government need not

grant the more extensive "transactional" immunity, which would immunize the witness from prosecution for offenses to which the compelled testimony relates. Ibid. Thus, even after a witness is immunized from the *use* of the evidence, he or she could still be prosecuted for such offenses in a subsequent proceeding. At the subsequent prosecution, a "Kastigar hearing" would need to be held, in which the prosecutor has the burden of proof to show that the evidence used against the witness was obtained in a manner "wholly independent" from the evidence compelled in the prior proceeding. See North, supra, 910 F.2d at 854.

In New Jersey, the Legislature has chosen to regulate the investigative inquiries of its committees by way of the provisions set forth at N.J.S.A. 52:13-1 to -13 ("Chapter 13"). Chapter 13 is divided into two Articles. Article 1, which consists of N.J.S.A. 52:13-1 to -4, contains general provisions relating to the power of legislative committees to issue subpoenas. Article 2, which consists of N.J.S.A. 52:13-5 to -13, describes the power of committees established by joint resolution to hold witnesses in contempt. The Committee's authority to grant immunity turns on the interpretation of Article 1, which applies to "special committees" formed by the Legislature:

> Any joint committee of the legislature, any standing committee of either house, or *any special committee* directed by resolution to enter upon any investigation or inquiry, the pursuit of which shall necessitate the attendance of persons or the production of books or papers, shall have power to compel the attendance before it of such persons as witnesses and the production before it of such books and papers as it may deem necessary, proper and relevant to the matter under investigation.
>
> [N.J.S.A. 52:13-1].

The concurrent resolutions establishing the Committee both refer to it as a "special committee," and both resolutions specifically state that the committee is formed pursuant to Chapter 13. Therefore, the Committee and its activities concerning the subpoena power clearly fall under the

purview of Article 1. One provision in Article 1 is particularly important as a potential basis for the Committee's power to grant immunity: N.J.S.A. 52:13-3. Under that provision, a witness may be compelled to testify before an Article 1 committee even over an objection based on self-incrimination grounds, provided that, "no answers made by any witness to any such questions shall be used or admitted in evidence in any proceeding against such witness." N.J.S.A. 52:13-3. By its terms, this provision applies to "witnesses summoned to appear" before a committee.

Here, the Committee argues—somewhat surprisingly to the court—that it has no power to grant immunity that would be sufficient under the United States Constitution. First, the Committee argues that N.J.S.A. 52:13-3 does not apply to subpoenas for document production. And second, the Committee argues that even if N.J.S.A. 52:13-3 does apply to document production, it does not permit the Committee to grant immunity that is coextensive with the protections guaranteed by the Fifth Amendment, and is therefore unconstitutional. Each of this arguments will be addressed in turn.

1. N.J.S.A. 52:13-3, Which Provides Immunity to Witnesses Appearing Before Legislative Committees, Applies to Subpoenas for Document Production.

At oral argument and in the supplemental briefing, counsel for the Committee argued that because N.J.S.A. 52:13-3 applies only to witnesses who are "summoned to appear" before the Committee, it does not cover subpoenas for document production. Instead, the Committee argues, this provision applies only to witnesses who physically appear and give testimony. Thus, the Committee claims that it has no power to compel compliance with its document subpoenas by granting immunity under N.J.S.A. 52:13-3.

Whether N.J.S.A. 52:13-3 provides legislative committees the authority to grant immunity to compel compliance with documents subpoenas is a matter of statutory

interpretation. When interpreting statutes, legislative intent "is the paramount goal . . . and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). Therefore, to analyze the meaning of a statute, courts begin with the plain terms of the statute. State v. Marquez, 202 N.J. 485, 499 (2010). These terms must be "read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1. Words and phrases having a "a special or accepted meaning in the law" must be construed in accordance with such meaning. Id. When the plain language of a statute is ambiguous or open to interpretation, courts examine extrinsic evidence, such as legislative history. Burnett v. Cnty. of Bergen, 198 N.J. 408, 421 (2009) (citations omitted).

Here, whether N.J.S.A. 52:13-3 applies to subpoenas for documents production turns on the meaning of the phrase "witnesses summoned to appear." Article 1 of Chapter 13 was passed on March 5, 1895. A review of the language used by case law precedents decided around the same time as Article 1 was passed reveals that the term "witness" meant one who provides evidence. This process generally involved an appearance even in response to a subpoena for document production. For example, in Murray v. Elston, 23 N.J. Eq. 212 (Ch. 1872), the court passed upon the validity of a subpoena *duces tecum* that required the witness to appear before a master to present a book. The court found the subpoena invalid because although it directed the witness where to appear to present the evidence, it failed to note "why he was to appear, or what he was to do when he got there." Id. at 214. The suggestion that an appearance was required in connection with a subpoena *duces tecum* was made in many other cases. See, e.g., Moran v. Green, 21 N.J.L. 562, 572 (E. & A. 1845) (discussing, *in dicta*, the practice at the time of serving

a subpoena *duces tecum* on the court clerk for certain documents for use at trial, and noting that "if he could not *attend in person*, would send his under clerk with the commission, or deputize the attorney in the cause to take charge of it") (emphasis added); Thomas v. Spencer, 42 A. 275, 278 (Ch. 1899) (noting question as to whether witness "could have been compelled, by a subpoena duces tecum, to produce *in court*" certain documents) (emphasis added); Thompson v. German V. R. Co., 22 N.J. Eq. 111, 113 (Ch. 1871) (noting that a subpoena *duces tecum* was issued to the Governor requiring him to "appear and testify," but that it would not be enforced due to executive privilege). In addition, in his concurring opinion in Hubbell, Justice Thomas reviewed the cases to ascertain the meaning of the term "witness," and concluded that the term as used in the Fifth Amendment means "a person who gives or furnishes evidence." Hubbell, supra, 530 U.S. at 50 (Thomas, J., concurring).

Moreover, an examination of the circumstances surrounding the passage of N.J.S.A. 52:13-3 and its actual usage by the Legislature in 1895 illustrates that the phrase "witnesses summoned to appear" was intended to apply to subpoenas for document production as well as to provide actual testimony. One day before Article 1 of Chapter 13 was passed, the first hearing was held by a special investigative committee of the New Jersey Senate that was established on February 13, 1895 to inquire into charges of "extravagance" in "furnishing the State House." REPORT AND RECORD OF THE PROCEEDINGS OF THE SELECT COMM. OF THE S. OF N.J., APPOINTED FEBRUARY 13TH, 1895 (MacCrellish & Quiqley, 1895). At the subsequent hearings, witnesses were sworn in and then asked if they had brought with them documents pursuant to subpoenas *duces tecum*. For example, one witness, John Mullins, was sworn in and then testified that he had brought with him the "books" demanded by a subpoena. Id. at 69–70. The committee then noted that Mr. Mullins had been "summoned" to produce a private ledger. Id. at 102. And in

questioning another witness, the committee noted that the "summons" required that witness to bring to the hearing his "order book, sales books, day books, journals and cash books and ledgers." Id. at 615. These statements by the committee, made very near the time that N.J.S.A. 52:13-3 was enacted, are compelling evidence that the statutory reference in N.J.S.A. 52:13-3 to "witnesses summoned to appear" before the committee was intended to apply to witnesses responding to subpoenas for documents.

The Committee's suggestion that the contemporary meaning of the phrase "to appear," which generally refers to an appearance for oral testimony, be grafted onto a statute enacted in 1895 is untenable. This suggestion is particularly ill-advised because New Jersey has long recognized the common law right against self-incrimination and "vigorously" protected that right for many years prior to the enactment of N.J.S.A. 52:13-3. State v. Reed, 133 N.J. 237, 250 (1993). If the Committee's interpretation of that provision were given effect, it would mean that the Legislature intended to create a gap in the power of legislative committees—such committees would be empowered to grant immunity in return for oral testimony, but not for document production. Moreover, it is a maxim of statutory interpretation that statutes be interpreted in relation to each other. Under N.J.S.A. 52:13-1, legislative committees are given the power to "compel" compliance with subpoenas for documents, but this power would be utterly useless—and when exercised to compel the production of documents, possibly unconstitutional—unless legislative committees could also immunize witnesses from the use of compelled evidence that is testimonial and self-incriminating. Thus, N.J.S.A. 52:13-3 must be read to apply to subpoenas for document production in order to give meaningful effect to the power to compel production of documents set forth at N.J.S.A. 52:13-1.

Finally, the Committee's position is undermined by the Code of Fair Procedures, N.J.S.A. 52:13E-1 to -10, which is expressly applicable to committees established pursuant to N.J.S.A. 52:13-1, including the plaintiff. The Code was passed in 1968, over seventy years after the passage of N.J.S.A. 52:13-3. Under the Code, any legislative committee may grant "to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine." N.J.S.A. 52:13E-7. If there were any doubt as to the applicability of N.J.S.A. 52:13-3 to documents subpoenas, the strikingly broad language contained at N.J.S.A. 52:13E-7, which was annexed to the subpoenas issued to Mr. Stepien and Ms. Kelly in these cases, allows legislative committees the ability to grant to witnesses further privileges, including immunity, in order to further the investigatory needs of those committees.

Therefore, the court finds that the Committee does indeed have the power to grant the immunity afforded by N.J.S.A. 52:13-3 to witnesses who are issued subpoenas for production of documents.

2. N.J.S.A. 52:13-3 Grants the Committee the Power to Offer Derivative-Use Immunity to Defendants.

The Committee also argues—again, somewhat surprisingly to the court—that it cannot utilize N.J.S.A. 52:13-3 to grant immunity to defendants because that provision is constitutionally defective. According to the Committee, N.J.S.A. 52:13-3 is unconstitutional because it does not permit a legislative committee to grant "derivative use" immunity. Instead, it argues, N.J.S.A. 52:13-3 only allows a committee to grant "simple use" immunity, which is not coextensive with the protections guaranteed by the Fifth Amendment. See Counselman, supra, 142 U.S. 547. Under N.J.S.A. 52:13-3, a witness may be compelled to respond to a subpoena, but "no answers made by any witness to any such questions shall be used or admitted in evidence

in any proceeding against such witness." As the Committee argues, this language does not specifically grant the authority to provide derivative use immunity, as is clearly provided by other statutes in other contexts. Compare N.J.S.A. 52:9M-17 and N.J.S.A. 2A:81-17.3. Thus, the question is whether the court should construe N.J.S.A. 52:13-3 to nonetheless allow the Committee to grant derivative use immunity, in order to further legislative intent and allow a constitutional version of the statute to survive.

When a statute is found to be constitutionally infirm, courts endeavor to "save" the statute by conforming it to a constitutional interpretation. Right to Choose v. Byrne, 91 N.J. 287, 311 (1982) ("It is our duty to save a statute if it is reasonably susceptible to a constitutional interpretation."). The key inquiry is whether "the Legislature would want the statute to survive with appropriate modifications rather than succumb to constitutional infirmities." Ibid. Thus, the matter is one of legislative intent. Ascertaining intent for the purposes of deciding whether to save or modify a statute depends on the "purpose, subject, and effect" of the statute. Ibid. Specifically, the New Jersey Supreme Court has held that, when deciding whether to construe a statute to provide derivative-use immunity, the "critical issue" is whether such a construction is "consistent with the legislative purpose." State v. Patton, 133 N.J. 389, 398 (1993).

In Patton, supra, 133 N.J. 389, the New Jersey Supreme Court interpreted an immunity statute that provided only simple use immunity to encompass derivative-use immunity as well in order to make the statute comply with the Fifth Amendment. The statute at issue in Patton provided that anyone who knowingly obtained or possessed a controlled dangerous substance was guilty of a crime if he or she failed to voluntarily deliver the substance to law enforcement. Id. at 391. The Court held that compliance with the statute was necessarily incriminating, and in conflict with the guarantees of the Fifth Amendment as well as the New Jersey privilege against

self-crimination. Id. at 398. The Court assumed that the statute was enacted "with an understanding of the contours of the privilege against self-incrimination," and interpreted it to provide use and derivative-use immunity in order to save it, even though the statute made absolutely no mention of either form of immunity. Id. at 402. The Court noted that such a construction was "consistent with and furthers the legislative goals embodied in the statute." Ibid.

The Appellate Division reached a similar conclusion in State in Interest of A.L., 271 N.J. Super. 192 (App. Div. 1994). There, a challenge was brought to the juvenile waiver statute, N.J.S.A. 2A:4A-26. That statute provided a presumption that a juvenile's case would transfer to adult court if the prosecutor established probable cause that an offense was committed when the juvenile was 14 years old or older. Id. 202–03. The burden then shifted to the juvenile to defeat the presumption, which the juvenile could do by showing the "probability of rehabilitation," which implicitly involves admitting guilt. Ibid. The Appellate Division held that this scheme did not infringe upon juveniles' self-incrimination rights because the juveniles are immunized from use of evidence produced during the hearing under N.J.S.A. 2A:4A-29, which provides that no such testimony "shall be admissible for any purpose in any hearing to determine delinquency or guilt of any offense." As the Committee argues in these cases, A.L. argued that N.J.S.A. 2A:4A-29 was unconstitutional because it did not expressly confer the ability to grant derivative-use immunity. Id. at 211. Citing Patton, the Appellate Division rejected this argument. The Appellate Division recognized that the statute's text only called for simple use immunity, rather than derivative-use immunity as required by the Fifth Amendment. However, the court engaged in "judicial surgery" to construe the statute to also grant derivative-use immunity, relying upon the Patton Court's assumption that the statute was enacted "with an understanding of the

contours of the privilege against self-incrimination." Id. at 213. The court also found that the "judicial surgery" was consistent with and furthered the legislative goals of the statute. Ibid.

The plain language of N.J.S.A. 52:13-3 reveals its purpose: it is intended to provide legislative committees with a mechanism to compel the testimony of witnesses over objections that providing such testimony would violate the witnesses' rights against self-incrimination. Cf. Shapiro, supra, 335 U.S. at 21(discerning, from the imprecise phrasing of an immunity statute, "legislative intention of requiring an *exchange of constitutional privilege for immunity*, an intent which the Court had previously thought discernible [sic] even in the less obvious terms used by the drafters of the earlier statutes.") (emphasis in original). An analysis of the history of N.J.S.A. 52:13-3 further supports this finding of legislative intent. As discussed above, Article 1 of Chapter 13 was passed one day after the first hearing of a special investigative committee of the New Jersey Senate to inquire into charges of "extravagance" in "furnishing the State House." In the opening paragraphs of the official record and report of the hearings, the Senate committee noted the difficulty it encountered when attempting to obtain information relating to its inquiry. It noted that of 97 witnesses who were examined, "by far the greater number have testified under compulsion." REPORT AND RECORD OF THE PROCEEDINGS OF THE SELECT COMM. OF THE S. OF N.J., APPOINTED FEBRUARY 13TH, 1895 at v (MacCrellish & Quiqley, 1895). During the subsequent hearings, the questioners specifically cited provisions from Chapter 13 before beginning the questioning. Id. at 445. And at one point during the hearings, a witness had refused to answer a question on incrimination grounds, but the Senate committee insisted on compelling an answer. Id. at 737–38 ("This Committee has decided to put the probe into this subject. This is a scandal now, and it is just a question for the Committee to say how deep they will put it or how far they will go."). It is clear from this history that the Legislature enacted

N.J.S.A. 52:13-3 as a means for its committees to obtain information without self-incrimination creating a barrier to investigation.

To give effect to the Committee's interpretation of N.J.S.A. 52:13-3 would completely undermine that purpose. The importance of the power to grant immunity has been noted repeatedly throughout this decision. Granting immunity is often the only way an investigatory body may obtain useful information from a witness who reasonably fears incrimination. Kastigar, supra, 406 U.S. at 444; Murphy, supra, 378 U.S. at 95; Patton, supra, 133 N.J. at 399 ("A grant of immunity frequently has been the mechanism used to neutralize the prosecutorial use of compelled testimony or a compelled testimonial act."). To give effect to the Committee's suggestion that N.J.S.A. 52:13-3 is unconstitutional because it fails to offer derivative-use immunity would severely undercut the Committee's ability to conduct investigations and obtain information essential to its legislative inquiries. Moreover, as in Patton and A.L., this court must assume that the Legislature was aware of the "the contours of the privilege" when it enacted Article 1 of Chapter 13. A.L., supra, 271 N.J. Super. at 213. Three years before N.J.S.A. 52:13-3 was enacted, the United States Supreme Court had held that simple use immunity was an insufficient guarantee of the Fifth Amendment right against self-incrimination. Counselman, supra, 142 U.S. 547. It is true that, at the time, the Fifth Amendment did not apply to the states, but New Jersey has recognized the common law right against self-incrimination since its beginnings as a State. See Hartley, supra, 103 N.J. at 286. Thus, it can be gleaned from the text of the statute and the circumstances of its passage that when enacting N.J.S.A. 52:13-3, the Legislature intended to provide witnesses the immunity necessary to procure information without violating the self-incrimination rights of those witnesses. Only an interpretation of N.J.S.A. 52:13-3 that allows committees to grant derivative-use immunity would further that intent.

Any doubt as to the power of legislative committees to grant derivative-use immunity was erased by the enactment of the Code of Fair Procedures, N.J.S.A. 52:13E-1 to -10, in 1968. As discussed above, the Code acknowledges the right of any legislative committee to grant "to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine." N.J.S.A. 52:13E-7. The Third Circuit Court of Appeals cited this statutory provision in United States ex rel. Catena v. Elias, 465 F.2d 765 (3d Cir. 1972), when it upheld the statute creating the New Jersey State Commission of Investigation (SCI), N.J.S.A. 52:9M-1. An incarcerated witness had challenged that statute, alleging that it failed to comport with due process. The court found that the procedures employed by the SCI under that statute were constitutional because they closely paralleled the procedures of the United States Commission on Civil Rights, which were approved by the United States Supreme Court in Hannah v. Larche, 363 U.S. 420 (1960). In comparing the challenged New Jersey statute with the statute discussed in Hannah, the court noted that although neither statute explicitly allowed individuals under investigation to call witnesses—a right guaranteed by due process principles—each statute contained a provision allowing the investigating body to grant further privileges. The court cited N.J.S.A. 52:13E-7, which rendered the processes employed by SCI constitutional because SCI could use that provision to grant those under investigation the right to call witnesses, even though that ability was not explicitly provided for in any of the other provisions governing the SCI. Elias, 465 F.2d at 771 (Appendix, para. 4). The court recognized that N.J.S.A. 52:13E-7 may operate to save the constitutionality of statutes creating investigative agencies by allowing those agencies to grant "rights and privileges as it may determine."

As in Catena v. Elias, supra, 465 F.2d 765, in these cases N.J.S.A. 52:13E-7 serves as a means by which the Committee may exercise its powers consistent with constitutional mandates. The extremely broad language used in this provision certainly encompasses the power for legislative committees to grant derivative-use immunity so that those committees may investigate without impediment while preserving the constitutional rights of witnesses. Indeed, counsel for the Committee candidly acknowledged the possibility that the Committee has the power to grant immunity under N.J.S.A. 52:13E-7, only suggesting that it should not be used because it is untested.

Thus, in these cases the Committee may compel the production of the requested documents by promising use and derivative-use immunity to Mr. Stepien and Ms. Kelly, protecting them from the future use of any incriminating evidence that they may produce. If the Committee chooses this route, Mr. Stepien and Ms. Kelly would have to comply with the subpoenas in their entirety to avoid being held in contempt. Mr. Stepien and Ms. Kelly would then be immunized from the use of any produced evidence that is incriminating in any subsequent prosecution, including any prosecution resulting from the ongoing federal grand jury investigation. Murphy, supra, 378 U.S. at 79 ("[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him."). This immunity would include immunization from the use of evidence obtained as a result of the mere *act* of producing documents that are either incriminatory or lead to incriminatory evidence under the Fifth Amendment, and would also include immunization of any incriminatory *contents* of documents in the "sphere of privacy" under the New Jersey privilege. Doe, supra, 465 U.S. at 617 n. 17 ("[T]he privilege in this case extends only to the act of

production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the *act of producing* his business records.") (emphasis added); Guarino, supra, 104 N.J. at 235 n.12 (stating that immunity was not needed under the New Jersey privilege because the *contents* of the documents were not incriminating). As discussed above, the contents of the documents would also be protected under the Fifth Amendment in situations where the act of producing those documents would be protected. The Committee argues that it has agreed to review the requested documents *in camera*, on a document-by-document basis, to evaluate any assertions of privilege. However, the defendants reasonably refused that offer. As noted repeatedly above, the defendants should be offered use and derivative use immunity *before* such a process is employed. Only then could Mr. Stepien and Ms. Kelly be protected from any self-incriminating evidence that turns up during the review.

If, as the Committee argues before this court, neither Mr. Stepien nor Ms. Kelly truly face the danger of prosecution, then there is no fear that a subsequent federal prosecution could be impeded by the grant of use immunity. Moreover, any incriminatory evidence produced by defendants under a grant of immunity would only be barred from being used against *them* in a subsequent criminal prosecution—it could nevertheless be freely used against third parties. For example, by granting Mr. Stepien use and derivative-use immunity, the evidence he turns over could nonetheless be used in a criminal prosecution against Ms. Kelly, and *vice versa*. As noted by the Court in Kastigar, the purpose behind the Fifth Amendment is to avoid *self*-incrimination, and not to prevent tribunals from obtaining evidence that is incriminatory to third parties. Kastigar, supra, at 453.

Finally, the Committee's ability to grant immunity undermines its argument that the Legislature's power to investigate would be severely restricted if this court finds that defendants

were justified in asserting the privilege against self-incrimination. Courts have repeatedly recognized that even incriminating testimonial evidence can be compelled without offending the Constitution, as long as the government provides use and derivative-use immunity to the evidence. See In re Zicarelli, 55 N.J. 249 (1970), aff'd 406 U.S. 472 (1972); Grosso, supra, 390 U.S. at 73 (Brennan, J., concurring) ("[B]y the simple expedient of granting appropriate immunity the Government is able to surmount entirely the self-incrimination barrier, despite the value of privacy that provision is intended to protect."). Indeed, investigatory bodies must often balance the need to obtain information with the consequences of immunity, and requiring the Committee to engage in similar balancing would not undermine its ability to investigate. See In re Daley, 549 F.2d 469, 478–79 (7th Cir.), cert. denied 434 U.S. 829 (1977) ("[T]he decision whether to confer immunity in order to facilitate the government's investigation is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity."). That the Committee has this choice is clear from the immunity-granting provision set forth at N.J.S.A. 52:13-3, as interpreted and applied above. Since the Legislature itself saw fit to limit the utilization of self-incriminating evidence if it was produced pursuant to a grant of immunity, the Committee's concern that requiring such immunity in these cases would undermine its legislative power of inquiry rings hollow. Moreover, the need to grant immunity in return for compelled evidence would only present prosecutorial concerns regarding information produced by witnesses facing the hazard of incrimination. It would not interfere with *all* legislative investigations, as the Committee suggests. Nor would granting use and derivative use immunity to the obtained evidence prevent subsequent criminal investigations—the criminal prosecutor could use the same exact evidence, as long as he could show that it was obtained from a source independent from Ms. Kelly and Mr.

Stepien's productions to the Committee. See, e.g. Zicarelli, supra, 55 N.J. at 267; see also North, supra, 910 F.2d 843 at 854.

B. The Court Will Not Compel Defendants to Comply with the Subpoenas.

As discussed above, Mr. Stepien and Ms. Kelly are entitled to use and derivative-use immunity as to any evidence produced that is protected by the Fifth Amendment and New Jersey rights against self-incrimination. Therefore, the Committee may compel production of the requested materials as long as use and derivative-use immunity is conferred on any materials covered by the self-incrimination privilege.

But the court will not enter its own order directing defendants to comply with the subpoenas subject to a grant of immunity. The reason for the court's reluctance to enter an order to compel is two-fold. First, after receiving this court's ruling that the defendants justifiably invoked their privileges against self-incrimination, the Committee may, for strategic reasons, simply not wish to continue to compel production of the documents because of the consequences immunity may have on any subsequent criminal proceedings. Compelling defendants to produce the documents would require a subsequent criminal tribunal to conduct a hearing in which the prosecution bears the burden of demonstrating that its evidence was obtained from a source that is "independent" from the Committee's compelled production of documents. See Kastigar, supra, 406 U.S. at 461–62; Strong, supra, 110 N.J. at 591–96. The Committee may wish to avoid placing this burden on any potential criminal prosecution. Indeed, the record reflects that the Committee's Special Counsel has already met with the United States Attorney in charge of the federal investigation, suggesting that at least some level of coordination may result in the wake of this decision. Alternatively, the Committee may wish to issue a new subpoena entirely, to address the constitutional concerns raised by the defendants and discussed at length in this

opinion. In light of the declaratory holdings set forth by the court, the Committee should be given the opportunity to decide how it wishes to proceed in regard to the subpoenas it issued to Ms. Kelly and Mr. Stepien.

The second reason the court is reluctant to issue an order for defendants to comply with the subpoenas pursuant to a grant of immunity is jurisdictional. This court clearly has jurisdiction to issue the declaratory relief requested by the Committee under the Declaratory Judgments Act. See General Assemb. of N.J. v. Byrne, 90 N.J. 376 (1982) (deciding declaratory judgment action brought by the Legislature to determine constitutionality of a statute); Morss, supra, 24 N.J. at 351, 357 (taking jurisdiction over matter seeking to determine the constitutionality of a statute because any jurisdiction-based objections were withdrawn). Indeed, neither defendant argues that this court does not have jurisdiction to issue declaratory relief, which is simply a declaration by the court of the legal rights of the parties.

However, it is unclear whether this court has jurisdiction to *order* a witness to comply with a *legislative* subpoena. The court will not decide this issue as it is unnecessary to the resolution of the matters at hand. As with other issues before this court, the lack of helpful precedents further fuels uncertainty in this sensitive area implicating important separation of powers concerns. Nonetheless, the court remains concerned with its jurisdiction to order compliance with a legislative subpoena. The parties' supplemental briefing did not allay these concerns. Since the issue may arise in the future, the court thinks it advisable to raise questions as to its jurisdiction to compel compliance with a legislative subpoena for the parties' consideration in shaping their conduct going forward.

Under the Declaratory Judgments Act, "further relief" can only be granted when the court has jurisdiction to grant such relief in the first place. N.J.S.A. 2A:16-60. The Committee only

cites Court Rule 1:9-6(b) as the basis for claiming that the court has jurisdiction to enter an order compelling witnesses to comply with the Committee's subpoenas. Under that rule, a "public officer" or "agency" may file an order to show cause with the court to compel a person to comply with a subpoena for documents. There is no dispute that the legislators who signed the subpoena qualify as "public officers" under the rule. But each subsection of Rule 1:9-6 makes reference to a "statute" that provides authority for an application to the courts for an order to compel. Whether subsection (a) or (b) of Rule 1:9-6 applies to a particular agency or public official depends on whether a statute allows for application to the court *ex parte* or by order to show cause. The parties have not cited any statute allowing legislative committees to apply to the court for orders to compel compliance with legislative subpoenas. Therefore, Rule 1:9-6(b) remains, at best, a questionable basis upon which to establish this court's jurisdiction to issue an order compelling compliance with the Committee's subpoenas.

Indeed, Rule 1:9-6 appears intended to apply to state agencies of the executive branch, as a means by which they can compel compliance with subpoenas by utilizing the courts. On the other hand, the Committee has statutory and inherent authority to compel compliance with its subpoenas. Committees of the Legislature have the power to compel compliance with their subpoenas under N.J.S.A. 52:13-1, and they enjoy full investigatory power—including the power to issue subpoenas—by virtue of their general authority to legislate. See Shain, supra, 92 N.J. at 530 ("No specific statutory grant is necessary to vest a legislative body with subpoena power."). The power to compel is incidental to the legislature's subpoena power. Ibid. ("Unless an investigating committee has power to compel testimony, it has no feasible method to obtain all the information it needs to perform its legislative function."). And here, the concurrent resolutions establishing the Committee specifically grant it the power to compel compliance with

its subpoenas. Since the Committee has its own constitutional and statutory authority to compel compliance with its subpoenas, it is thus unclear whether this court should interfere by issuing an order to compel if and when such an order is otherwise justifiable.

The previous legislative committee investigating this matter, represented by one of the same counsel that represents the Committee here, argued before the court in response to David Wildstein's motion to quash a subpoena to testify that the court had no subject matter jurisdiction to hear the case. Similarly, in these cases no party has cited any statutory basis for the court to intrude upon the well-defined subpoena power of the Legislature and, more importantly, there is no need to do that because the Committee has full constitutional and statutory authority to compel enforcement with the subpoenas it issues. N.J.S.A. 52:13-1; see N.J. Const. Art. III, para. 1 ("The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."); see Shain, supra, 92 N.J. at 530.

At oral argument, counsel for the Committee raised for the first time the argument that the Committee cannot compel compliance with legislative subpoenas without a court order because it has no *contempt* power. The court then directed supplemental briefing on this issue. Under N.J.S.A. 52:13-5, the contempt power applies "in any investigation or inquiry by any committee constituted by joint resolution of the legislature." The Committee suggests that use of the phrase "joint resolution" in this provision limits its application, and that since the Committee was formed by "concurrent resolution" it has no contempt power under this statutory provision. The Committee is correct when it argues that the statutory *framework* established by N.J.S.A. 52:13-5 to -13 does not apply to it because it was not established by joint resolution. Indeed, the

procedures in Article 2 are unique to committees created by joint resolution because a finding of contempt under this Article requires a joint hearing of both houses and a joint order of contempt to be issued. However, this is a question of process, not power. The fact that the *procedures* outlined in Article 2 do not govern this Committee's contempt proceedings says nothing in terms of the Committee's inherent *power* to hold witnesses in contempt. Although Article 2's procedures are not applicable to the Committee, under N.J.S.A. 52:13-3 a person who fails to comply with a subpoena is guilty of a misdemeanor. The Committee could therefore enforce any orders to compel by referring the matter for prosecution as a criminal matter under N.J.S.A. 52:13-3. This method of enforcing compliance is very similar to that now utilized by Congress. See 2 U.S.C. § 192 (person summoned to appear before Congress is guilty of a misdemeanor for failing to appear or refusing to answer questions); Watkins v. United States, 354 U.S. 178, 207–09 (1957) (discussing Congress's use of the federal criminal courts to punish those not in compliance with legislative subpoenas).

The Committee may also have the *inherent* power to hold a recalcitrant witness in contempt, though the court need not reach this issue in light of the statutory contempt power contained in N.J.S.A. 52:13-3. Notably, Article 2 was enacted as an apparent reaction to the decision in Ex parte Hague, 104 N.J. Eq. 31, 47 (Ch.), aff'd, 104 N.J. Eq. 369 (1929). There, the court held that a contempt warrant could not issue from a committee created by joint resolution because there was no statutory authority for the Legislature to convene in joint session to issue such warrants. But the court was careful to note that since the committee could *not* be created by joint resolution, the power to hold the witness in contempt resided in either house of the Legislature. Id. at 46 ("Whatever means the two houses use for the purpose of investigating, the right to investigate is separate and distinct in each house, and when it is sought to punish a

recalcitrant witness, the right so to do must be vindicated by the senate or general assembly, in their separate relations, for the reason that the right so to do is separate, not joint."). Although this language is *dicta,* the Hague opinion suggests that the Legislature maintains the ability to hold witnesses in contempt as an incident to its investigative authority. Federal courts have reached the same conclusion when recognizing Congress's *constitutional* authority to hold witnesses in contempt as an "auxiliary power" of the legislative function. See McGrain v. Daugherty, 273 U.S. 135, 162–176 (1927). It may be prudent for New Jersey courts to adopt the reasoning of McGrain, particularly in light of the New Jersey Supreme Court's approval of that decision in Shain, supra, 92 N.J. at 532–33, but the court need not reach this issue in light of the contempt provision contained in N.J.S.A. 52:13-3.

Importantly, in its complaints, the Committee has not asked the court to hold the defendants in contempt. Instead, the Committee has only requested an order to compel production, which the Committee clearly has authority to do on its own under the concurrent resolutions as well as under the statutory provisions that were discussed at length above. The fact that the Committee has the power to enforce its own subpoenas through orders to compel and grant immunity in return, and the lack of a clear jurisdictional basis for this court to intrude upon that power, raises serious questions concerning the exercise of judicial power to compel compliance with legislative subpoenas or to order a grant of immunity as a condition of compliance. These complicated and untested jurisdictional issues provide further justification for the court's decision not to issue its own order compelling compliance with the subpoenas in exchange for immunity. See Worthington v. Fauver, 88 N.J. 183, 192 (1982) ("[A]n unnecessary decision on constitutional issues should be avoided.").

CONCLUSION

For the reasons set forth in this opinion, plaintiff's applications for judgments declaring that defendants have failed, without justification, to produce documents in accordance with the subpoenas are denied, as are plaintiff's requests for injunctive relief ordering defendants to comply with the subpoenas. Plaintiff's complaints in both actions are dismissed.