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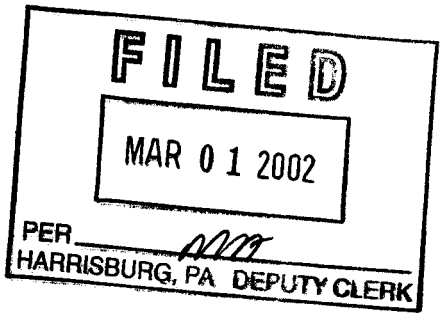
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	**CIVIL NO. 1:CV-01-2439**
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	



MEMORANDUM

Before the court is Defendant Presiding Officers'[1] motion *in limine* to prohibit the testimony concerning legislative process or motive. The parties have briefed the issue, and the motion is ripe for consideration.

I. BACKGROUND

Plaintiffs filed this case in December of 2001 challenging the constitutionality of the Pennsylvania congressional redistricting plan ("Act 1"). That plan, enacted pursuant to the year 2000 decennial national census, reflects that Pennsylvania has lost two seats in Congress. Defendants moved to dismiss Plaintiffs' constitutional challenge pursuant to Federal Rules of Civil Procedure 12 (b)(1) and (6). By an order dated February 22, 2002, the court granted that motion in part and denied it in part. The lone remaining issue is Plaintiffs' claim that Act 1

[1]"Presiding Officers" is an appellation for Defendant Representative Matthew Ryan, Speaker of the Pennsylvania House of Representatives, and Defendant Lieutenant Governor Robert Jubelirer, Presiding Officer of the Pennsylvania Senate.

violates the one person-one vote requirement of Article I, § 2 of the United States Constitution.

Defendant Presiding Officers filed the instant motion *in limine* to exclude any testimony concerning the legislative process that resulted in Act 1's enactment or the legislature's potential motive for enacting Act 1. Specifically, Defendant Presiding Officers seek to exclude the testimony of Representative William DeWeese, minority leader of the Pennsylvania House of Representatives.

II. DISCUSSION

Defendant Presiding Officers contend that the instant motion should be granted because testimony implicating the legislative process and/or motive is prohibited by the broad grant of legislative immunity found in the Speech or Debate Clause. *See* U.S. Const., Art. I, § 6 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

Because evidentiary privileges contravene "the fundamental principal that the public has a right to every man's evidence," such privileges are strictly construed. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (citations omitted). As a result, the burden of establishing entitlement to a privilege rests on the party asserting the privilege. *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court recognized a common law legislative immunity for state legislators that absolutely protects them from liability for their legislative activities. This common law privilege of legislative immunity is co-extensive with the protection provided to members of Congress pursuant to the Speech or Debate Clause. *Bogan v. Scott-*

Harris, 523 U.S. 44, 49 (1998); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998).

A. Does the Legislative Immunity Privilege completely bar Representative DeWeese's testimony?

The legislative immunity doctrine recognizes that it is " 'not consonant with our scheme of government for a court to inquire into the motives of legislators.' " *Bogan*, 523 U.S. at 55 (quoting *Tenney*, 341 U.S. at 377). Because the legislative immunity doctrine serves important public purposes, courts have affirmed that the doctrine generally shields legislative actors not only from liability, but also from being required to testify about their legislative activities. *See, e.g., Gravel v. United States*, 408 U.S. 606, 615-16 (1972) (holding that United States senator could not be made to answer questions about events that occurred in senate subcommittee); *see also Powell v. Ridge*, 247 F.3d 520, 524 (3d Cir. 2001) ("Absolute immunity . . . creates not only protection from liability, but also a right not to stand trial.").

Defendant Presiding Officers contend that because the redistricting process is undoubtably a legislative procedure, the court must prohibit Representative DeWeese's testimony. While the court agrees that redistricting is a legislative process, the court disagrees on Defendant Presiding Officers' proposed application of the privilege. The court's disagreement is two-fold. First, the court disagrees that the legislative privilege belongs exclusively to the institution, in this case, the House of Representatives. Second, the selective application of the privilege that Defendant Presiding Officers seek to invoke is outside of the scope of the privilege.

Defendants contend that Representative DeWeese cannot waive the privilege as to himself because the privilege belongs to the institution – the Pennsylvania House of Representatives – and not to the individual legislators. In support of this proposition, Defendant Presiding Officers cite *United States v. Craig*, 528 F.2d 773, 780-81 (7th Cir. 1976), and *In re Grand Jury Investigation*, 587 F.3d 589, 593 (3d Cir. 1978). However, both of these cases explicitly recognize that the legislative immunity privilege serves dual purposes: (1) to protect the institution as a whole due to its status as a co-equal branch of government; and (2) to protect the individual legislators from the distraction of defending civil suits that arise of their legislative activities.[2] Additionally, it is beyond doubt that the legislative immunity privilege, like other privileges, can be waived. *See Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995). Each legislator has their own privilege which they may assert or waive as they please. *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1998) (Legislative privilege "is a personal one and may be waived or asserted by each individual legislator."). However, due to the dual nature of the privilege, when an individual legislator asserts or waives the privilege, this action has no effect on other legislator's ability to assert the privilege. Representative DeWeese, therefore, possesses his own legislative immunity

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[2]The court would like to take this opportunity to note the impropriety of Defendant Presiding Officers' disingenuous and selective quotations from these cases. Specifically, Defendant Presiding Officers state in a parenthetical notation to its citation to *In re Grand Jury*, that the "privilege is of 'great institutional importance to the House as a whole.' " (Def. Pres. Offs. Br. in Sup. at 6.) Yet the entire sentence reads: "That privilege, although of great institutional interest to the House as a whole, *is also personal to each member*." *In re Grand Jury*, 587 F.2d at 593 (emphasis added). Additionally, Defendant Presiding Officers state in a parenthetical notation to its citation to *United States v. Craig* that the "privilege provides 'an institutional immunity for the legislature itself.' " (Def. Pres. Offs. Br. in Sup. at 6.) Yet, in that case, the entire sentence reads as follows: "The Speech or Debate Clause is intended to provide *a personal safeguard for the individual legislator* and an institutional immunity for the legislature itself." *United States v. Craig*, 528 F.2d at 781 (emphasis added).

privilege. If he chooses to waive the privilege, this will have no effect whatsoever on the remaining legislators' ability to refuse to testify.[3]

Even if the court were to accept that the legislative immunity privilege belongs exclusively to the House itself, the application of that privilege in this case is inappropriate. In *Powell v. Ridge*, the Third Circuit recognized that "a proper invocation of legislative immunity would typically call for the dismissal of a legislator from the lawsuit." 247 F.3d at 525. In that case, a group of students and parents sued the City of Philadelphia alleging that the formula used by the Commonwealth of Pennsylvania to allocate certain federal education funds yielded racially discriminatory results in Philadelphia and other predominately minority school districts. Two months into the litigation, several leaders of the Pennsylvania General Assembly, including the Defendant Presiding Officers in this case, moved to intervene. Thereafter, the defendants sought to quash the plaintiffs' motion to compel discovery, citing legislative immunity. The District Court denied the motion to quash and the Third Circuit affirmed. In affirming, the Third Circuit held that the type of one-sided immunity that the defendants sought did not exist.

> [T]he Leaders wish to remain as defendants and participate as long as this case is around; at no time, we note, have they invoked legislative

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[3]All but two of the cases cited by Defendant Presiding Officers involved legislators who were unwilling to testify. Those cases are inapplicable to the situation at hand. *See U.S.F.L. v. N.F.L.*, 842 F.2d 1335, 1374-75 (2d Cir. 1985) (stating that testimony by senator that was barred on the basis of double hearsay could have also been barred on the basis that the senator could not waive the legislative immunity privilege of another member); *Holmes v. Farmer*, 475 A.2d 976, 985 (R.I. 1984) (holding that voluntary testimony of state legislator who waived privilege should have been barred). The *U.S.F.L.* decision is ambiguous dicta which does not bind this court. Likewise, the decision of the Rhode Island Supreme Court, although more specifically on point, does not bind this court. Furthermore, the court disagrees with Defendant Presiding Officers that the Supreme Court in *United States v. Helstoski*, 442 U.S. 447 (1979) strongly intimated that the legislative immunity privilege could not be waived. Instead, that decision clearly did not decide the issue, and instead held that the privilege is dual and that neither the institution, nor the individual legislator may waive it on behalf of the other. *Id.* at 492-94.

> immunity as a basis for any of their various motions to dismiss. This is simply not a case of legislators caught up in litigation in which they do not wish to be involved. Rather, these are self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword. . . .
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> A proper invocation of legislative immunity would typically call for the dismissal of a legislator from the lawsuit . . . Not only is dismissal of the legislator the logical and eminently appropriate result where legislative immunity applies, it also is the remedy which best furthers the underlying goals of the doctrine. . . . The privilege described by the Legislative Leaders would not protect them absolutely from the burdens of this litigation and, therefore, is outside the bounds of traditional legislative immunity. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good."

Id. at 525-26 (quoting *Tenney v. Brandhove*, 341 U.S. at 377).

In all fairness to Defendant Presiding Officers, they are not "self-made defendants" as they were in *Powell*. *Id.* Yet, like the situation in *Powell*, Defendant Presiding Officers never raised the issue of legislative immunity in their motion to dismiss. The Defendant Presiding Officers' version of the legislative immunity privilege would not further the ultimate purpose of the privilege – preventing legislators from being distracted from their appointed duties by having to defend civil suits relating to their legislative activities.[4]

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[4]The court disagrees with Defendant Presiding Officers' conclusion that the Third Circuit never reached the merits in *Powell*. According to Defendant Presiding Officers', the Third Circuit "dismissed on jurisdictional grounds, refusing to exercise appellate jurisdiction under the collateral order doctrine to review the underlying dispute." (Def. Pres. Offs. Reply at 6-7.) While it is true that the court dismissed for lack of jurisdiction, the court lacked jurisdiction because it found that the privilege asserted by the defendants was "not only 'not traditionally recognized,' but is not even suggested by any reasonable reading of the applicable case law." *Id.* at 526 (quoting *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 57 (3d Cir. 2000) (holding that the collateral order doctrine bars interlocutory appeals of discovery orders unless such orders implicate "the narrow categories of trade secrets and traditionally recognized privileges, such as attorney client and work product")). Given this language, it would strains logic to conclude that the court did not reach the merits of the defendant's claim of legislative immunity privilege.

Representative DeWeese's testimony implicates his independent legislative immunity privilege. It his privilege to assert or waive. It appears, however, that he wishes to voluntarily testify. Therefore, the court will not exclude his testimony. Despite their vociferous contention that allowing Representative DeWeese to testify would "lead to the destruction of legislative privilege in the federal courts," Defendant Presiding Officers cite no authority to contradict the individual legislator's right to waive the privilege. (Def. Pres. Offs. Reply at 7.)

B. Is the court completely barred from examining evidence of the motive for enacting Act 1?

Defendant Presiding Officers also argue that the court is prohibited from examining the legislature's possible motive for enacting laws by legal principle "rooted in long-standing judicial precedent." (Def. Pres. Offs. Br. in Sup. at 8.) Therefore, according to Defendant Presiding Officers, Representative DeWeese's testimony, which may implicate the motive for enacting Act 1, should be excluded.

In support of their contention, Defendant Presiding Officers sight a passel of cases holding that courts should not delve into the sticky task of ascertaining the legislative motives underlying facially constitutional legislation. These cases are inapplicable here because Act 1 is not facially constitutional. According to the Supreme Court's decision in *Karcher v. Daggett*, 462 U.S. 725

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[4] (...continued)
reasonable reading of the applicable case law." *Id.* at 526 (quoting *Bacher v. Allstate Ins. Co.*, 211 F.3d 52, 57 (3d Cir. 2000) (holding that the collateral order doctrine bars interlocutory appeals of discovery orders unless such orders implicate "the narrow categories of trade secrets and traditionally recognized privileges, such as attorney client and work product")). Given this language, it would strains logic to conclude that the court did not reach the merits of the defendant's claim of legislative immunity privilege.

avoidable differences in population were not the result of a good-faith effort to achieve population parity, the state must prove that each variance was necessary to achieve some legitimate goal. *Id.* at 730-31; *accord Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 396 (D. Md. 1991).

In this case, Plaintiffs allege that the population variances in Act 1 were avoidable and not the result of a good-faith effort to achieve population parity. Instead, Plaintiffs insist that Act 1 is a Republican plan to utilize the redistricting process to dilute the votes of Democrats in the Commonwealth. Thus, evidence concerning the legislative process may tend to prove, or disprove, that Act 1 was enacted in good faith. Therefore, such evidence is most certainly relevant to the ultimate issue in this case. *See* Fed. R. Evid. 401.[5]

More to the point, there is no wholesale bar that prohibits courts from examining either a legislature's motive for passing a law or the process that it employed in enacting legislation. Of course, in our system of co-equal branches of government, such an examination should not be taken lightly. However, where, as here, legislation implicates a suspect classification or a fundamental right, courts will reluctantly engage in the tortuous task of ascertaining legislative intent. *See, e.g., Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 264-68 (1977) (holding that evidence of legislative procedure is a subject of "proper inquiry in determining whether racially discriminatory intent existed" in equal protection challenge); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292,

[5]Although relevant, such evidence may be excluded from evidence if it violates another rule of evidence. *See* Fed. R. Evid. 402; *see also* Rules, 601, 602, 701, 802, 805, and 1002.

298 n. 12 (D. Md. 1992) (stating that examination of legislative motive is allowed in voting rights cases so long as such evidence does not violate the legislative immunity privilege).

Because the evidence concerning the legislative process and motive for enacting Act 1 is relevant to this case, in addition to the fact that this case implicates voting rights, the court will allow the introduction of the evidence. As stated above, *see supra* Part II.A, Representative DeWeese may waive his individually-held legislative immunity privilege. Therefore, his testimony will not violate the legislative immunity privilege.

III. CONCLUSION

The court finds that testimony regarding the legislative process involved in enacting Act 1 is relevant to Plaintiffs' one person-one vote claim. Additionally, introduction of such testimony will not violate the legislative immunity privilege. Therefore, the court will deny Defendant Presiding Officers' motion *in limine* to prohibit testimony concerning the legislative process or motive.

Dated: March 1, 2002.

SYLVIA H. RAMBO
United States District Judge