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

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PRESIDING OFFICERS' MOTION IN *LIMINE* TO PROHIBIT TESTIMONY CONCERNING THE LEGISLATIVE PROCESS OR MOTIVE

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INTRODUCTION

Plaintiffs challenge Act 1 of 2002, legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census. A hearing in this matter is set for March 11-12, 2002. By order dated January 30, 2002, the parties were instructed to file any motions in *limine* in advance of the hearing and supporting briefs by February 22, 2002. Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") have filed a motion in *limine* to prohibit testimony from witnesses for the Plaintiffs concerning the legislative process or motive of the General Assembly in enacting Act 1. This issue is critical to the conduct of the hearing, for a denial of the present motion virtually ensures the issuance of at least 42 subpoenas for trial testimony and a repeat battle before this Court of the political battle fought in the General Assembly. Presiding Officers file this brief in support of their motion.

BACKGROUND

On February 1, 2002, the Commonwealth Court of Pennsylvania, pursuant to an order of the Pennsylvania Supreme Court, held an evidentiary hearing in the parallel proceeding of *Erfer v. Commonwealth*, Pa. Supreme Ct. No. 14 MM 2002. Petitioners' counsel (Plaintiffs' counsel herein) called Representative William DeWeese (Minority Leader of the Pennsylvania House of Representatives) and Larry Ceisler (a purported expert on Pennsylvania politics who is also under contract as a communications consultant for the House Democratic Caucus) as witnesses on behalf of Petitioners. Testimony was elicited from Rep. DeWeese and Mr. Ceisler concerning the process of drafting Act 1 and the motives of the General Assembly in enacting the legislation.[1] Among other things, Rep.

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[1] Counsel for Presiding Officers objected to this testimony on the basis of the Speech or Debate Clause of the Pennsylvania Constitution, *see* PA. CONST., art. II, §15, and irrelevancy. Commonwealth Court preserved all such objections for

DeWeese and Mr. Ceisler were asked to testify concerning the participation and input of House Democrats in the process leading up to the passage of Act 1.

Plaintiffs have identified Mr. Ceisler as an expert witness for the upcoming hearing. It is also anticipated that Rep. DeWeese will testify and that both witnesses will be asked to testify as to the legislative process of enacting Act 1 and the motives of the General Assembly or certain members thereof. Such testimony, however, whether from Rep. DeWeese, Mr. Ceisler or any other witnesses proffered by Plaintiffs, should be prohibited in *limine*.

QUESTIONS PRESENTED

A. Whether testimony of Rep. DeWeese, Mr. Ceisler or any other witness proffered by Plaintiffs concerning the legislative process surrounding the enactment of Act 1 should be prohibited on the basis of common law legislative immunity.

B. Whether testimony of Rep. DeWeese, Mr. Ceisler or any other witness proffered by Plaintiffs, to the extent offered to prove the motive of the General Assembly or any member thereof in enacting Act 1, should be prohibited on the basis of irrelevancy and incompetency.

Suggested answer to both: YES.

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resolution by the Pennsylvania Supreme Court. As the order dismissing all of the *Erfer* Petitioners' state constitutional claims did not address evidentiary issues and no opinion has been released, the status of the evidentiary objections is unknown.

ARGUMENT

I. TESTIMONY IMPLICATING THE LEGISLATIVE PROCESS IS PROHIBITED

A. Common Law Legislative Privilege

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court recognized a common law legislative immunity for state legislators that protects them, absolutely, from liability for their legislative activities. This common law immunity or "legislative privilege" is co-extensive with the protection provided members of Congress by the Speech or Debate Clause of the United States Constitution. *See Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980). *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (reaffirming *Tenney* and extending common law legislative privilege to local legislators); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998) ("[T]he Supreme Court has recognized that in civil cases, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause"); *Lunderstaadt v. Collafella*, 885 F.3d 66 (3d Cir. 1989).

The legislative privilege "preserve[s] the constitutional structure of separate, coequal, and independent branches of government," *United States v. Helstoski*, 442 U.S. 477, 491 (1979), and "insures that legislators are free to represent the interests of their constituents without fear [] they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1944). As explained by the district court in *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992), "legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege." As such, the legislative privilege ensures that the legislative process is, for the good of the public, protected from disruption.

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity,'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Thus, the privilege applies not only to legislators but also to their staff and anyone involved in activity that is appropriately deemed "legislative" in nature, including employees and paid consultants privy to the process. *See Gravel v. United States*, 408 U.S. 606 (1972) (explaining why privilege extends to staff); *see also Marylanders for Fair Representation, Inc.* 144 F.R.D. 292 (common law legislative privilege applies to staff members, officers and other employees of the body because the immunity attaches by virtue of function, not title); *Campaign for Fiscal Equity v. New York*, 687 N.Y.S.2d 227 (N.Y. Sup. Ct.), *aff'd,* 697 N.Y.S.2d 40 (N.Y. App. Div. 1999) (issuing protective order to bar deposition of former Department of Education employee who communicated with legislators re: computer models for educational funding).

The determination of whether an activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Third Circuit pointed out in *Government of the Virgin Islands v. Lee*:

> In general [ ] the cases interpreting the Speech or Debate Clause in which legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., United States v. Helstoski, 442 U.S. 477 (1979) (introducing proposed legislation); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); Doe v. McMillan, 412 U.S. 306 (1973) (inserting material in the Congressional Record); Gravel v. United States, 408 U.S. 606 (1972) (introducing evidence during committee hearings); United States v. Johnson, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); Tenney v. Brandhove, 341 U.S. 367 (1951)

> (interrogating witnesses during committee hearing); Kilbourn v. Thompson, 103 U.S. 168 (1881) (voting on resolutions) . . . [T]he acts themselves were obviously legislative in nature. It is the very legislative character of these acts which triggers the protection of legislative immunity.

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted).

Redistricting is a legislative process, *see e.g., Reynolds v. Sims*, 377 U.S. 533, 586 1964) ("legislative reapportionment is a matter for legislative consideration and determination"), and the development and passage of legislation to establish congressional districts is quintessential legislative activity. Courts considering challenges to redistricting plans have routinely applied the legislative privilege to prevent inquiry (whether by deposition, subpoena *duces tecum* or trial testimony) into the process of enacting state and congressional redistricting plans. *See e.g., Deem v. Manchin*, No. 3:01cv75 (N.D. W.Va. Mem. Op. Dec. 21, 2001) (copy attached at Tab A) (referencing earlier decision to prohibit deposition of senators about motives behind redistricting plan); *Simpson v. City of Hampton*, 166 F.R.D. 16 (E.D. Va. 1996) (denying motion to compel discovery of personal notes & files of city council in racial vote dilution case); *Marylanders for Fair Representation*, 144 F.R.D. 292 (prohibiting deposition of advisory committee members & legislators on how plan was developed & why alternative plans rejected); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission*, 536 F. Supp. 578, 582 n.2 (E.D. Pa.), *aff'd* 459 U.S. 801 (1982) (granting motion for protective order against deposition inquiring into motives behind legislative reapportionment plan); *see also In re Rick Perry*, 2001 Tex. LEXIS 96 (Oct. 17, 2001) (prohibiting deposition of reapportionment board members & staff regarding calculations performed in developing plan); *Montgomery County v. Schooley*, 627 A.2d 69 (Md. App. 1993) (reversing trial court's permission to depose councilman on motives behind the plan); *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984) (affirming trial judge's refusal to permit

legislators & their aides to testify at hearing on motives behind the plan). This Court should follow suit and apply the privilege to prohibit any testimony pertaining to the process of enacting Act 1.

B. Presiding Officers May Assert The Privilege On The General Assembly's Behalf

The legislative privilege is institutional when raised in the context of a constitutional challenge to legislation. *See United States v. Craig*, 528 F.2d 773, 780-81 & n.2 (7th Cir. 1976) (privilege provides "an institutional immunity for the legislature itself"); *In re Grand Jury Investigation*, 587 F.2d 589, 593 (3d Cir. 1978) (privilege is of "great institutional importance to the House as a whole"). Legislators, such as Presiding Officers, who seek to preserve the privilege on the institution's behalf, must be permitted to assert legislative privilege against those who would subvert its protections, perhaps for personal or political gain. *See Mongomery County*, 627 A.2d at 122 (county could raise privilege against councilman to prevent voluntary testimony about redistricting process). As the Supreme Court of Rhode Island has explained, to permit waiver of the privilege by an individual legislator or person involved in the legislative process who wishes to testify is inconsistent with the institutional purposes served by the privilege:

> The privilege protects the institution of the Legislature itself from attack [as well as] the individual legislators personally. ... *To allow the privilege to be waived would be inconsistent with these purposes.* The privilege is *institutional* in its protection of the Legislature, ensuring the separation of powers among the coequal branches of government. [Allowing] an individual legislator to waive the institution's privilege *would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.*

Holmes, 475 A.2d at 985 (emphasis added) (refusing waiver in challenge to redistricting plan); *see U.S. Football League v. NFL*, 842 F.2d 1335, 1375 (2d Cir. 1988) (purposes of Speech or Debate protection would be "'ill-served' if such

waivers were permitted"); *see also Helstoski*, 442 U.S. at 492 (strongly intimating that the legislative privilege cannot be waived).

To allow waiver in the context of a constitutional challenge to legislation would have grave consequences, threatening both legislative independence and judicial efficiency. Where legislation is challenged on constitutional grounds, and "the legislative process itself or [] the end product of that process," is under attack, "waiver by one legislator of his privilege may, in effect, dictate the waiver by other legislators of their privilege. One willing member could thus cripple the privilege of other members and be the instrument for dismantling the separation of powers pillar upon which the privilege is, in part, based." *Montgomery County*, 627 A.2d at 120-121 (refusing waiver in challenge to redistricting plan). If waiver is permitted, the privilege which serves as a bulwark of separation of powers could be consistently lost for reasons conflicting with the interests of the institution. It would also lead to a repeat battle in court of the political battle in the General Assembly. Even the Governor, who signs the final bill version, would become a potential witness. Under the circumstances, Presiding Officers must be allowed to assert the privilege against testimony that implicates the legitimate legislative activity of enacting Act 1.

C. Application

Rep. DeWeese is the Leader of the House Democrat Caucus. Any testimony he may provide as to the legislative process of enacting Act 1 will *a fortiori* violate the common law legislative privilege. His voluntary testimony will, moreover, force other legislators to contemplate waiving the privilege to refute his allegations. Defense counsel may have to subpoena other members, including the 42 members of Rep. DeWeese's caucus who voted in favor of Act 1, to rebut his testimony. If the subpoenas are quashed or the witnesses are allowed to invoke privilege or not as they see fit, the defense will have been prejudiced by the Court

allowing the voluntary testimony of one partisan opponent of the statute. Rep. DeWeese should not be permitted to testify as to any discussions, or activities that occurred or did not occur during the process of drafting, considering and enacting Act 1. Any other result threatens the General Assembly's institutional interests and threatens to engulf the court in an endless parade of witnesses providing their recollection of the political process behind Act 1.

Mr. Ceisler is a paid communications consultant to the House Democrat Caucus, and as such, is in a unique position to learn details of the legislative process for certain bills. In this action, he cannot be permitted to testify as to any information concerning the process of drafting Act 1.

Any other witnesses called by Plaintiffs, with insight into or knowledge of the legislative process surrounding the enactment of Act 1, should similarly be prohibited from testifying about that process.

II. TESTIMONY AS TO MOTIVE IS PROHIBITED

A. Applicable Legal Principles

Two legal principles, rooted in long-standing judicial precedent, limit inquiry into the legislative motive behind Act 1: (1) the common law legislative privilege discussed above; and (2) the irrelevancy and incompetency of an individual legislator's testimony concerning the intent of the legislature as a whole. These principles require that any testimony purporting to explain the "motive or design" behind Act 1 be prohibited in *limine*.

The common law legislative privilege, in addition to prohibiting inquiry into the legislative process, also operates to prohibit inquiry into the motive or intent of the General Assembly. *See Tenney*, 341 U.S. at 377 ("[t]he claim of an unworthy purpose does not destroy the privilege"). As explained above, the privilege prevents any inquiry into activities occurring within the "legitimate legislative sphere." How and why legislators or the body itself voted on a particular bill is

quintessentially activity occurring within the legislative sphere. *See e.g., Kilbourn v. Thompson*, 103 U.S. 168 (1881) (voting protected activity under federal Speech or Debate Clause). Numerous courts have prevented inquiry into the motives behind a challenged redistricting plan on the basis of the legislative privilege (or a state constitutional counterpart). *See e.g., Deem*, No. 3:01 cv 75 (Mem. Op.) (referring to earlier decision to prohibit deposition of senators about motives behind plan); *In re Rick Perry*, 2001 Tex. LEXIS 96 (prohibiting deposition of reapportionment board members & staff regarding calculations underlying plan); *Holmes*, 475 A.2d 976 (affirming refusal to force legislators & their aides to testify at hearing on motives behind plan).

It is also generally recognized that the testimony of an individual legislator concerning the intent of a legislative body as a whole is irrelevant and incompetent evidence. The basis for this principle was cogently explained by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 384 (1968):

> It is now a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statue on the basis of an alleged illicit legislative motive. ... Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. *What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.* We decline to void essentially on the ground that it is unwise legislation which Congress has the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

391 U.S. 367, 383-84 (1968) (emphasis added). *See also Fletcher v. Peck*, 6 Cranch 87, 130-131 (1810); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (citing

Fletcher and *O'Brien* and explaining, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment; ... there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons"); *Foreman v. Dallas Co.*, 193 F.3d 314, 322 (5th Cir. 1999) (citing *O'Brien*) ("No one legislator, or even a group of three legislators, has sufficient personal knowledge to declare the overall intent to of the Texas Legislature"); *Mo. Knights of the KKK v. Kansas City*, 723 F. Supp. 1347, 1352 (W.D. Mo. 1989) (citing *O'Brien*) ("Legislative motive or, more specifically, the motive an individual legislator has for voting for a particular piece of legislation is irrelevant and will not be grounds to invalidate an otherwise constitutional law or resolution").

While the Supreme Court has mandated that "intentional discrimination" as well as "actual discriminatory effects" must be established in a partisan gerrymandering claim under the Fourteenth Amendment, *Davis v. Bandemer*, 478 U.S. 109, 127 (1986), virtually all evidence of discriminatory intent is "indirect." Sources of "direct" evidence are limited by long-standing principles (such as the legislative privilege) which protect the independence and integrity of the legislature. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 & 268 n.18 (1977) (counseling sensitive inquiry into "such circumstantial and direct evidence of intent *as may be available*" and acknowledging the prohibition against "judicial inquiries into legislative [] motivation"); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (cautioning lower courts against "judicial intervention into the legislative realm" in gerrymandering cases); *In re Perry*, 2001 Tex. LEXIS 96 *14 (refusing, in challenge to redistricting plan,

to allow inquiry into intent under *Arlington Heights* absent extraordinary circumstance justifying the "unprecedented excursion into legislative immunity"). This Court may, consistent with *Bandemer*, infer discriminatory intent from objective indicia, if available, thereby scrupulously avoiding any direct inquiry into the motive or intent of the General Assembly. *See e.g., Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (focusing solely on effects), *aff'd*, 488 U.S. 1024 (1989); *Pope v. Blue*, 809 F. Supp. 392, 396 (W.D. N.C.), *aff'd* 506 U.S. 801 (1992) (same).

B. Application

It is anticipated that Rep. DeWeese will be asked to testify about why certain members of the General Assembly voted as they did on the bill that became Act 1. Such testimony would be offered to show that the General Assembly acted with a certain motive, when motive, as explained above, is not relevant in the context of this constitutional challenge. Rep. DeWeese is, moreover, but one legislator among the 253 members of the General Assembly. His testimony as to motive is highly speculative, imbued with self-interest and thoroughly irrelevant. It should be prohibited in *limine*.

Similarly, to the extent that Mr. Ceisler or any other witness is asked to testify concerning the motives of the General Assembly in enacting Act 1, their testimony would be irrelevant. Permitting testimony about motive, as with permitting testimony about the legislative process, virtually ensures a parade of witnesses contradicting one another as to the motive of the General Assembly, a multi-member body. The constitutionality of Act 1 must stand or fall, not on the purported motives of the legislators who voted for it, but on its effects

CONCLUSION

For the reasons set forth above, this Court should grant Presiding Officers' motion *in limine* to prohibit testimony at the upcoming hearing concerning the legislative process or the motive of the General Assembly in enacting Act 1.

Respectfully submitted,

February 22, 2002

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CERTIFICATE OF SERVICE

I certify that on February 22, 2002, I caused a copy of the foregoing Brief in Support of Presiding Officers' Motion in *Limine* to Prohibit Testimony Concerning the Legislative Process or Motive to be served on the following in the manner indicated:

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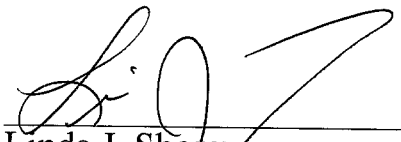

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