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 OF THE HOUSE REPUBLICAN CAUCUS IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

BACKGROUND

Plaintiffs challenge Act 1, legislation putting into place 19 Congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census. A hearing in this matter, on the sole remaining claim, is presently scheduled for March 11-12, 2002.[1]

On February 8, 2002, Plaintiffs served a subpoena *duces tecum* on the Custodian of Record of the Carnegie Mellon University ("CMU"), seeking production of the following documents:

> 1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie

[1] On February 22, 2002, this Court granted the motions to dismiss of Defendants Executive Officers and Presiding Officers on Counts II-V of Plaintiffs' Amended Complaint. Only Count I (one- person, one-vote) remains.

> Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

On February 19, 2002 (after learning of the subpoena late in the day on February 14, 2002, which was also the day set for compliance therewith), Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") filed a Motion to Quash Subpoena or For Protective Order. In their supporting memorandum of law, Presiding Officers argued that the subpoena should be quashed for failure to serve a notice of deposition on Presiding Officers' counsel and/or a protective order should issue to prohibit the discovery as violative of the common law legislative privilege. Also on February 19, 2002, the Republican Caucus of the Pennsylvania House of Representatives ("House Republican Caucus") moved to intervene for the limited purpose of joining Presiding Officers' motion.

On February 22, 2002, this Court granted the motion to intervene. By separate order, the Court also denied the motion to quash the subpoena or for protective order. The House Republican Caucus, along with the Presiding Officers, immediately moved to stay the latter order, noting its intention to file an immediate appeal. Today - February 25, 2002 - the House Republican Caucus filed a notice of appeal. This memorandum is filed in support of the stay motion.

QUESTION PRESENTED

Whether this Court should stay its February 22, 2002 order denying the motion to quash or for protective order concerning the subpoena issued to Carnegie Mellon University.

Suggested answer: YES.

ARGUMENT

I. APPLICABLE LEGAL STANDARD

To determine whether a stay is appropriate, four factors are considered: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). *See also Thomas v. Philadelphia Housing Authority*, 875 F. Supp. 272 (E.D. Pa. 1995).

A. House Republican Caucus Is Likely To Succeed On The Merits

The common law legislative privilege, which formed the basis for the motion for protective order, is a long-recognized and well-founded privilege. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Lunderstadt v.Collafella*, 885 F.2d 66 (3d Cir. 1989). In civil matters, where applicable, the legislative privilege is absolute. *See e.g., Bogan,* 523 U.S. 44; *Tenney*, 341 U.S. 367; *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.").

The scope of the legislative privilege in civil discovery disputes such as the one at hand has not been squarely addressed by either this Court, the United States Court of Appeals for the Third Circuit or the United States Supreme Court. Nonetheless, other courts have addressed it in opinions that strongly support the protective order sought here. *See e.g., Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). *See also* Presiding Officers' Memorandum

in Support of Motion to Quash Subpoena or for Protective Order at 6-10. Given the Third Circuit's recent reaffirmance of the privilege in *Larsen*, there is a strong likelihood that Legislative Leaders will prevail on appeal.

B. House Republican Caucus Will Be Irreparably Harmed

The legislative privilege is lost if the Custodian of Records of CMU produces the documents requested during the pendency of the appeal. As the Third Circuit recognized in *In re Ford Motor Company*, a case concerning the attorney-client privilege, "once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed ... the cat is already out of the bag." 110 F.3d 954, 963 (3d Cir. 1997). While the Third Circuit made this observation in the context of the "effective review" prong of the collateral order doctrine, it is equally applicable here because the underlying principle is the same: "[R]eview after final judgment is ineffective if the right sought to be protected would be, for all practical and legal purposes, destroyed if it were not vindicated prior to final judgment." *Id.* at 962. Here, the injury is truly irreparable because, even if the House Republican Caucus ultimately prevails on its assertion of privilege, the harm which will come to pass in the absence of a stay cannot be remedied.

Similar concerns have been recognized in the context of immunity. *See In re Ford*, 110 F.3d at 963 (referring to the various immunities including speech or debate immunity). The legislative privilege invoked here is part of the same privilege that provides state legislators with immunity from civil suit. *See Larsen*, 152 F.3d at 249. In *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982), the Court predicted that "[a] showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal." *See also Ruehman v. Village of Palos Park*, 842 F. Supp. 1043, 1062 (N.D. Ill. 1993) ("Upon the filing

of a non-frivolous interlocutory appeal from an immunity ruling, the district court should stay any further proceeding against that party.").

There is an immediate threat of harm here. Given that the order being appealed from effectively directs the Custodian of Records of CMU to respond to Plaintiffs' subpoena *duces tecum*, in the absence of a stay, the privilege will be lost before the Third Circuit addresses the appeal.

C. Other Parties Will Not Be Injured

Plaintiffs will not be injured by a stay. The contract they seek is publicly available and thus, would already be in their hands if they really wanted it. The contract, however, is not really the issue as the subpoena asks for more, including all correspondence between CMU and the House Republican Caucus. These documents are not only privileged, but also are not probative of any element of Plaintiffs' case. To the extent that the intent of the General Assembly was an issue in the Plaintiffs' "partisan gerrymandering" claim, that intent had to be inferred from the face of the statute and objective indicia found outside the legislative process, not by prying into that process.[2] Because the Court has now dismissed the partisan gerrymandering claim (simultaneously with the denial of the motion for protective order), the formerly irrelevant discovery sought by Plaintiffs is now *a fortiori* irrelevant.

Plaintiffs cannot be harmed by not obtaining irrelevant material, even though they will not have it for the hearing on March 11, 2002. In any event, there is no judicially cognizable harm that results from the protection of privileged material. It is a *damnum absque iniuria*. If this were not the case, such purported harm would swallow up every privilege.

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[2] *See* Reply of Presiding Officers to Plaintiffs' Memorandum Opposing Motion to Quash Subpoena or For Protective Order at 5.

Plaintiffs' desire to obtain legislative communications has much to do with the rivalry of partisan factions, for certain of which they are the stalking horses. It has nothing to do with the remaining claim in this case of slight mathematical deviations in population among congressional districts. Although Plaintiffs may believe that they have plenty of partisan, extra-judicial uses for internal communications, Plaintiffs lack a courtroom use for this information that would be anything other than irrelevant and impertinent. Lacking a proper, judicial use for the information they seek, Plaintiffs are merely trying to excite in the Court a "prurient interest" in what goes on inside the legislative process. The Court should not indulge it.

D. The Public Interest Favors A Stay

The Supreme Court reaffirmed in *Bogan* that "[t]he principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." 523 U.S. at 48. In *Bogan*, the Court stressed that "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference ... ." *Id.* at 52.

In the context of a stay request, the D.C. Circuit has explained that "the public interest in an official's 'unflinching discharge of [the official's] duties' normally will support a stay." *McSurely*, 697 F.2d at 317 (footnote omitted). The injury caused by the delay of trial pending a ruling on immunity is normally "subsidiary to the overarching interest in preserving the immunity defense." *Id.*[3]

There is a substantial public interest at stake in preserving the legislative privilege, the purpose of which is "to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*,

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[3] The stay in *McSurely* was ultimately denied as the case had been pending and no trial held for 11 years. On balance, the Court felt that the public interest was better served by avoiding further delay. *See id.* Such is not the situation here.

408 U.S. 501, 515 (1972). The privilege operates "for the public good." *Tenney*, 341 U.S. at 377, by protecting legislators from the "distractions of private civil litigation" and intrusive discovery procedures. *See Brown & Williamson*, 62 F.3d at 415, 418; s*ee also United States v. Rural Electric Convenience Cooperative Co.*, 922 F.2d 429, 440 (7th Cir. 1991) (in context of an injunction sought against a state court declaratory judgment, district court correctly noted that the government's interest is presumed to be the public's interest).

CONCLUSION

For the reasons set forth above, the House Republican Caucus respectfully requests that the Court grant their request for a stay pending appeal.

Respectfully submitted,

February 26, 2002

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CERTIFICATE OF SERVICE

I certify that on February 25, 2002, I caused a copy of the foregoing Memorandum of Law in Support of Motion for Stay Pending Appeal to be served on the following in the manner indicated:

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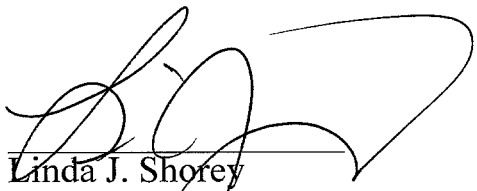

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