Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts

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UNMASKING THE MOTIVES OF GOVERNMENT DECISIONMAKERS: A SUBPOENA FOR YOUR THOUGHTS?

LOUIS S. RAVESON†

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Since the early 1970s, the Supreme Court has held in a variety of contexts that the motive of the legislature in passing a law is critical in determining the law's constitutionality. The speech or debate clause of the Constitution, however, prevents the use of evidence of legislative acts when such use would intimidate legislators in performing their legislative function. Thus, if this privilege were applied as an absolute privilege in this context, it potentially could disable a court's inquiry into legislative intent and could prohibit the questioning of decisionmakers, themselves, about their motives. Professor Raveson argues that the speech or debate clause privilege is intended to guarantee the separation of powers, and that the Supreme Court already considered these separation of pow-

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ers concerns in determining that judicial inquiry into legislative motive was necessary in certain cases. Nevertheless, although the privilege should not be absolute, the need for legislative independence cannot be ignored entirely; in determining whether to admit evidence subject to the privilege, courts must balance the interest in legislative autonomy against the need for and probative value of such evidence on a case-by-case basis. Professor Raveson discusses the factors courts must weigh in making this determination, including the type of evidence involved, the particular legal definition of unconstitutional purpose used, whether the evidence is of institutional or individual intent, and the availability of other evidence. By weighing these and other factors, courts can accommodate their obligation to examine legislative intent with a healthy degree of legislative freedom.

In determining the constitutionality of official acts, the judicial significance of the motives of government decisionmakers has had a tortured history. The Supreme Court has held that legislative motivation is irrelevant, while contemporaneously striking down laws because their purpose was impermissible. As recently as 1971 the Court, in Palmer v. Thompson, held that evidence of decisionmakers' motives should not be considered in adjudicating the constitutionality of a governmental action. This refusal to consider motivation was based largely on the Court's perception that proving government officials' intent would be extremely difficult and that invalidating a law which would be "valid as soon as the legislature . . . repassed it for different reasons," would be futile. In addition, commentators have identified another concern that the Court surely must have considered, based on its understanding of the separation of powers: judicial review of motivation involves a significant intrusion into the integrity and independence of decisionmaking institutions.

Since Palmer, however, the Court has embraced enthusiastically reviewing the purpose for which an official act was taken as a critical factor in determining the action's constitutionality. In a variety of contexts the Court has held that if

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1. The terms "motive," "purpose," and "intent" are used interchangeably in this Article to mean the results decisionmakers "desire to achieve by the operation of their decision." See infra note 421.
8. At least one commentator has voiced a fear that the Court might too readily accept illicit motivation as the critical factor for determining the unconstitutionality of a governmental action. See J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145 (1980) ("It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of
constitutionally impermissible motives influenced a decision, that decision itself is unconstitutional.9 In these areas of constitutional adjudication, decisionmaker motive has become the touchstone of unconstitutionality. Accordingly, the focus of both courts and commentators has shifted from whether purpose is relevant to how it can be proved.10

As predicted earlier by the Court, determining whether unconstitutional motivation is present has proved difficult. Proving the intent of an individual itself is often an arduous task, and ascertaining the motives that may have affected the decision of a collective body can be even more demanding. A number of methodologies for proving impermissible motives have been suggested by the Court11 and commentators.12 Not surprisingly, most of these proposals have considered whether decisionmakers can be questioned about their reasons for having taken an official action. Testimony and discovery from decisionmakers is an obvious and potentially rich source of evidence of decisionmaker purpose; few, if any, means of proving intent are better than examining those whose intent is at issue. Such evidence has been considered by numerous courts and in many cases has contributed to findings of unconstitutional motivation.13 This Article examines whether and to what extent government decisionmakers should be privileged to refuse to submit to discovery to testify about their motives for an official action. Decisionmakers undoubtedly should be protected from free and hostile cross-examination on their processes of deliberation14 and should be shielded from unnecessarily intimidating external influences that threaten the independence and integrity of the officials’ judgment.

A number of privileges afford government officials such protection. Although the various privileges that may be invoked by federal and state legislators and administrators differ considerably in scope, all are designed to protect the functional independence of decisionmaking processes and guard them against improper influence. The most potent of these privileges is the speech or
debate clause of the United States Constitution,\textsuperscript{15} which provides absolute immunity from suit challenging the legislative conduct of members of Congress, as well as providing an evidentiary privilege that may prevent obtaining proof of the deliberative processes of Congress. Analogous privileges protect the independence of noncongressional decisionmakers. These privileges pose a dilemma because if successfully invoked, they may effectively prevent proper judicial inquiry into decisionmakers' motives—the precise inquiry that the Supreme Court has required in reviewing certain categories of governmental actions.

An examination of the proper role of the speech or debate clause within a tri-partite system of separation of powers reveals that even it should not provide absolute protection from judicial inquiry into legislative motive. The historic function of the clause was to prevent legislators from being intimidated, so that their independence as a body would not be threatened. As such, the clause was but one aspect of a larger separation of powers design. Insulating legislative processes from review, however, is at odds with another aspect of the design—the judiciary's obligation to review the constitutionality of legislation.\textsuperscript{16} When the separation of powers requires review of legislative deliberations, the speech or debate clause should not operate independently to prevent the courts from inquiring into motive or obtaining the evidence needed for an effective review. Rather, the use of such evidence, including the compelled testimony of legislators, should overcome the privilege when failure to do so would defeat the courts' obligation to judge the constitutionality of the challenged legislation. By establishing the inquiry into motive as permissible and even crucial, the Court implicitly has determined that the intrusion resulting from this inquiry is subordinate to the courts' constitutional mandate to determine the constitutionality of statutes.

Nevertheless, the legitimate institutional concerns that gave rise to the clause remain. Although the courts must not be prevented from fulfilling their role, neither must the legislature be stripped unnecessarily of the protection that maintains the legislature's functional independence. Therefore, in this context, the speech or debate clause should provide only a qualified privilege: members of Congress should not be compelled to testify or submit to discovery unless doing so is demonstrably critical for the court to discharge its obligation. Federal administrators and state legislative and administrative officials have no greater protection than this qualified privilege; there is reason to conclude that the scope of the privilege protecting them is somewhat narrower.

Whether a privilege should bar decisionmaker testimony or discovery is best determined by balancing the competing interests on a case-by-case basis. The courts should balance the harm to the government from not recognizing the privilege against the necessity for the evidence in the particular case. Whether the evidence is necessary will depend on both the availability of alternate sources

\textsuperscript{15} U.S. Const. art. I, \S 6 provides: "[F]or any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other Place."

\textsuperscript{16} This conflict is evidenced by the Court's vacillation regarding the constitutional significance of decisionmaker motive. See supra notes 3-4 and accompanying text.
of evidence to prove the specific facts at issue and whether the probative value of the evidence is sufficiently great to outweigh the interests underlying the qualified privilege. A court should recognize the privilege unless the evidence is both unavailable through other sources and highly probative.

The relevance and probative value of various kinds of evidence will depend largely on the underlying theories that necessitate inquiry into unconstitutional motive. Although a vigorous debate continues on the shape and substance of those theories, the methodology that this Article proposes for determining whether the need for the evidence should overcome a particular claim of privilege will yield the correct results within the context of each theory. The need to protect from coercive influence the decisionmaking processes of government officials frequently will outweigh the benefits of compelling decisionmakers to testify. Officials should be required to testify about their reasons for making a decision, however, when such testimony is likely to affect adjudication of a case. This Article attempts to identify the various factors that the court should consider in making this assessment.

I. THE ROLE OF PURPOSE IN CONSTITUTIONAL LITIGATION

In determining the constitutionality of statutes and acts of public officials, the Supreme Court in recent years increasingly has considered the subjective purpose of decisionmakers. The Court has deemed inquiry into legislative and administrative purpose to be relevant or essential in cases arising under the due process, bill of attainder, free exercise, and establishment clauses, as well as more recently under the equal protection, freedom of speech, and commerce clauses and perhaps the fifteenth amendment. The Court has held that in some instances a finding of illicit purpose itself is sufficient to invalidate the challenged statute or administrative action.

This emphasis on decisionmaker purpose represents a significant reversal by the Court. The change has been particularly evident in the Court's interpretation of the equal protection clause when "facially neutral" classifications have

been challenged. As late as 1971, the Supreme Court in Palmer v. Thompson seemed to bar any judicial inquiry into legislative motive in such cases. Justice Black, writing for the Palmer majority, stated that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." Although conceding that "language in some of our cases" suggests "that the motive or purpose behind a law is relevant to its constitutionality," he asserted that "the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did."

The reasons articulated by the Palmer Court for refusing to permit inquiry into motive were the difficulty of ascertaining such motivation and the futility of invalidating a law that would be upheld as constitutional if simply reenacted for different reasons. The Court observed that it generally is "extremely difficult" to identify accurately a decisionmaker's motivation. The evidentiary problems associated with proving an individual's motives are numerous and sub-

26. "Facially neutral" classifications are those that do not explicitly separate or classify individuals on the basis of race, alienage, illegitimacy, or gender.
28. In Palmer the City Council of Jackson, Mississippi had voted to close the four city-owned swimming pools and surrendered the lease to a fifth, following a court order invalidating the enforced segregation of the public recreation facilities. The justification for closing the pools was that they could not be operated safely and economically on an integrated basis. Id. at 219. Complainants, black residents of the city, sued to compel the city to reopen and operate the pools on a desegregated basis. Id. The Court held that the closing of the pools, which affected all residents similarly, did not constitute a denial of equal protection of the laws under the fourteenth amendment, and did not create a "badge or incident" of slavery in violation of the thirteenth amendment. Id. at 226.
29. Id. at 224.
30. Id. at 225.
31. Id. Justice Black was distinguishing Griffin v. County School Bd., 337 U.S. 218 (1964), and Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). Both Griffin and Gomillion contain language suggesting that the Court considered the motive or purpose behind an enactment to be relevant to its constitutionality. Brest, supra note 14, at 98-100. The Court's apparent conclusion in Palmer that the equal protection clause was violated by a discriminatory effect rather than a discriminatory purpose was reinforced by its decision in what seemed to be an analogous case, Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs the Court held that a facially neutral employment classification that operated to disqualify a disproportionate number of blacks was unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 (1982), unless shown to be job related. Griggs, 401 U.S. at 431. The Griggs Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id.

33. Id. at 225.
34. Id. at 224-25; see also Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 359 (1949) (stating that determination of legislative motive is difficult task).
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ststantial. As commentators have observed, circumstantial evidence of an individual's motive often is reduced to an intuitive assessment,35 and the usefulness of direct evidence is limited seriously by the ease with which motive testimony can be fabricated36 and by the cost of obtaining such testimony from multimember decisionmaking bodies.37 Even if the actual purpose underlying the conduct of a decisionmaker could be judicially determined, there also is the problem of "mixed" or multiple motivation. A single decisionmaker may have had several purposes for acting as he did—some constitutionally offensive and others not.38 The courts then would have to determine how much illicit intent underlying an individual decisionmaker's conduct must be shown before his conduct is deemed unconstitutional: must the improper motive be the "sole" or "dominant" one;39 must the influence be one "but for" which the decisionmaker would not have acted as he did, even if that is less than an outright majority of the influences;40 or must the improper motive merely "taint" the challenged action?41

The difficulties of proving the purpose of a multimember decisionmaking body are even more substantial. As Chief Justice Warren stated in United States v. O'Brien,42 "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."43 The inferences drawn from the available evidence of the motives of many, if not most, of the members of such a body may be untrustworthy.44 Furthermore, the burden on complainants in such cases is not at all certain. Are they required to show that a majority of the members acted with an illicit motive, that a substantial number did so, or that those that did were the decisive factor, a "but for" cause of the outcome?45

It also is likely that if courts inquire into motive, decisionmakers may work harder to conceal their illicit objectives.46 Such inquiry thus could be self-defeating; once decisionmakers knew of the practice, they could make even more perilous the task of identifying their purposes.47 Reflecting this concern about

35. See Brest, supra note 14, at 120-21. But see Gomillion v. Lightfoot, 364 U.S. 339, 341 (1964) (finding that those responsible for drawing of Tuskegee's boundaries were "solely concerned with segregating white and colored voters" based entirely on inferences drawn from shape of boundaries themselves).
36. See Brest, supra note 14, at 123-24.
37. Id. Professor Brest also notes that the utility of direct testimony may be limited further by the legal doctrines that may immunize legislators and high executive officials.
38. See Ely, supra note 2, at 1213-14.
39. See Palmer, 403 U.S. at 224-25. Justice Black noted that it was particularly "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." Id.
40. See Brest, supra note 14, at 117-19. For a further discussion of the "but for" standard, see infra notes 451-86 and accompanying text.
41. See Brest, supra note 14, at 117.
42. 391 U.S. 367 (1968).
43. Id. at 384.
44. See infra notes 513-14, 550-51, 560-67 and accompanying text.
45. See infra notes 451-84 and accompanying text.
46. Brest, supra note 14, at 125.
47. See infra notes 626-29 and accompanying text.
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futility, Chief Justice Warren noted in *O'Brien* that it would be inappropriate to void a statute “which could be reenacted in its exact form if the same or another legislator made a ‘wiser’ speech about it.” Not only would such a reenactment or repetition expose the ineffectiveness of the initial judicial intervention, it also would undermine the dignity and power of the judiciary as the final arbiter of the constitutionality of statutes. A remedy that could be so readily circumvented would suggest that the Court’s role somehow had been compromised.

The courts considering this issue also have been sensitive to institutional or separation of powers concerns. Any inquiry into motive requires an extraordinary degree of intrusion into the decisionmaking process, which arguably indicates a lack of respect for the coordinate branches of government. Although invalidating statutes or administrative actions on their merits may suggest that decisionmakers made an error, invalidation on the basis of motive impugns the essential integrity of those decisionmakers and is tantamount to accusing them of violating their constitutional oath of office. A decisionmaker thus could view inquiry into his motives as an attack on his integrity and honesty; the intimidation accompanying such an inquiry would be magnified by the public nature of the scrutiny and its potential consequences. Given these potential threats to legislative and administrative independence, the Court for many years refused to permit inquiry into motive and characterized all evidence of illicit motive as irrelevant. In the 1973 case of *Keyes v. School District No. 1*, however, the Court revived judicial review of intent as a permissible inquiry in equal protection cases. *Keyes* was the Court’s first opportunity to consider school desegregation outside the South. Justice Brennan, writing for the majority, set forth criteria...
for a finding of de jure discrimination in the absence of a history of state-mandated segregation. Although it stopped short of requiring a showing of illicit purpose, the Court held such a showing sufficient to establish a prima facie case of unconstitutional discrimination.  

Three years later, the Court completed its apparent reversal on the issue in Washington v. Davis. In that case, several District of Columbia police officer candidates challenged the validity, under the equal protection clause, of a "qualifying test" that resulted in the exclusion of a disproportionately large number of black candidates. Justice White, writing for the majority, rejected the notion that this proof of a disparate impact established a prima facie constitutional violation. Stating that because "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," the Court held that it could not find such conduct unconstitutional "solely because [it has] a racially disproportionate impact." The Court instead placed on complainants in such cases the additional burden of demonstrating that the challenged conduct was undertaken with a "racially discriminatory purpose."

One year later, in Village of Arlington Heights v. Metropolitan Housing Development Corp., the Court further amplified Davis' discriminatory-purpose requirement. Complainants in Arlington Heights challenged restrictive zoning practices that allegedly had prevented the construction of low and moderate income housing in the village. Reaffirming Davis, the Court stated without

Colorado school district. \textit{Id.} at 191. Although the evidence of intentional segregation was limited largely to only one portion of the city-wide school district, plaintiffs sought a desegregation remedy that would encompass the entire district. \textit{Id.} at 191-95.

58. \textit{Id.} at 201-03, 206-10.
59. \textit{Id.}
60. 426 U.S. 229 (1976).
61. \textit{Id.} at 234-35. The candidates were required "to receive a grade of at least 40 out of a possible 80 on 'Test 21,'" an examination used throughout the federal service, as a precondition to acceptance into the police department's training program. \textit{Id.}
63. Although Justices Brennan and Marshall dissented on statutory grounds, \textit{Washington}, 426 U.S. at 257 (Brennan, J., dissenting), the newly established requirement of proof of discriminatory purpose apparently had the unanimous support of the Court.
64. \textit{Id.} at 239. \textit{Washington} itself involved the equal protection component of the fifth amendment. \textit{Id.}
65. \textit{Id.} Justice White observed that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." \textit{Id.} at 242.
66. \textit{Id.} at 239-42. The Court's later cases have made clear that proof of purposeful racial discrimination invokes the Court's "strictest scrutiny," but does not result in automatic invalidation of the challenged action. Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982); \textit{Washington}, 436 U.S. at 247-48.
68. \textit{Id.} at 255-58. Plaintiffs sought to have a 15-acre parcel of land rezoned from a single-family to multiple-family classification to permit the building of 190 clustered townhouse units for low and moderate income tenants. The village denied this request. \textit{Id.} at 254. Plaintiffs then sued in federal court contending that the denial was racially discriminatory. \textit{Id.} Following a bench trial, the United States District Court for the Northern District of Illinois entered judgment for the village. \textit{See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights}, 373 F. Supp. 208 (N.D.\textit{Id.}}
elaboration that racially discriminatory intent or purpose must be proved to establish a prima facie violation of the equal protection clause. Evaluating the evidence adduced at trial, the Court conceded that the impact of the village’s actions “arguably” bore more heavily on the affected racial minorities. Nonetheless, the Court found that plaintiffs had not met their “burden of proving that discriminatory purpose was a motivating factor,” a conclusion that “ends the constitutional inquiry.”

The Court subsequently extended the intent requirement to other equal protection clause cases: those involving facially neutral classifications that result in a disparate impact on gender and those involving at-large municipal election systems that allegedly dilute the votes of racial minorities. The Court also considered evidence of legislative purpose relevant in a commerce clause challenge to a state highway regulation. Most recently, in Board of Education v. Pico, a plurality of the Court found motive decisive and established a test for detecting improper motive in a case brought under the free speech clause of the first amendment.

Permitting judicial inquiry into purpose in these varied contexts represents a change in the Court’s position. As if in response to its previously expressed doubts on how to ascertain motive reliably, the Court’s more recent opinions permitting the inquiry contain substantial discussion on methods of proof. The Court also apparently dismissed its concerns that its actions ultimately would be futile if the statute later were reenacted. The Court’s determination to permit the inquiry implicitly was predicated on an understanding that it is not the words of a statute that are constitutionally repugnant, but rather the decisionmaker’s consideration of improper objectives. Accordingly, a deci-


70. Id. at 269.
71. Id. at 270-71.
74. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670-71 (1981). Justice Brennan noted that both his opinion and the majority’s opinion “have found the actual motivation of the Iowa lawmakers . . . highly relevant to, if not dispositive of, the case.” Id. at 683 n.3 (Brennan, J., concurring).
75. 457 U.S. 853 (1982).
76. In Pico five students challenged the decision of a local school board to remove certain books from junior high and high school libraries. Id. at 856-58. Writing for the plurality, Justice Brennan determined that whether the removal of the books violated the first amendment “depends upon the motivation behind” those actions. Id. at 891. The plurality established a two-part inquiry: First, did the school board intend to deny students access to ideas with which the school board disagreed? Second, was that intent the “decisive factor” in the board’s decision? Id.
77. E.g., Rogers v. Lodge, 458 U.S. 613, 622-28 (1982); Pico, 457 U.S. at 870-75; Personnel Adm’r v. Feeney, 442 U.S. 256, 279 n.24 (1979); Arlington Heights, 429 U.S. at 266-68; Davis, 426 U.S. at 241-42.
78. See Brest, supra note 14, at 125.
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A decisionmaker arguably would remain free to reenact or readopt the challenged action if done with the proper intent.\(^7\)

Permitting judicial inquiry into motive also signals that the Court is reassessing the doctrine of separation of powers. On the one hand, the Court sought, by means of the intent requirement, to restrain the exercise of judicial power to intrude into governmental functions that otherwise are confined properly to the legislative and executive branches.\(^8\) Democratic theory accords substantial weight to the legislature’s policy decisions and the executive branch’s implementation of those decisions,\(^9\) both of which necessarily involve the weighing of competing interests and the allocation of scarce resources.\(^10\) By requiring proof of illicit purpose pursuant to its understanding of separation of powers, the Court allows the judiciary to nullify such legislative and administrative acts only when these processes have been tainted by impermissible considerations. Thus, in the equal protection context, the Court limited judicial intervention by requiring that the plaintiffs bear the burden of proving illicit purpose.

The Court also determined implicitly that its obligation to review the constitutionality of such legislative and administrative acts outweighed the intrusive effect of the inquiry. The Court did not opt, as it might have, for a case-by-case “balancing” of this potential intrusion, permitting inquiry into purpose only when the need for review of the underlying constitutional issue outweighed the intrusion. Instead, it concluded that its constitutional mandate was, in these circumstances, absolute. Because the Court determined that a decisionmaker’s very consideration of improper objectives is offensive to the Constitution, the intrusiveness of the inquiry into motive—no matter how great—could be of no consequence.\(^11\)

II. THE BASES FOR A DECISIONMAKER’S PRIVILEGE

A. The Speech or Debate Clause

A number of generally recognized legislative and administrative privileges\(^12\) arguably provide a basis for barring decisionmaker testimony or the introduction of legislative or administrative documents pertaining to the issue of uncon-

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79. Id. A decisionmaker whose action was invalidated because it was wrongly motivated, however, should not be allowed to conceal his illicit motives in readopting it. Id. at 126; see infra note 427.

80. See Note, supra note 10, at 1383; see also Rogers v. Lodge, 458 U.S. 613, 642-43 (1982) (Stevens, J., dissenting) (stating that intent requirement is often treated “as a restraint on the exercise of judicial power . . . that otherwise would be confined to the legislature”); Personnel Adm’r v. Feeney, 442 U.S. 256, 247 (1979) (stating that legislature must be motivated “because of” and not merely “in spite of” a law’s discriminatory purpose for court to void the law).


82. A. BICKEL, supra note 7, at 19.

83. See infra notes 254-69 and accompanying text.

84. It always is possible that a new privilege prohibiting testimony of and discovery from decisionmakers can be created statutorily by Congress or state legislatures or through the rulemaking authority of the courts.
stitutional motivation. Of these privileges, the most potent is the speech or debate clause. In addition to the speech or debate clause, there are two other possible constitutional sources of legislative privilege from compelled testimony or disclosure of documents: the publication clause and the immunity from arrest clause. U.S. CONST. art. I, § 6, provides: "[Congressmen] shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same ...." The language of the clause appears to confer a general privilege of confidentiality. Kaye, Congressional Papers, Judicial Subpoenas and the Constitution, 24 UCLA L. Rev. 523 (1977). As Professor Kaye correctly notes, a literal reading of the publication clause grants Congress only the power to refuse or prevent the publication of certain materials in the Congressional Record or other "Journal," but not of congressional proceedings. These debates reveal that the Framers intended to create only a narrow band of confidentiality to protect against the disclosure of military and diplomatic secrets. See infra notes 286-95 and accompanying text. It thus appears that the privilege issues in both Ehrlichman and Calley were decided incorrectly by the district courts since in neither case did the documents sought contain any secret material. See supra, at 536-46.

The other potential source of legislative privilege is the immunity from arrest clause. U.S. Const. art. I, § 6 provides: "[Congressmen] shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same ...." The language of the clause appears to protect members of Congress only from imprisonment while traveling to or from a legislative session; the clause neither refers to protection against other types of interference, nor extends to periods when the legislature is not in session. The language and history of the clause fully support the Court's interpretation that it does not protect legislators from compliance with either subpoenas duces tecum or subpoenas ad testificandum. See supra, at 536-46.

The English antecedent of this clause at one time was extremely broad in scope, exempting members of Parliament from the obligation of ever appearing in court as either defendant or witness. See infra notes 111-22 and accompanying text. The Supreme Court consistently has interpreted the clause more narrowly than its English equivalent. The Court first confronted a claim of privilege based on this clause in Williamson v. United States, 207 U.S. 425 (1908). Following his conviction for conspiracy to suborn perjury, Representative Williamson argued that the clause protected him from imprisonment during his term of office. The Court rejected this argument, concluding that the clause does not provide immunity from criminal process or sanctions. Id. at 445-46. Tracing the origins and development of the English parliamentary privilege, the Court found that the identical language of its qualifying phrase, "treason, felony, and breach of the peace," exempted all criminal prosecutions from the coverage of the clause. The Framers' use of the same phrase, without discus-
debate clause of the United States Constitution. The speech or debate clause provides legislators with substantive immunity, which has been invoked as a shield against criminal prosecution and grand jury investigation initiated by the executive branch and damage and injunctive actions brought by private citizens. The Supreme Court also has barred the use of evidence of legislative acts and motives when judicial inquiry into those acts or motives otherwise would be barred by the clause's grant of substantive immunity. This evidentiary aspect of the privilege is important because it potentially provides lawmakers with the right to refuse to testify, submit to discovery, or produce documentary evidence. In this wide variety of contexts, the Supreme Court consistently has concluded that if the speech or debate clause privilege is applicable, its protection is absolute.

The clause was created and developed as an aspect of the doctrine of separation of powers to prohibit, for the benefit of the people, interference with their elected representatives. By insulating legislators from intimidation, the clause protects the integrity of the legislative process. Separation of powers principles,

sion, suggested a similar intention to limit the operative scope of the clause in this country. Id. at 438.

Subsequently, in Long v. Ansell, 293 U.S. 76 (1934), the Court considered the applicability of the immunity from arrest clause in civil actions. In that case Senator Long moved to quash a summons in a libel suit on the grounds that the clause protected him from civil process. The Court, again turning to the English analogue for guidance, found that the privilege in England at the time the United States Constitution was drafted provided no immunity from civil process as long as members of Parliament were not detained physically. Id. at 82-83. They were protected only against arrest as a means of commencing a civil action, not the simple service of a summons. Id. The Court determined that the American privilege must be construed similarly. Id.

Finally, in Gravel v. United States, 408 U.S. 606 (1972), the scope of the clause was narrowed further. Senator Gravel sought to dismiss a grand jury subpoena that required his aide to testify in an investigation of the senator's actions. The Court concluded that the clause did not provide immunity from the service of such a subpoena, stating that the clause's protection was limited to arrest in the civil context. Id. at 614-15. A subpoena requiring testimony by a legislator as a witness in a criminal proceeding was not within the scope of the privilege. Id.

These decisions do not determine whether the clause provides a legislator with immunity from being called as a witness in a civil action. Because the Court consistently has viewed the privilege as limited to protecting legislators from arrest at the initiation of a civil action, however, it appears that the Court would, if faced with the question, find that the clause does not protect a legislator called as a witness. Cf. Dennis v. Sparks, 449 U.S. 24, 31 (1980) (Despite concerns that a judge's time would be consumed unduly by being called to testify, members of the judiciary enjoy no immunity from appearing as witnesses in civil matters.). Testimony from legislators need not be barred completely to ensure that their constituents are not deprived of representation. All court appearances simply could be scheduled so as to minimize any intrusion on legislative functioning.

86. See supra note 15 for the full text of the speech or debate clause.

87. The majority of state constitutions provide similar protection for state legislators. See infra note 241.


89. See, e.g., Gravel v. United States, 408 U.S. 606 (1972).


however, also require the judiciary to protect the people from the excesses of legislative power. The Court has attempted to reconcile these competing constitutional commands by interpreting the clause to distinguish between "legislative acts,"\(^9^4\) which are absolutely protected from the scrutiny of the coordinate branches, and nonlegislative or "political acts,"\(^9^5\) which are not. Although the Supreme Court uses these terms in its analysis, the speech or debate clause cases may be explained most clearly by focusing on the extent to which separation of powers principles require insulation of the legislature from judicial scrutiny that otherwise might subvert legislative processes. The Court therefore readily has extended the clause to protect legislators in situations in which inquiry regarding legislative acts might intimidate members of Congress in the performance of legislative functions.

Nevertheless, separation of powers principles at times may require such in-

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\(^9^4\) The Court over time has narrowed the definition of "legislative acts," as shown by the following chronological progression of cases: Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (legislative acts are those "things generally done in a session of the House by one of its members in relation to the business before it"); Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (legislators protected "for what they do or say in legislative proceedings"); United States v. Johnson, 383 U.S. 169, 183 (1966) (parameters of what constitutes legislative activity generally have been narrowed by the Supreme Court over time and include preparation and delivery of speeches); Gravel v. United States, 408 U.S. 606, 625 (1972) (act other than speech or debate protected only when it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House").

Although the Supreme Court’s analytic framework generally has been endorsed, its definition of "legislative act" has been subject to a great deal of criticism. See, e.g., Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113 (1973). According to Reinstein and Silverglate, the Supreme Court’s adherence to a literal and static interpretation of the speech or debate clause leads the Court to define the term "legislative activity" far too narrowly. Id. at 1145, 1147, 1149. Analyzing the speech or debate clause from a functional-historical perspective, the authors assert that the privilege should be expanded to protect legislators in their performance of all proper legislative functions. Id. at 1148. They suggest that the privilege "arose dynamically to preserve the functional independence of the legislature"; therefore, the clause today must be shaped by the contemporary functions of a legislature in a representative democracy. Id. at 1149; see also *Hearings on Constitutional Immunity of Members of Congress Before the Joint Comm. on Congressional Operations*, 93d Cong., 1st Sess. 3 (1973) (opening statement of Sen. L. Metcalf) (Gravel definition of legislative activities is a "far-reaching institutional challenge"); id. at 5 (prepared statement of Rep. J. Cleveland) (Gravel and Brewster v. United States, 408 U.S. 501 (1972), represent "major assault" by Court); id. at 54 (testimony of former Justice Goldberg) (Gravel and Brewster mark "unprecedented and undue narrowing" of scope of legislative powers); id. at 75 (testimony of Sen. J. Fulbright) (Gravel and Brewster impair legislators’ ability to act with candor and independence); Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 Suffolk U.L. Rev. 1019, 1021-22 (1974) (Doe v. McMillan, 412 U.S. 306 (1973), Gravel, and Brewster administered "potentially fatal blow" to Congress as coequal branch); Cleveland, *Legislative Immunity and the Role of the Representative*, 14 N.H.B.J. 139, 139-40 (1973) (Gravel and Brewster sharply limit scope of congressional immunity); Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 Va. L. Rev. 175, 175 (1973) (Gravel and Brewster so restrict immunity that legislators cannot acquire information and report it to constituents without risk of criminal prosecution). But see Comment, *The Constitutional Limits of the Speech or Debate Clause*, 25 UCLA L. Rev. 796, 803 (1978) (Eastland v. United States Service-men’s Fund, 421 U.S. 491 (1975), and Doe suggest “movement toward broad deference to congressional discretion”).

inquiry rather than prohibit it. Judicial review of enacted legislation reflects different separation of powers concerns than when, for example, the courts are asked to enjoin ongoing legislative activity. Since *Marbury v. Madison*, the Supreme Court often has reaffirmed its central and unique obligation to do the former, yet also has foreclosed any possibility of doing the latter. When the judiciary is fulfilling its constitutional commitment to review enacted legislation, it necessarily must override the legislature's interest in freedom from encroachment.

The Supreme Court has confirmed this constitutional allocation of balanced powers in the context of motivation analysis. Although the Court otherwise has interpreted the speech or debate clause to place the motives or purposes underlying legislative acts beyond judicial inquiry, the Court has required precisely that inquiry in motive cases. When a court undertakes to review the constitutionality of legislative actions the clause should not act as an independent shield to forestall judicial inquiry. When this inquiry is undertaken, the clause also should not bar the use of legislators' testimony and documentary evidence of legislative acts and motives to the extent that such evidence is necessary for the court's review. Such a qualified evidentiary privilege sufficiently protects the legislative process from improper interference by the judiciary in motive cases, while allowing for meaningful judicial review of legislative action.

1. The Historical Development of the Clause

As several commentators have observed, the various historical perspectives on the origins and evolution of the speech or debate clause suggest differing contemporary constructions of the scope of the privilege. Although the clause's historical development and definition are somewhat controversial, this Article adopts the premise that the privilege arose and evolved to preserve

96. 5 U.S. (1 Cranch) 137 (1803).
97. See, e.g., Davis v. Passman, 442 U.S. 228 (1979); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Raines, 362 U.S. 17 (1960). The judiciary's special role as the interpreter of the Constitution is not limited to challenged acts of Congress. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (judicial review of President Truman's steel seizure); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) (judicial review of state enactment); see infra notes 255-60.
100. See supra notes 60-76 and accompanying text; infra notes 250-60 and accompanying text.
101. See infra notes 250-60 and accompanying text.
102. The proposal in this Article for qualified legislative and administrative privileges and a methodology for determining their applicability in a particular case is limited to constitutional litigation in which the purpose of the decisionmaking body is a determinative factor. The appropriateness of this proposal in other contexts, such as statutory construction, is beyond the scope of this Article. The principles articulated in this Article, however, should be applicable generally to statutory construction cases and other types of litigation in which the courts have required inquiry into the acts and goals of governmental decisionmakers. Even if the methodology for balancing the competing interests at stake is the same, however, the results may differ dramatically.
legislative independence in a system of separation of powers.\footnote{105} This view accordingly suggests that the contours of the privilege depend on the nature and functions of the legislative branch vis-à-vis those of the other branches of government.

The speech or debate clause originated in the prolonged struggles between the British Parliament and the Crown.\footnote{106} In its earliest form, the privilege grew out of the predominantly judicial function of the contemporary Parliament. As the supreme judicial council, the Parliament claimed for itself a privilege protecting the speeches and debates of its members from interference by private persons through the lower courts.\footnote{107} Parliament also claimed several other privileges that flowed from its judicial function, including freedom from civil arrest and the right to impose sanctions for contempt.\footnote{108} The narrow scope of the judicially based free speech privilege, however, provided no shield against coercive prosecutions or investigations by the Crown.\footnote{109} It was not until 1542, a century and a half after this first free speech privilege originated, that Parliament asserted a more comprehensive freedom of speech or debate.\footnote{110}

Expansion of the scope of the privilege was triggered by the growth and change in Parliament’s functions. By the late fifteenth and early sixteenth centuries, the House of Commons had enlarged its legislative role by exerting authority over bills submitted by the Crown.\footnote{111} As Parliament’s powers changed, so too did the scope of its claimed privilege. Experience with the legislative process caused the House to expand the judicially based free speech privilege into “a guarantor enforcing a nascent system of separation of powers.”\footnote{112} The newly shaped privilege was incorporated into the Speaker’s Petition in 1542,\footnote{113} and

\footnote{105} The author’s analysis relies heavily on the seminal work by Reinstein & Silverglate, supra note 94, which in turn built on the ground-breaking research by J.E. Neale. See supra note 104.

\footnote{106} United States v. Johnson, 383 U.S. 169, 178 (1966). As stated by Justice Harlan: “Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.” Id. (citing C. Wittke, supra note 104; Neale, supra note 104).

\footnote{107} See Reinstein & Silverglate, supra note 94, at 1122. See generally C. McILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: A HISTORICAL ESSAY OF THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND 229-46 (1910) (House of Commons asserted that its privilege should not be reviewed by lower courts); Neale, supra note 104, at 147-76 (freedom of speech attained when House of Commons became sole judge of conduct of its members except in extreme circumstances). The House of Lords was created as a judicial body and remains the highest appellate court in England. The House of Commons had jurisdiction over the quasi-judicial function of acting on private petitions. See C. McILWAIN, supra, at 202-05; Neale, supra note 104, at 151-52; Reinstein & Silverglate, supra note 94, at 1123 n.50.

\footnote{108} Reinstein & Silverglate, supra note 94, at 1122.

\footnote{109} Id. at 1122-23. This judicially based privilege in essence was a corollary of sovereign immunity; the members of the highest court were the personal delegates of the King and were answerable only to him for their conduct. Id.

\footnote{110} Id. at 1123; see also Neale, supra note 104, at 157 (historical evidence shows that at least until 1539 no member of Parliament made petition for free speech as a right).

\footnote{111} Neale, supra note 104, at 163-64; Reinstein & Silverglate, supra note 94, at 1123-24.

\footnote{112} Reinstein & Silverglate, supra note 94, at 1124; see also Neale, supra note 104, at 163-64 (parliamentary free speech arose from “need for unrestrained criticism of government measures”).

\footnote{113} Neale, supra note 104, at 157; Reinstein & Silverglate, supra note 94, at 1123-24. The Speaker’s Petition “defined, albeit vaguely, the relations of Parliament and the Crown.” Id. at 1123 (citing Neale, supra note 104, at 157).
first was invoked by a harrassed member in 1575.114

The Crown, however, steadfastly refused to accept this attempted broadening of the scope of the privilege; consequently, members of Parliament remained largely unprotected from prosecution before the King's Bench on charges of "licentious" or "seditious" acts stemming from their legislative speech or debate.115 The power struggle continued throughout the next century, with the House of Commons claiming for itself an ever greater role in government affairs,116 and the Tudor and Stuart monarchs asserting an inherent sovereign right to impose criminal sanctions for legislative activities.117 This dispute was brought dramatically to a head by events leading up to the Revolution of 1689 and the exile of James II.118 The English Bill of Rights, which was enacted as a result, included the declaration "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."119 The Bill of Rights also abolished the Crown's power to suspend or nullify statutes passed by Parliament.120 These two provi-

114. Reinstein & Silverglate, supra note 94, at 1124; see also Cella, The Doctrines of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present, and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk U.L. Rev. 1 (1968) (A speaker stated that the Crown's censure of speech is a violation of the rights of the House of Commons.)

The member invoking the privilege was Peter Wentworth. In a speech in which he elaborated on the rationale for the newly broadened privilege, he noted that free speech would not be secure as long as the House heeded the Crown's commands not to discuss matters involving the Crown's prerogatives. Reinstein & Silverglate, supra note 94, at 1124 n.54 (citing S. D'Ewes, Journal of All the Parliaments During the Reign of Queen Elizabeth 236-37 (1682)). He then called for an absolute and exclusive right of the House to control its debates:

[It] is a dangerous thing in a Prince to oppose or bend herself against her Nobility and People . . . . And how could any Prince more unkindly intreat, abuse, oppose herself against her Nobility and People, than her Majesty did the last Parliament? . . . [I]t is not all one thing to say, Sirs, you shall deal in such matters only, as to say, you shall not deal in such matters? And so as good to have Fools and Flatterers in the House, as men of Wisdom . . . . It is a great and special part of our duty and office, Mr. Speaker, to maintain the freedom of Consultation and Speech, for by this, good Laws . . . . are made . . . . for we are incorporated into this place, to serve God and all England, and not to be Time-Servers . . . . or as Flatterers that would fain beguile all the World . . . . [but] let us show ourselves a People endured with Faith . . . . that bringeth forth good Works . . . . Therefore I would have none spared or forb orn that shall from henceforth offend herein, of what calling so ever he be, for the higher place he hath the more harm he may do . . .

Id. (citing S. D'Ewes, Journal of All the Parliaments During the Reign of Queen Elizabeth 238-40). Immediately after his speech Wentworth was placed under arrest, interrogated, and imprisoned for one month. Id. (citing S. D'Ewes, Journal of All the Parliaments During the Reign of Queen Elizabeth 241-46); see also Cella, supra, at 8-9 (Wentworth was arrested after the speech and imprisoned for over a month after stating that he would refuse to discuss his speech if the committee hearing was conducted on behalf of the Crown because the Crown lacked authority.).

115. Reinstein & Silverglate, supra note 94, at 1126.

116. Id. During this period the House of Commons began to involve itself in matters once considered to be within the exclusive domain of the Crown, including foreign policy and the succession. Id. The House "began to conceive of itself seriously as Grand Inquest of the Nation, demanding 'a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion.'" Id. (quoting W. Anson, The Law and Custom of the Constitution 35 (5th ed. 1922)).

117. Id.

118. For a detailed analysis of these events, see id. at 1129-35.

119. 1 W. & M. Sess. 2, c.2 (1689).

120. Id. The first article of the Bill of Rights stated "[t]hat the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." Id.
sions together “preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers.” \footnote{121} The struggles between Crown and Commons were resolved, and the basis for the eventual supremacy of Parliament was firmly established. \footnote{122}

The legislative privilege developed in the colonies out of a parallel concern for the functional independence of the legislature. \footnote{123} The language of the speech or debate clause ultimately adopted by the Constitutional Convention was nearly identical to that of the English Bill of Rights. \footnote{124} The American version, however, having been tailored to the uniquely American political context, was somewhat narrower in scope. In contrast to the preeminent English Parliament, Congress was to be but one of three coequal branches of government; \footnote{125} the early American experience cautioned against a system of unchecked legislative power. \footnote{126} The unrestrained power of any of the branches of government, including the legislature, was perceived as a danger to liberty.

The clause elicited little discussion at the Constitutional Convention, presumably because the principal of legislative independence was established firmly in the minds of the Framers. \footnote{127} A similar provision had been included in the

\footnote{121. Reinstein \& Silverglate, \textit{supra} note 94, at 1135.}

\footnote{122. See C. Wittke, \textit{supra} note 104, at 12-14; see also United States v. Johnson, 383 U.S. 169, 178 (1966) (referring to free speech and debate clause as “the culmination of a long struggle for parliamentary supremacy”).}

\footnote{123. Reinstein \& Silverglate, \textit{supra} note 94, at 1144.}

\footnote{124. See \textit{supra} text accompanying note 119. Cf. \textit{supra} note 15 (text of American speech or debate clause).}


\begin{quote}
Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.
\end{quote}

\footnote{126. As Thomas Jefferson wrote in \textit{Notes on the State of Virginia}, quoted in \textit{The Federalist} No. 48, at 341 (J. Madison) (Dunne ed. 1901):

\begin{quote}
All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating of these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one . . . .
\end{quote}

As Gordon Wood stated: “Tyranny was now seen as the abuse of power by any branch of the government, even, and for some especially, by the traditional representatives of the people.” G. \textit{Wood}, \textit{The Creation of the American Republic} 1776-1787, at 10, 608 (1969), \textit{quoted in} Levi, \textit{supra} note 125, at 375. The Framers' deletion of the phrase “or proceedings” from the version of the privilege ultimately adopted also has led at least one commentator to infer an intent to exclude from the privilege acts of official legislative corruption. Bradley, \textit{The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?}, 57 N.C.L. REV. 197, 209-14 (1979).

\footnote{127. See Tenney v. Brandhove, 341 U.S. 367, 373 (1951); see also Reinstein \& Silverglate, \textit{supra} note 94, at 1136 (stating that the principle was so “firmly rooted” that little discussion took place at}
Articles of Confederation, and three state constitutions previously had adopted the privilege. The Framers' intentions were clear, however, from their modification or exclusion of certain other privileges being claimed at that time by members of Parliament. For example, the unlimited privilege from arrest and civil process was limited strictly in article I, section 6, and the general privilege of contempt power was withheld entirely from Congress. Furthermore, the Framers included within the Constitution a provision that unmistakably nullified the House of Commons' controversial rule forbidding the publication of its proceedings by either members or the press, except by specific leave of the whole body. Thus, although the evolution of the speech or debate clause privilege reflects a concern for protecting the functional independence of the legislature, the American version was equally tempered by a concern that the separation of powers between coequal branches be maintained.

2. Judicial Interpretation

Although the historical justification for the speech or debate clause privilege was to insulate the legislature from executive intrusions, the Supreme Court has expanded the privilege to provide protection from judicial interfer-

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128. Article V of the Articles of Confederation provided: "Freedom of speech or debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ."


130. Reinstein & Silverglate, supra note 94, at 1136-37. Most of these privileges had grown out of Parliament's original judicial character, and thus, at the very least, were unnecessary to protect the independence of the legislative processes of Congress. Id.

131. Id.; see also T. Jefferson, Manual of Parliamentary Practice § 3 (1797-98) (article I limitations on privilege). The privilege from arrest and civil process had been extended before this time to include not only the members of Parliament and their servants, but their families and estates as well. See C. Wittke, supra note 104, at 41-43. In the period between the Revolution of 1689 and 1769, several statutes were passed eliminating these excesses. Reinstein & Silverglate, supra note 94, at 1137 & n.128.

132. Reinstein & Silverglate, supra note 94, at 1137. The contempt power had been used during this period to imprison offending newspaper reporters. Id.; see also W. Anson, The Law and Custom of the Constitution 161-64 (5th ed. 1922) (contempt power privilege).

133. Reinstein & Silverglate, supra note 94, at 1137; see supra note 85.

134. See supra notes 106-22 and accompanying text.
The Court has concluded that the clause provides absolute immunity "from executive and judicial oversight that realistically threatens to control . . . [legislative] conduct."\(^{137}\)

To function independently, the legislature, at a minimum, must be free from any pressures that threaten the "integrity of the legislative process."\(^{138}\) The Supreme Court has been extremely sensitive, in defining the scope of speech or debate immunity, to the kinds of coercive influences that might cause legislators to modify their official behavior. The Court has identified several species of coercive pressure that warrant the absolute prohibition of the clause: "intimidation by the executive,"\(^{139}\) "accountability before a possibly hostile judiciary,"\(^{140}\) and "the cost and inconvenience and distractions of a trial."\(^{141}\) Despite varied characterizations of the interests at stake, it appears that in every case in which the Court has held the speech or debate clause privilege applicable, the Court was responding to a perceived threat to the integrity of the legislative process, resulting from either the intimidation of individual legislators or interference with ongoing congressional activity.\(^{142}\)

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The Court's failure to distinguish between executive interference with legislative activity and private civil actions seeking redress for the violation of individual rights has been criticized severely. See Feinstein & Silverglate, supra note 94, at 1113.

137. Gravel v. United States, 408 U.S. 606, 618 (1972); see also United States v. Helstoski, 442 U.S. 477, 491-92 (1979) (purpose of clause is to prevent intrusion by Executive and Judiciary into legislative activities) (quoting Gravel); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975) (clause ensures that Congress may perform its constitutional functions independently); Doe v. McMillan, 412 U.S. 306, 311, 316 (1973) (clause prevents "intimidation of legislators by the Executive or 'a possibly hostile judiciary'"); United States v. Brewster, 408 U.S. 501, 507, 516 (1972) (clause protects "integrity of the legislative process by insuring the independence of individual legislators"); Powell v. McCormack, 395 U.S. 486, 503, 505 (1969) (clause "insures that legislators are free to represent the interest of their constituents" without risk of being taken to court); Dom- browski v. Eastland, 387 U.S. 82, 85 (1967) (legislators should not be subject to burden of defense); United States v. Johnson, 383 U.S. 169, 179-81 (1966) (clause ensures "independence of the legislature"); Tenney v. Brandhove, 341 U.S. 367, 372-75 (1951) (clause essential for legislators' exercise of free speech); McSurely v. McClellan, 353 F.2d 1277, 1284 (D.C. Cir. 1967) (clause intended to maintain "independence and integrity" of legislative branch), cert. dismissed, 438 U.S. 189 (1978); cf. Coffin v. Coffin, 4 Mass. 1, 27 (1808) (interpreting state constitution) ("These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal.").


140. Id.; see also Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975) (judicial power over legislators threatens legislative independence).

141. Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (analogizing common-law state legislative immunity to the speech or debate clause privilege). Because Tenney did not involve a claim of speech or debate clause privilege, its discussion of the clause is dictum.

142. See, e.g., United States v. Brewster, 408 U.S. 501, 507 (1972). The Court saw "independence of individual legislators" as the means by which to achieve the public good of protecting the "integrity of the legislative process." Id. The Court explicitly noted that this protection was not for "the personal or private benefit" of individual members. Id.
In *United States v. Johnson*\(^{143}\) the Court considered whether the speech or debate clause protected a member of Congress from criminal prosecution for making a speech on the floor of the House of Representatives, favorable to certain private banks, in exchange for a sum of money.\(^{144}\) Although the speech itself had not been admitted into evidence, the trial court had permitted extensive questioning concerning the authorship of the speech and the reason for including certain sentences.\(^{145}\) Reversing the conviction, the Supreme Court held that during the course of a prosecution, inquiry into the motives of legislators for such conduct violated the speech or debate clause.\(^{146}\) The Court noted that the privilege serves as "an important protection of the independence and integrity of the legislature," as well as serving "the additional function of reinforcing the separation of powers."\(^{147}\)

The *Johnson* Court was concerned primarily with protecting the legislature from executive-initiated prosecution\(^{148}\) and from the judiciary's power to determine and impose liability.\(^{149}\) The Court's sensitivity to separation of powers principles prompted its proscription of judicial inquiry into congressional motive in these circumstances. As if to underscore this point, the Court noted that such inquiry might be permissible in a prosecution under a narrowly drawn statute enacted by Congress to regulate the conduct of its own members.\(^{150}\)

Since *Johnson* the Supreme Court consistently has concluded that the speech or debate clause provides members of Congress with absolute immunity

\(^{143}\) 383 U.S. 169 (1966). *Johnson* was the first criminal case involving the speech or debate clause that the Court considered.

\(^{144}\) *Id.* at 171. Johnson had been convicted of violating 18 U.S.C. § 371 (1964) (conspiracy to defraud the United States) and 18 U.S.C. § 281 (1964) (conflict of interest).

\(^{145}\) *Johnson*, 383 U.S. at 178.

\(^{146}\) *Id.* at 180. After reviewing the history of the privilege in England and the United States, the Court cited *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 110 (1810) in support of this proposition. *Fletcher* was the earliest case in which the Court stated that legislative motivation is irrelevant in a judicial determination of a statute's propriety. Thus, the Court's interpretation of the scope and nature of the clause was founded at least in part on its earlier resolution of the relevant separation of powers issues inherent in determining the relevance of legislative motivation. Accordingly, the Court's new position on the propriety of judicial inquiry into legislative motivation suggests the need for reexamination of the doctrinal basis for an absolute privilege.

The extension in *Johnson* of the speech or debate privilege from "anything generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), to the *motivations* for such activities has been criticized as "totally without historical justification." *Bradley*, supra note 126, at 220.

\(^{147}\) *Johnson*, 383 U.S. at 179. The Court added: "We see no escape from the conclusion that such an intensive judicial inquiry, made in the course of a prosecution by the Executive Branch under a general conspiracy statute, violates the express language of the Constitution and the policies which underlie it." *Id.* at 177.

\(^{148}\) The Court noted:

There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominant [sic] thrust of the Speech or Debate Clause.

*Id.* at 182.

\(^{149}\) The Supreme Court declared that the "central role" of the speech or debate clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Id.* at 181, quoted in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975); *Doe v McMillan*, 412 U.S. 306, 311 (1973); *Gravel v. United States*, 408 U.S. 606, 617 (1972).

\(^{150}\) *Johnson*, 383 U.S. at 185.
from prosecution for "legislative acts." 151 In those cases in which the Court has found the privilege applicable, it has reiterated its prohibition of inquiry into the motivation for legislative acts.152 When the Court has found the conduct to be "nonlegislative," prosecution for such conduct has been permitted, as well as the use of relevant evidence of motive. 153 Thus, the Court permits executive intimidation through prosecution when it will affect only the performance of "nonlegislative" acts.

The Supreme Court also has extended the clause to bar civil damage actions against legislators. 154 In Dombrowski v. Eastland 155 the Court articulated its

151. See, e.g., United States v. Brewster, 408 U.S. 501, 512 (1972) ("[T]he Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties . . . ."). In Gravel v. United States, 408 U.S. 606 (1972) the Court stated:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." United States v. Doe, 455 F.2d, at 760.

Id. at 625. The Court's definition of a "legislative act," however, has narrowed in the years since Johnson. See supra note 94.

152. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975):

Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it. . . . In Brewster we said that "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." 408 U.S., at 525 (emphasis added). And in Tenney v. Brandhove we said that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S., at 377.

Id. at 508.

153. Courts apparently have not considered whether prosecution for "nonlegislative" activity might significantly chill "legislative" activity. See Reinstein & Silverglate, supra note 94, at 1159-63; see also infra note 184 and accompanying text (The only way to ensure total legislative independence is to dispose of all judicial checks on congressional action and accord absolute immunity to congressional committees for legislative and nonlegislative acts.).

154. See, e.g., Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam); Kilbourn v. Thompson, 103 U.S. 168 (1881). In Kilbourn, the first speech or debate case, the Court held members of a congressional committee immune from a private damage action for an illegal arrest. Interestingly, the Court did not bar absolutely any inquiry into legislative motive, and even implied that certain motives—"an utter perversion of [legislative] powers to a criminal purpose"—might render a legislator liable even for a clearly legislative act. Id. at 204-05. That potential liability was refuted, however, by United States v. Johnson, 333 U.S. 169 (1966). See supra notes 148-50 and accompanying text.

155. 387 U.S. 82 (1967) (per curiam). In Dombrowski plaintiffs had claimed that the Chairman of the Internal Security Subcommittee of the Senate Judiciary Committee, Senator Eastland, and the Subcommittee's Chief Counsel, Sourwine, tortiously entered into and participated in a conspiracy with certain Louisiana officials to seize plaintiffs' property and records in violation of the fourth amendment. Id. at 83. Louisiana courts had held the searches and arrests illegal because the warrants secured by the police had not been supported by a showing of probable cause. Id. While the records were in the possession of the Louisiana officials, they were subjected to a subpoena issued in the name of the Subcommittee, and the records accordingly were transferred into its custody. Dombrowski v. Burbank, 358 F.2d 821, 822 (D.C. Cir. 1966), aff'd in part, rev'd in part sub nom. Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam). Plaintiffs, asserting that the subpoena was issued without authority, sought both damages and injunctive relief preventing use by the Subcommittee of the records and requiring their return to plaintiffs. Id. at 822-25. The Court affirmed the dismissal of the complaint against Senator Eastland, finding that "[t]he record does not contain
rationale for doing so:

It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution . . . , that legislators engaged ‘in the sphere of legitimate activity’ . . . should be protected not only from the consequences of litigation’s result but also from the burden of defending themselves.\textsuperscript{156}

This broadening of the clause to protect not only against liability, but also against the burdens of litigation, appeared to one commentator more like an “ad hoc response to separate attacks on the privilege than like elements of an over-acting, comprehensive theory of the Clause.”\textsuperscript{157} In fact, the Court consistently has protected the legislature from those influences that it perceived as sufficiently strong to subvert independent action.\textsuperscript{158} Although the potential threat to legislative independence is far more apparent in criminal prosecutions, the burdens of defending against civil litigation and possible damage awards are sufficiently burdensome to affect a legislator’s behavior.\textsuperscript{159}

In \textit{Eastland v. United States Servicemen’s Fund}\textsuperscript{160} the Court held that the clause absolutely protected against civil suits seeking purely injunctive relief. In \textit{Eastland}, members of the Senate Subcommittee on Internal Security issued a subpoena to a bank, directing it to produce all records pertaining to the account of the United States Servicemen’s Fund (USSF).\textsuperscript{161} Before the bank complied, the USSF sued members of the Subcommittee and its chief counsel, seeking to enjoin enforcement of the subpoena.\textsuperscript{162} Finding that defendants’ action fell within the “legitimate legislative sphere,”\textsuperscript{163} the Court concluded that the speech or debate clause privilege provided “complete immunity” for both the senators and the chief counsel.\textsuperscript{164} The Court also stated that it would not inquire into whether the subpoena was motivated by an illicit purpose or whether evidence of his involvement in any activity that could result in liability.” Dombrowski, 387 U.S. at 84. Citing Tenney and Kilbourn, however, the Court reversed the dismissal as to chief counsel Sourwine, noting that the privilege was “less absolute, although applicable, when applied to [legisla
tive] officers or employees.” \textit{Id.} at 85. Accordingly, postenforcement review of a congressional subpoena was permitted through an action against a legislative employee.

\textsuperscript{156.} Dombrowski, 387 U.S. at 84-85.
\textsuperscript{157.} Comment, \textit{The Scope of Immunity for Legislators and Their Employees}, 77 \textit{Yale L.J.} 366, 382 (1967). The comment notes the Court’s departure in \textit{Dombrowski} from the rationale offered only a year-and-a-half earlier in \textit{Johnson}, that the “predominant thrust” of the clause was to afford immunity from “instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum.” \textit{Johnson}, 383 U.S. at 182 (emphasis added). The author suggests that the sudden shift in rationale may be attributed to the fact that \textit{Dombrowski} was a civil suit rather than a criminal prosecution.
\textsuperscript{158.} See Dombrowski, 387 U.S. at 84-85.
\textsuperscript{159.} The potential threat to legislative independence from civil actions brought by individuals is so much less than in other contexts that some commentators have called for the abrogation of immunity in such cases, at least when suit is brought to redress an alleged violation of constitutional rights. See Reinstein & Silverglate, \textit{supra} note 94, at 1171-77.
\textsuperscript{160.} 421 U.S. 491 (1975).
\textsuperscript{161.} \textit{Id.} at 494.
\textsuperscript{162.} \textit{Id.} at 494-95. Apparently, the bank never was served with the subpoena. \textit{Id.} at 494. At least partially for that reason, the bank did not participate in the action. \textit{Id.} at 495 n.5.
\textsuperscript{163.} \textit{Id.} at 505-06. The Court determined that the investigation of the USSF was “related to and in furtherance of a legitimate task of Congress.” \textit{Id.} at 505.
\textsuperscript{164.} \textit{Id.} at 507.
its enforcement would infringe on plaintiffs’ first amendment rights.\(^{165}\)

_Eastland_ did not involve legislator liability for damages.\(^{166}\) The Court instead was concerned that judicial review of the subpoena might disrupt the legislative process. The Court suggested that the demands of litigation could divert the attention of the members from their legislative work.\(^{167}\) To the extent that the Court desires to protect legislators from time-consuming litigation, the Court could be expected to interpret the clause broadly to prohibit all such distractions. The Court, however, has not attempted to protect legislators absolutely from incursions into their time.\(^{168}\) Furthermore, the Court could not have been concerned that legislators would forego certain activities for fear of being sued and thereby distracted from their legislative work. Legislators never would be coerced into foregoing activities if the most that a suit could achieve was an injunction against that conduct because they could voluntarily stop their actions when suit was brought and avoid any distracting litigation.

More fundamentally, the Court sought to avoid interference with ongoing legislative activity that necessarily would result from preenforcement review\(^{169}\) of a congressional subpoena.\(^{170}\) This preenforcement review posed the more sig-

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165. _Id._ at 508-11. The Court, however, did not foreclose all possibility of judicial investigation of legislative motive, and did not hold that such review in and of itself violated the speech or debate clause. Rather, the Court’s solicitude towards legislators’ motives stemmed from its protection of legislative independence. To the extent legislators’ motives provide a potential basis for criminal or civil liability, or for judicial interference with ongoing legislative activity, they are privileged from inquiry. _Id._ at 510-11. In these contexts, there would be no other relevance to such a probe.

166. _Id._ at 496.

167. _Id._ at 511.

168. See _supra_ note 94 and accompanying text; _infra_ notes 177-81, 184, 298-302 and accompanying text.

169. _Eastland_, 421 U.S. at 509 n.16. The Supreme Court has justified its refusal to review the validity of congressional subpoenas prior to enforcement in part because of the possibility of doing so in contempt proceedings. See United States v. Ryan, 402 U.S. 530, 532-33 (1971); _Cobbledick v. United States_, 309 U.S. 323, 324-26 (1940). When review in such proceedings has been unavailable, the Court has recognized the need for some preenforcement review, at least to determine whether the investigation is pursuant to a legitimate legislative purpose. See _Eastland_, 421 U.S. at 501 n.14; United States v. Nixon, 418 U.S. 683, 691-92 (1974); _Perlman v. United States_, 247 U.S. 7, 12-13 (1918).

170. The _Eastland_ Court’s overriding concern with protecting ongoing legislative activity from judicial interference is evidenced further by a conflict between the majority and concurring opinions. Justice Marshall’s concurrence emphasizes that the speech or debate clause would not shield judicial review of the congressional subpoena in _Eastland_ if proper parties were being sued against whom appropriate relief could be granted, such as legislative functionaries acting at the direction of the subcommittee, or the party upon whom the subpoena was served. _Eastland_, 421 U.S. at 513-18 (Marshall, J., concurring). On the other hand, the majority opinion distinguished its prior cases that had permitted judicial review of legislative action through suits against legislative functionaries. _Id._ at 507-11. See _infra_ notes 177-81 and accompanying text. In _Kilbourn v. Thompson_, 103 U.S. 168 (1881), the Court had dismissed a damage action for wrongful false imprisonment against members of Congress but allowed it against the Sergeant at Arms who carried out the congressional directive to arrest plaintiff. _Id._ at 205. The _Eastland_ majority argued that review of the arrest in _Kilbourn_ was permissible only because the arrest was not “essential to legislating.” _Eastland_, 421 U.S. at 508 (quoting _Gravel v. United States_, 408 U.S. 606, 621 (1972)). The majority apparently considered the issuance of a routine subpoena to be “essential to legislating” and thus immune from judicial review, regardless of the identity of defendants. See _id._
significant separation of powers issue:

This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years during which the Members and their aide have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause was written to prevent the need to be confronted with such questioning . . . . \textsuperscript{171}

The \textit{Eastland} Court distinguished \textit{Watkins v. United States}\textsuperscript{172} and \textit{Barenblatt v. United States},\textsuperscript{173} both of which had involved criminal contempt prosecutions in which defendants had raised their first amendment rights to justify their refusals to answer congressional inquiries. In neither case had the separation of powers doctrine barred the judiciary's obligation to review congressional action.\textsuperscript{174} As the Court in \textit{Eastland} noted, however, these cases had not involved attempts to "impede" any ongoing legislative activity.\textsuperscript{175} Any interference with congressional action had occurred prior to judicial intervention and it had been Congress itself that had sought "the aid of the judiciary to enforce its will."\textsuperscript{176} Conversely, judicial interference with the pending operations of Congress represents a far greater intrusion on legislative independence. In circumstances in which the courts' commitment to review legislative action is not delineated manifestly, the speech or debate clause appropriately may restrain such judicial oversight.

These cases make clear that the speech or debate clause absolutely prohibits review of and inquiry into the propriety of legislative acts or the motives of members of Congress in civil damage and injunctive actions against them. Often, such suits against members of Congress have been the only means available for testing the validity of legislative actions, and in those instances the Court has concluded that the speech or debate clause precludes all review.

\textsuperscript{171} Eastland, 421 U.S. at 511.

\textsuperscript{172} 354 U.S. 178 (1957).

\textsuperscript{173} 360 U.S. 109 (1959).

\textsuperscript{174} The speech or debate clause, however, was never invoked in an attempt to bar such review in \textit{Barenblatt}.

\textsuperscript{175} Eastland, 421 U.S. at 509 n.16.

\textsuperscript{176} Id.
When other means of reviewing congressional actions have existed, the Court explicitly has permitted inquiry into the validity of legislative acts. Thus, the Court has approved the review of legislative actions in damage suits against legislative employees—other than close legislative aides or agents—even when these functionaries simply had executed the will of Congress.\textsuperscript{177} For example, in\textit{Powell v. McCormack},\textsuperscript{178} Adam Clayton Powell challenged members of the House of Representatives, the Sergeant at Arms, the Clerk of the House, and the Doorkeeper for actions excluding him from the House. The Supreme Court held that the speech or debate clause required dismissal of the suit against House members, but permitted review of the propriety of the House's actions in the suit against the named House employees.\textsuperscript{179} The Court may have drawn this distinction because of the unseemliness of suits against legislators—to allow the lawmakers to "save face." There is little indication, however, that reviewing legislative actions through a suit against a legislative employee is significantly less intimidating to the legislative process than would be a suit against a legislator. If legislators want to defend the validity of their actions, they will do so vigorously despite the identity of the nominal defendant. Alternatively, the Court may have felt that separation of powers principles required review of legislative acts and therefore may have sought to create a means to circumvent the absolute immunity accorded legislators. The Court hinted at this reasoning in\textit{Powell},\textsuperscript{180} which did not foreclose the possibility that an action could be maintained solely against members of Congress when no agents participated in the challenged action and no other remedy was available.\textsuperscript{181}

The Court's interpretation of the speech or debate clause privilege therefore reflects a consistent effort to reconcile the conflicting needs for judicial review and legislative independence. To the extent that certain means of review are too intimidating or interfere too much with legislative independence, the clause, as an aspect of the doctrine of separation of powers, prohibits judicial inquiry. When the intrusion on legislative autonomy is reduced to some degree\textsuperscript{182} by the particular method of review, however, the Court has not interpreted the speech or debate clause to bar inquiry. Thus, the Court's differentiation between legislative and nonlegislative action, and between legislators and functionaries, has allowed it to review congressional actions\textsuperscript{183} while accommodating legislators'

\textsuperscript{177} In four of the eight speech or debate cases decided by the Court, legislative employees were found liable to suit although members of Congress were held immune. \textit{See} Doe v. McMillan, 412 U.S. 306 (1973); \textit{Powell v. McCormack}, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1881).

\textsuperscript{178} 395 U.S. 486 (1969).

\textsuperscript{179} \textit{Id.} at 503-06.

\textsuperscript{180} \textit{Id.} at 506 n.26. \textit{But see} Eastland, 421 U.S. 491.

\textsuperscript{181} \textit{Powell}, 395 U.S. at 506 n.26.

\textsuperscript{182} Judicial review has not been permitted every time that the threat to legislative independence has been mitigated in some way. For example, interference with legislative autonomy is somewhat less when a close legislative aide is sued rather than a legislator himself. The Court, however, has found them equally protected by the speech or debate clause. \textit{See}, e.g., Gravel v. United States, 408 U.S. 606, 616 (1972) ("[F]or the purpose of construing the [speech or debate] privilege a Member and his aide are to be 'treated as one.'").

\textsuperscript{183} By restricting the clause's immunity to legislative action, the Court allows review not only of all nonlegislative activities of members of Congress but also of legislative acts through permissible
needs for independence. These distinctions established inroads into the full protection of legislative autonomy that recognition of an absolute legislative immunity would achieve. Additionally, the speech or debate clause does not prevent judicial review of the constitutionality of legislation through a suit against the noncongressional officials responsible for enforcing it, despite the degree to which such an inquiry can chill legislative autonomy. In these instances in which the Court has determined that judicial review is appropriate, the speech or debate clause has not barred what appears to be “questioning” about legislative activity. The Court therefore has made it clear that complete legislative independence must be subordinate to maintaining judicial checks on congressional action. Given that the Court has decided that such review is proper in some circumstances, whether the speech or debate clause plays any further role in limiting the Court’s inquiry must be considered.

The speech or debate clause privilege has an evidentiary aspect, which supplements the clause’s substantive immunity in protecting legislative independence. Evidence of legislative acts could not be admitted to establish criminal or civil liability for other acts, or the legislative process would be undermined as effectively as if liability had been imposed for the legislative acts themselves. Mere disclosure of such acts, however, is not necessarily offensive to the clause.

suits against functionaries. Only when a functionary engages in activity “not essential to legislating,” Eastland, 421 U.S. at 509, is the underlying congressional action open to judicial questioning. For example, in Kilbourn the constitutionality of the House’s decision to arrest Kilbourn could be reviewed because the arrest by the Sergeant at Arms was not essential to legislating. See Kilbourn v. Thompson, 103 U.S. 168, 196-98 (1881). In this respect, the functionary doctrine merely restates the Court’s limitation of immunity to legislative acts; as the Court suggested in Gravel, if the legislators themselves executed an unconstitutional arrest, the speech or debate clause would not protect them. Gravel, 408 U.S. at 621. Conversely, if legislative employees engage in activities that are essential to legislating, such as typing a subpoena or printing the Congressional Record, the Court would not permit judicial review of the underlying Congressional actions in a suit against the functionaries. When a functionary performs an act that is not essential to legislating, however, both the nonessential activity and the underlying congressional decision may be reviewed in a suit against the functionary. Thus, the Court may be concluding that review of purely legislative activities, even when in a suit against low level employees, still might pose too great a threat to legislative independence.

184. As Professor Tribe also has noted, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18, at 296 n.23 (1978), the potential threat to legislative independence would disappear only when legislators were accorded absolute immunity for legislative as well as nonlegislative acts. As ABSCAM recently has demonstrated, the executive branch can interfere effectively with the independence of select legislators through prosecution for nonlegislative acts.

185. See supra notes 252-54 and accompanying text.


187. See supra note 186.


189. Rather, it is the use of evidence of legislative acts in imposing civil or criminal liability against legislators that violates the privilege. Cf. In re Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978) (evidentiary privilege not designed to foster secrecy in legislative process; democratic system has only limited tolerance for secrecy); In re Grand Jury Proceedings (Cianfrani), 563 F.2d 577, 584 (3d Cir. 1977) (evidentiary privilege frees legislative debate and action not by preventing disclosure, for most protected acts already are on public record, but by preventing evidentiary use of legislative acts in imposition of criminal liability). But see Note, EVIDENTIAL IMPLICATIONS OF THE SPEECH OR DEBATE CLAUSE, 88 YALE L.J. 1280, 1286 n.30 (1979), which contends that the evidentiary
The evidentiary privilege first was announced in United States v. Johnson.\textsuperscript{190} Johnson held that a member of Congress could not be prosecuted for either a legislative act or for the motivations behind such an act, and further that any prosecution “dependent on such inquiries necessarily contravenes the Speech or Debate Clause.”\textsuperscript{191} In Johnson the motives underlying a legislative act were relevant only as a basis for criminal liability. The Court held this inquiry impermissible—both when the legislative acts (or the motives behind them) are the gravamen of the charge\textsuperscript{192} and when they are used solely as evidence to prove some other illegal act.\textsuperscript{193} In either case, requiring that legislators justify their legislative acts and motivations to escape criminal liability would chill legislative independence.\textsuperscript{194}

This view of the evidentiary privilege as an adjunct to the clause’s grant of substantive immunity has been followed by the Supreme Court in a number of similar cases. In United States v. Brewster\textsuperscript{195} the Court reaffirmed that the clause precluded “any showing” of a legislative act or of the motive underlying it as evidence of a crime.\textsuperscript{196} Later, in United States v. Helstoski\textsuperscript{197} the Court held that the “past legislative acts”\textsuperscript{198} of defendant Congressman “may not be shown for any purpose in a prosecution” for bribery.\textsuperscript{199} These cases reflect the Court’s concern that the mere use of evidence of legislative acts or motives in a criminal prosecution against a legislator poses as great a threat to legislative independence as would allowing prosecution for the content of the acts. Thus, when the speech or debate clause bars review of legislative activity, it also protects evidence of the activity.

In each of the cases in which the Supreme Court developed the evidentiary aspect of the speech or debate clause, the privilege barred introduction of evidence as a basis for criminal sanctions. Similarly, in Gravel v. United States\textsuperscript{200} the legislator claiming the privilege was subject to potential criminal liability. Senator Gravel, as chairman of the Public Buildings and Grounds Subcommit-

\textsuperscript{190} 383 U.S. 169 (1966).
\textsuperscript{191} Id. at 184-85.
\textsuperscript{192} However reprehensible such [legislative] conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions.
\textsuperscript{193} Id. at 180.
\textsuperscript{194} Id. at 176-77.
\textsuperscript{195} Id. at 176-77, 180-81, 184-85.
\textsuperscript{196} 408 U.S. 501 (1972).
\textsuperscript{197} Id. at 527.
\textsuperscript{198} 442 U.S. 477 (1979).
\textsuperscript{199} Id. at 489. The Court stated the “it is clear from the language of the Clause that protection extends only to an act that has already been performed.” Id. at 490. In contrast, “a promise to introduce a bill” or “[a] promise to deliver a speech, to vote, or to solicit other votes at some future date” is not a legislative act protected by the privilege. Id.
\textsuperscript{200} 408 U.S. 606 (1972).
tee, had convened a night meeting and had inserted the entire forty-seven volumes of the Pentagon Papers\textsuperscript{201} into the \textit{Congressional Record}. Shortly thereafter, Gravel and an aide arranged to have Beacon Press republish the classified study from the \textit{Congressional Record}. A grand jury, investigating potential criminal liability for the release and publication of the study, subpoenaed Gravel's aide to testify. Gravel intervened to quash the subpoena, and the Supreme Court, on appeal, held that although the privilege did not bar the aide's testimony, it did limit it.\textsuperscript{202} Gravel's aide was required to answer questions before the grand jury as long as the questions did not require testimony about or impugn a legislative act.\textsuperscript{203}

Gravel appears to conclude\textsuperscript{204} that members of Congress cannot be questioned elsewhere than in Congress about their legislative acts or motivations: "We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting."\textsuperscript{205} The Court never has taken a literal approach to its interpretation of the speech or debate clause, however, and was not doing so in \textit{Gravel}.\textsuperscript{206} Rather, the Court has used a functional

\begin{itemize}
\item \textsuperscript{201} Id. at 609. The Pentagon Papers were a study officially titled, "History of the United States Decision-Making Process on Viet Nam Policy," and was classified by the Defense Department as "Top Secret Sensitive."
\item \textsuperscript{202} Id. at 627-29. The Court concluded that the scope of the privilege for congressional aides was coextensive with that enjoyed by members of Congress themselves. Distinguishing \textit{Kilbourn, Dombrowski}, and \textit{Powell}, the Court stated:
\begin{quote}
None of these three cases adopted the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection . . . . In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.
\end{quote}
\textit{Id.} at 620-21.
\item \textsuperscript{203} Id. at 621-22. The Court decided that although Gravel's conduct at the committee hearing constituted legislative activity, \textit{id.} at 624, both the private republication of the Pentagon Papers and their acquisition by Gravel's aide did not. \textit{Id.} at 625-27.
\item \textsuperscript{204} Some commentators have interpreted \textit{Gravel} as holding that members of Congress may not be questioned elsewhere. \textit{See, e.g., Kaye, supra} note 85, at 549-51.
\item \textsuperscript{205} \textit{Gravel}, 408 U.S. at 616.
\item \textsuperscript{206} An analysis of the literal language of the clause might even lead to the opposite conclusion—that it protects legislators only from suit and not from questioning about legislative activity. The speech or debate clause states: "for any Speech or Debate in either House, they shall not be questioned in any other Place." \textit{U.S. Const.} art. I, § 6, cl. 1. Putting the preposition "for" in its usual place produces: "they shall not be \textit{questioned for} any speech or debate." The phrase "questioned for" does not mean merely asking a question of a person; such terms as "about," "concerning," "relative to," and "pertaining to," would be more appropriate to convey that meaning. More importantly, the expression "question for," now rare, commonly had been used at the time the Constitution was drafted to mean: "to examine judicially: hence to call to account, challenge, accuse (of)." \textit{Oxford English Dictionary} 2390 (1984). The \textit{Oxford English Dictionary} actually cites the speech or debate clause as an example of this meaning of "question for." Moreover, the word "question," with regard to judicial examination, at this time connoted the use of torture in conducting the examination. \textit{Id.} ("1761: Hume, Hist. Eng. III, li. 110. He urged too, that Felton should be put to the question in order to extort from him a discovery of his accomplices."). The phrase was used in 1801 in Trinidad, an English colony, to order the judicial torture of Luisa Calderon, a slave: "Appliquez la question a Luisa Calderon" ("Apply the question to Luisa Calderon."). \textit{See V.S. Naipul, The Loss of El Dorado} 205 (1969). Thus, the Framers of the clause may never
approach, expanding the literal protection of the clause when necessary to ensure legislative autonomy, and permitting judicial "questioning" of speech or debate when the purpose of the clause was not found to foreclose judicial review. In Gravel the Court's real concern, as in Johnson, Brewster, and Hestoski, was that evidence of legislative activity, for which a legislator is immune from prosecution, should not be used to establish criminal liability for any other act. In all four cases, the inquiry into legislative acts and motivations might have provided a basis for finding a legislator or legislative aide criminally liable, a finding barred by the clause's substantive immunity. As the Court stated in Gravel: "Having established that neither the Senator nor [his aide] is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either [Gravel's aide] or third parties on this subject."

In a footnote the Court noted that the occurrence of at least one legislative act at the subcommittee hearing—publication of the Pentagon Papers—might "prove material" to the grand jury's investigation. The Court then concluded, however, that the fact of publication could be established by the public record of the hearing. Moreover, the footnote suggested that third-party witnesses could be interrogated about legislative activities of members of Congress during grand jury investigations or criminal trials of nonlegislators. Thus, when evidence of legislative conduct is relevant to some permissible inquiry, the speech or debate clause does not prohibit completely its admissibility. Gravel, however, does not establish clearly the extent to which such evidence should be admissible. Presumably, Gravel does not indicate that evidence of legislative activities should be used freely whenever it is material to a permissible inquiry, since such an interpretation would contradict Brewster, Johnson, and Hel-
Thus, the Court must be distinguishing between the use of evidence of legislative conduct that threatens legislative independence and use that does not. Evidence of legislative activity could be used when material to permissible inquiries about third parties or at least third-party crimes, but not in inquiries about legislators themselves. When evidence of legislative conduct is used for inquiries about third parties, neither a legislator nor a legislative act is being "questioned"; no legislative activity is being justified to another governmental branch. Rather, the mere fact of occurrence of the legislative act is being used potentially to impose liability on a third party. Of course, using evidence of legislative conduct in this manner still may chill the independence of legislators. When that is a real possibility, the speech or debate clause should bar the use of such evidence even against third parties.

In the same footnote, the Gravel Court also appeared to distinguish between the testimony of third parties concerning legislative deliberations, which it deemed permissible, and the testimony of members of Congress (or their close aides), which it implied is not permissible. The Court's reference is too ambiguous and off-hand to merit a lengthy discussion of its meaning and reasoning. To the extent that a prohibition on the questioning of legislators about legislative conduct is limited to those circumstances when the legislative acts themselves are not reviewable, however, the distinction would seem to be appropriate. The nonreviewability of legislative deliberations justifies restrictions on the use of evidence of congressional deliberations, as well as limitations on the source of such evidence. When legislative acts or motives are not themselves reviewable, much greater restrictions on the use and source of evidence of the acts are justified. Requiring legislators to testify about legislative conduct can seriously threaten legislative independence, and is not justified when courts are forbid-

214. It is even possible that evidence of Gravel's legislative activity might have been material to the grand jury's investigation concerning his nonlegislative activity of preparing for the subcommittee hearing and republicating the Pentagon Papers privately. When the Court in Gravel stated that the fact of publication at the hearing could be proven by the public record, it did not state explicitly whether such use was limited only to possible third-party crimes; that appeared, however, to be the Court's intent.

215. The use of evidence of legislative conduct as a basis for civil liability for a legislator's nonlegislative actions also should be precluded under the speech or debate clause as overly intrusive. See supra notes 154-59 and accompanying text.

216. See infra notes 221-34 and accompanying text.

217. After stating that third-party witnesses might not be excluded totally from testifying about the legislative acts of Congress' members in grand jury investigations and criminal trials of third parties, the Court noted:

As for inquiry of [Gravel's aide] about third-party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch. Gravel, 408 U.S. at 629 n.18. It is less than obvious that the Court was trying to draw a principled distinction between the questioning of legislators and that of nonlegislators concerning legislative activity. The terms of the protective order that the Court fashioned suggest that it was not drawing this distinction in the grand jury investigation at issue; that order forbade questioning both Gravel's aide and third-party witnesses about legislative conduct. The juxtaposition of the two sentences, however, implies that the Court was noting some difference in propriety between the two sources of evidence.

218. Despite the relevance of evidence of legislative conduct to third-party crimes and despite the substantive immunity of legislators themselves, grand jury inquiry into legislative activity implies
den by the speech or debate clause from "questioning" or reviewing the legislative conduct in question. When the action and motives of legislators are independently reviewable by the judiciary, however, courts are obligated to inquire into and "question" legislative deliberations, despite the resulting intrusion on legislative autonomy, and without the same restrictions.\(^2\)

These decisions make clear that a member's legislative conduct and motives for such conduct may not be the basis of a criminal judgment against him or an investigation of him. The Court, however, never has faced whether the speech or debate privilege protects a legislator from testifying about legislative deliberations when he faces mere civil liability,\(^2\) or when evidence of legislative activity is relevant to an inquiry concerning third parties.\(^2\) A number of lower courts have applied the privilege in such situations, concluding in several libel actions that the privilege protects nonparty legislators from being compelled to testify regarding their legislative conduct.\(^2\) In *Miller v. Transamerican Press, Inc.*,\(^2\) for example, the United States Court of Appeals for the Ninth Circuit held that the privilege protects a legislator from revealing his sources of information.\(^2\) The court in *Miller* correctly reasoned that even though the legislator faced no liability, the possibility of such public exposure could chill speech and debate on the floor.\(^2\) These decisions follow the rationale of *Gravel*: when legislative conduct itself is not reviewable, despite its materiality to third-party controversies, inquiry about such conduct should be allowed only when legislative independence would not be threatened.\(^2\)

\(^2\) Although the *Gravel* Court was not faced with the issue, the footnote discussed *supra* note 217 appeared to address it.


\(^2\) 709 F.2d 524 (9th Cir. 1983).

\(^2\) Id. at 530-31.

\(^2\) The court stated: "The Congressman might censor his remarks or forego them entirely to protect the privacy of his sources, if he contemplated that he could be forced to reveal their identity in a lawsuit." *Id.* at 531.

\(^2\) The court's responsibility for providing a forum for the litigation of common-law torts also is arguably less critical than its obligation to review the constitutionality of enacted legislation.
inqriy into legislative activity will chill legislative deliberations,227 evidence of such activity should be barred,228 and the compelled testimony of legislators prohibited.229

At least one lower court also has held that legislators cannot be compelled to honor a subpoena duces tecum from a defendant in a criminal trial for the transcript of testimony, taken during legislative activity, of a prosecution witness.230 In United States v. Ehrlichman,231 the United States District Court for the District of Columbia, fearing that the requested transcript would reveal con-

227. Since the legislator in Miller was no longer in office, the court was not concerned about preventing distractions from legislative duties. Rather, the court found that the inquiry itself threatened legislative independence. Id. at 528-31.

228. Conversely, when legislative activity is relevant to third-party litigation and would not be intimidating to legislative autonomy, it arguably should be permitted. Since compelled testimony always is intrusive to some degree, however, and this issue will arise only when a legislator feels sufficiently threatened to claim the privilege the court perhaps should not compel a legislator's testimony about legislative activity unless the legislative activity itself is subject to review.

229. On the other hand, because the degree of intimidation in these cases is much less than when a legislator is subject to criminal or even civil liability, the evidentiary privilege as so construed arguably overprotects the interests of legislative independence. The Gravel Court held the threat to legislative independence resulting from the compelled revelation of confidential sources subordinate to the need to trace the leak of highly classified materials. Gravel, 408 U.S. at 628 & n.17. The Court termed the acquisition of the classified materials "preparation for the subcommittee hearing," which it concluded was nonlegislative conduct and thus not protected. Id. at 629. Since then, and with no attempt to distinguish Gravel, the Court consistently has held that the acquisition of information pertinent to potential legislation or investigation is legislative activity. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975); Doe v. McMillan, 412 U.S. 306, 313 (1973). Miller sought to distinguish Gravel on the ground that in Gravel the source's revelation of the information constituted a crime. It is difficult, however, to see, how characterizing a third party's actions as illegal affects whether the congressman's receipt of the information was legislative or nonlegislative conduct. Regardless of whether the third-party source's revelations are illegal, the compelled revelation of a legislator's source presumably would chill legislative independence to some extent. The Court's failure to explain satisfactorily the disparate treatment in Gravel suggests that the Gravel Court was responding in an ad hoc manner to what was perceived as a heightened need for the evidence and the desire to discourage illegal activity.

Moreover, in distinguishing between legislative and nonlegislative activity, the Supreme Court and lower courts have ignored the threat to legislative independence that results from denying applicability of the privilege to nonlegislative acts. Commentators have noted that the Court's narrowing of the definition of legislative activity to some extent threatens the legislative process. See Reinstein & Silverglate, supra note 94, at 1149. The Court's efforts to distinguish between the two types of activity, however, is at least intellectually consistent with its functional approach to the clause. Nevertheless, the Court has applied the functional approach inconsistently by failing to recognize that an inquiry into nonlegislative activity can significantly chill legislative activity. For example, if Senator Gravel knew that he might have to reveal his source, he might have refrained from the legitimate use of the information pertinent to potential legislation or investigation is legislative activity. See infra notes 275-89 and accompanying text.

230. Whether congressional documents are privileged from disclosure under the speech or debate clause depends on the same general considerations as the legislator's testimonial privilege. See supra notes 275-89 and accompanying text.

231. 389 F. Supp. 95 (D.D.C. 1974), aff'd sub nom. United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976). In Ehrlichman defendant G. Gordon Liddy sought transcripts of prosecution witnesses who had appeared before a congressional subcommittee to gain access to potentially exculpatory material. Liddy contended that the subcommittee's refusal to obey the subpoena was a violation of the Jencks Act, 18 U.S.C. § 3500 (1970), Brady v. Maryland, 373 U.S. 83 (1963), and the compulsory process clause of the sixth amendment. Liddy was convicted and on appeal the court failed to address the privilege issue, concluding that Congress' refusal to produce the subpoenaed transcript was harmless error in any event. Liddy, 542 F.2d at 83. The conflict between congressional privilege and the sixth amendment rights of a criminal defendant is beyond the scope of this Article. See generally Note, A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses, 80 YALE L.J. 1388 (1971) (discussion of conflict between congressional privilege and sixth amendment rights).
gressional "deliberative and communicative processes," concluded that production of the document would violate the speech or debate clause.\(^2\) As in the libel cases discussed above, the rationale for this decision appears to be that the exposure of legislative deliberations to judicial scrutiny may well menace legislative independence. To the extent that the transcript of the testimony before Congress would reveal legislative deliberations that could threaten legislative autonomy, the case comports with those above. If the mere disclosure of the transcript would not expose legislative conduct or legislators themselves to intimidating inquiry, the constitutionally compelling need for potentially exculpatory evidence in a criminal trial\(^2\) justifies its production.

Gravel seemed to approve such use by permitting proof of publication by the legislative record and suggesting that third-party witnesses could testify about legislative activities in criminal trials. The confidentiality of legislative deliberations is not protected absolutely by the speech or debate clause,\(^2\) but only against impermissible exposure to executive or judicial influence. It is extremely unlikely that the possibility of coerced disclosure of the testimony in Ehrlichman would have influenced the legislator's decision to take testimony or their manner of doing so. Nevertheless, when the legislative activity itself is not subject to the court's review, any threat to legislative independence should trigger the absolute protection of the speech or debate clause.

Finally, the Supreme Court has touched on, and a few courts have considered directly, whether a legislator can be compelled to testify or submit to discovery concerning legislative deliberations when the legislative acts or motives themselves were properly under review by a court.\(^2\) In Arlington Heights the


\(^{234}\) See infra notes 286-95 and accompanying text.

Supreme Court, discussing possible sources of evidence that could tend to prove unconstitutional purpose, stated that, "[i]n some extraordinary instances the members [of legislative or administrative bodies] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."236 The Court similarly noted that because "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government, placing a decisionmaker on the stand is . . . 'usually to be avoided.'"237 Thus, the Supreme Court apparently contemplated that, in some circumstances, legislators might be compelled to testify about the purpose for which a law was enacted.238

In May v. Cooperman239 the court considered this question in deciding whether a state statute providing for a moment of silence in public schools had a religious or secular purpose.240 The court in May decided first that state legislators were protected by an evidentiary privilege deriving from their common-law immunity from being sued in their official capacity.241 Although the court

N.Y.2d 178 (Mun. Ct. 1955) (state legislator required to testify). Several courts also have considered this question with regard to administrative decisionmakers. See also infra note 344 (discussion of question with regard to administrative agencies).

236. Arlington Heights, 429 U.S. at 268 (emphasis added).

237. Id. at 268 n.18 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)) (emphasis added).

238. The Court did not indicate why and under what circumstances legislators might not be privileged to refuse to testify. The Court's only citation in support of the existence of a legislative privilege was to Tenney v. Brandhove, 341 U.S. 367 (1951). In Tenney the Court held that members of the California legislature were immune from civil suit under a common-law privilege analogous to the speech or debate clause. The Supreme Court's failure, in Arlington Heights, to cite any of the Court's speech or debate cases involving members of Congress might suggest that the Court was speaking only about state legislators. The courts have afforded state legislators the same degree of protection in civil suits, however, as that afforded federal legislators under the speech or debate clause, see infra note 241; thus the distinction, even if the Court intended to draw it, would not appear significant.


240. A legislative enactment violates the establishment clause of the first amendment if its purpose is to advance religion. See, e.g., Committee for Public Educ. v. Regan, 444 U.S. 646 (1980).

241. May, slip op. at 38. Most state constitutions provide state legislators with analogous speech or debate privileges. See, e.g., Ala. Const. art. IV, § 56; Colo. Const. art. V, § 16; N.J. Const. art. IV, § 4, § 9; N.Y. Const. art. III, § 11. The individual clauses differ widely, both in applicability and scope, and are beyond the scope of this Article. By its very terms, the federal speech or debate clause does not apply to state legislators in federal court actions. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). State constitutional privileges also do not protect state legislators in federal court, when the claim does not arise under state law. See United States v. Gillock, 445 U.S. 360, 368 (1980); Wm. T. Thompson Co. v. General Nutrition Corp., 671 F.2d 100 (3d Cir. 1982); Fed. R. Evid. 501. In Gillock the Court also held that federal law provides neither immunity nor an evidentiary privilege for state legislators in federal criminal prosecutions. In civil cases, however, the Court has granted state legislators in federal courts immunity from challenges to their legislative activity in civil rights actions seeking damages and injunctive relief. See Supreme Court v. Consumers Union of the United States, 446 U.S. 719 (1980); Tenney v. Brandhove, 341 U.S. 367 (1951). The Supreme Court has not determined whether this privilege in civil cases includes an evidentiary aspect. To the extent that such a privilege does exist, its applicability and scope in motivation analysis should be governed generally by the same principles that govern federal legislators. Arguably, separation of powers principles justify a lesser privilege for state legislators in civil actions than that afforded members of Congress. See, e.g., In re Grand Jury Proceedings, 563 F.2d 577, 587 (3d Cir. 1977) (Gibbons, J., concurring). For example, in Jordan v. Hutchenson, 323 F.2d 597 (4th Cir. 1963), the court permitted an action for injunctive relief against a state legislative committee that attempted to invoke a separation of powers privilege—an action
stated that the policies leading the Supreme Court to grant state legislators such immunity suggest that the legislators "should not be subject to discovery in the normal course," it is not clear whether the court based its ruling on the privilege it appeared to recognize or on general procedural rules prohibiting burdensome discovery. Furthermore, the court ruled that because the legislature intervened in the action, and would be participating at trial, legislators would be required to submit to any discovery necessary for plaintiffs' preparation.

All of the speech or debate cases discussed reveal a central theme: courts should interpret the clause to protect the functional independence of the legislature by prohibiting certain means of reviewing legislative activity that are likely to threaten legislative autonomy. The threat may take a variety of forms, but generally arises whenever legislators, either individually or as an institution, are personally or collectively accountable to a coordinate branch for their legislative conduct or motives. The clause circumscribes the power of the executive and judicial branches to review legislative activity in these circumstances by prohibiting any inquiry into the deliberative processes of Congress that seriously threatens to chill legislative action.

3. Evaluation

The legislative independence that the speech or debate clause guarantees was derived from, and should be shaped by, the doctrine of separation of powers. The doctrine seeks to ensure the freedom of the legislative process from analogous to that prohibited by *Eastland* against members of Congress. Similarly, in *Bond v. Floyd*, 385 U.S. 116 (1966), the Supreme Court allowed an action against named state legislators, and held that a state legislature could not refuse to seat one of its members because of objections to his views. In *Powell v. McCormack*, 395 U.S. 486 (1969), however, the Court concluded that the speech or debate clause prohibited an analogous action against named members of Congress even though the action challenging congressional conduct was allowed to proceed against legislative functionaries. See supra notes 178-79 and accompanying text. Moreover, the *Gillock* Court's holding that federal criminal statutes take precedence to some degree over state legislative autonomy would seem equally applicable when state legislative conduct allegedly infringes federal constitutional guarantees.


243. *May* court stated that "whether this be deemed a privilege of some sort or whether it be deemed an application for general principles of undue burdensomeness under FED. R. CIV. P. 26(c), . . . legislators normally should not be required to give discovery concerning their legislative activities." *Id.*

244. *Id.* at 39-40. The court decided that the legislators' intervention as party-defendants, however, did not waive completely their privilege from discovery. See infra notes 397-400 and accompanying text.

245. See supra notes 139-41 and accompanying text.

246. The contours of Congress' power to try and discipline its members is beyond the scope of this Article. For cases discussing this issue see, e.g., *United States v. Helstoski*, 442 U.S. 477, 492 (1979); *United States v. Brewster*, 408 U.S. 501, 519-20 (1972). See generally McLaughlin, *Congressional Self-Disciplin*: The Power to Expel, to Exclude and to Punish, 41 *Fordham L. Rev.* 43 (1972) (analysis of procedural and substantive rules that limit Congress' power to expel, exclude, or punish its members); Note, The Power of a House of Congress to Judge the Qualifications of its Members, 81 *Harv. L. Rev.* 673, 682-83 (1968) (analysis of whether Congress' power to judge qualifications of its members should include qualifications that are not enumerated expressly in the Constitution). As elected officials, legislators ultimately are accountable to their constituents.

247. See, e.g., *Eastland* v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975) (The speech or debate clause "serves the . . . function of reinforcing the separation of powers deliberately established by the founders.") (quoting United States v. Johnson, 383 U.S. 169, 178 (1966)).
intimidation by either of the other branches. The doctrine, however, also vests in the courts the power and obligation to adjudicate claims by individuals that congressional action has infringed their constitutional rights. By dividing the powers of government among three departments—legislative, executive, and judicial—the Framers sought to ensure that no branch would have unchecked power to threaten individual rights. Each branch was to be independent, but reliant upon the others. Although this structure restricts one branch from controlling or exercising the powers properly belonging to another branch, it also provides each branch with the authority to check the others to protect against government excesses. Thus, the speech or debate clause privilege must accommodate both of these interests—shielding the legislature from intimidation, yet allowing the judiciary to guard legitimately against legislative excesses, particularly violations of constitutional rights.

Occasionally, these competing interests conflict. In resolving that conflict, the Court has not always concluded, despite its pronouncements to the contrary, that because the inquiry involves legislative acts or motivations, judicial review is improper. When the courts have had an indirect method available for reviewing the validity of legislative conduct such as through the nonlegislative acts of functionaries, the courts have undertaken such review. Although the Supreme Court's willingness to review legislative conduct in this way is uncertain, once the court decides to review legislative activities, it will consider evidence about legislative deliberations without any apparent regard for whether the inquiry itself intrudes on legislative autonomy. If a suit challenging the constitutionality of a legislative decision threatens legislative independence, the fact that a legislative employee is the nominal defendant does not mitigate the threat. Thus, although the Court may have appeared to have considered the intrusiveness of the inquiry in determining whether to review legislative action, the opposite was true: The Court made an independent decision whether to review, and that decision determined whether the inquiry was allowed. The Court's determination whether to review, in turn, has been controlled by separation of powers considerations. Because there always will be a nonlegislative official enforcing a

248. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (The Framers "had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.").


250. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508-09 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look into the motives alleged to have prompted it."); United States v. Brewster, 408 U.S. 501, 525 (1972) ("[T]he Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.").

251. The courts have approached a holding that such review is permissible as long as legislators are not personally required to defend their conduct. See Powell v. McCormack, 395 U.S. 486, 505 (1969) ("Freedom of legislative activity and the purposes of the Speech or Debate clause are fully protected if legislators are relieved of the burdens of defending themselves.").

252. For example, the Court appears unwilling to review the legislative activity of members of Congress in suits against legislative employees who were performing acts essential to the legislation. See supra note 183 and accompanying text.
statute against whom suit can be maintained, these considerations guarantee that the constitutionality of enacted legislation, unlike some other kinds of legislative conduct, will be subject to judicial review.

The Supreme Court recently has decided that, as a matter of substantive law, the motives of legislators are a crucial factor in determining a law's constitutionality. Although the Court has not considered specifically whether the speech or debate clause precludes an inquiry into motive, it already has considered identical separation of powers issues in determining whether to allow judicial review of the constitutionality of enactments. In fact, separation of powers concerns contributed to the Court's initial refusal to permit inquiry into motive. Nevertheless, the Court now has established that such inquiry does not encroach unjustifiably on the prerogatives of the legislative branch. Because the speech or debate clause is derived from the doctrine of separation of powers, the clause would not independently affect the Court's resolution of this question. The clause should not operate to bar judicial review of the constitutional validity of enacted legislation. Moreover, since the Constitution prohibits laws enacted for particular illicit purposes, and courts properly can review the constitutionality of these laws, courts must be free to inquire into the issue of purpose. Otherwise, Congress would have the unreviewable power to enact certain unconstitutional statutes.

253. See, e.g., Buckley v. Valeo, 424 U.S. 1, 119 (1976) ("[T]he Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws . . . .") (citing Springer v. Philippine Islands, 277 U.S. 189, 201 (1928)).
254. See, e.g., Gravel v. United States, 408 U.S. 606, 624 (1972) ("[A House] Member's conduct at legislative committee hearings, [is] subject to judicial review in various circumstances, as is legislation itself . . . .") (emphasis added); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review of the constitutionality of congressional legislation).
255. See supra notes 56-76 and accompanying text.
256. Cf De La Cruz v. Tormey, 582 F.2d 45, 72-73 (9th Cir. 1978) (Wallace, J., dissenting) (plaintiff failed to demonstrate discriminatory impact in gender discrimination suit, therefore, speech or debate clause prohibited judicial inquiry into decisionmakers' motives).
257. See supra notes 51-55 and accompanying text.
258. See supra notes 51-76 and accompanying text.
259. Such inquiry is necessary because the Court's recognition of the relevance of legislative purpose has narrowed the courts' previous power, in some contexts, to invalidate laws purely because of their effects. See supra notes 60-66 and accompanying text.
260. The adoption of the Bill of Rights arguably overrode some of the protections provided to members of Congress by the speech or debate clause. Thus, the Framers of the Bill of Rights may have contemplated that when violations of those rights are in issue, the Bill of Rights should limit the scope of congressional privilege to the extent necessary to ensure those constitutional guarantees. The Supreme Court followed similar reasoning in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). In Bitzer the Court considered whether the eleventh amendment bars the award against a state of backpay pursuant to Title VII of the Civil Rights Act of 1964. The Court held that section 5 of the fourteenth amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," expressly grants to Congress the power to enforce the substantive provisions of the fourteenth amendment, which themselves embody significant limitations on state authority." Id. at 456. Thus, the Court concluded that Congress, in determining what is "appropriate legislation" with which to enforce the fourteenth amendment, may provide for private suits against states which in other contexts are unconstitutional. See also Hutto v. Finney, 437 U.S. 678, 693-94 (1978) (Congress has power to override states' eleventh amendment immunity in enacting Civil Rights Attorney's Fees Awards Act of 1976). The proscriptions of various constitutional amendments, such as "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, may embody similar limitations on the privileges possessed by members of Congress in other circumstances. But see Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (Congress,
Similarly, when courts are obligated to review the constitutionality of congressional action, the speech or debate clause should not bar disclosure or use of the evidence necessary for such a review. The justification for precluding evidence of legislative acts or motives in the speech or debate cases has been the inappropriateness of judicial inquiry into such matters. When courts investigate motive, the evidence that frequently had been barred by the speech or debate privilege no longer should be prohibited absolutely.\textsuperscript{261} For example, although legislative history, which includes the legislative record and internal documents, routinely has been held admissible in statutory construction cases,\textsuperscript{262} its introduction often has been prohibited by the speech or debate clause in other contexts.\textsuperscript{263} In Village of Arlington Heights \textit{v. Metropolitan Housing Development Corp.},\textsuperscript{264} however, the Court held that inquiry into the motive of the decisionmaker\textsuperscript{265} was proper and could be proved by the introduction of legislative history evidence.\textsuperscript{266} Although \textit{Arlington Heights} involved the motives of a local

\begin{footnotesize}
261. In \textit{Gravel} the Court decided that the legislative record may be admitted in some circumstances, even though the Court could not review the underlying legislative conduct.


As to what restrictions the Clause places on the admission of evidence, our concern is not with the "specificity" of the reference. Instead, our concern is whether there is mention of a legislative act. To effectuate the intent of the Clause, the Court has construed it to protect other "legislative acts" such as utterances in committee hearings and reports. E.g., \textit{Doe v. McMillan}, 412 U.S. 306 (1973).

\textit{Id.} at 490; see also Hutchinson v. Proxmire, 443 U.S. 111, 116 n.3 (1979) ("[W]e assume, without deciding, that a speech printed in the Congressional Record carries immunity under the Speech or Debate Clause as though delivered on the floor."); \textit{In re Grand Jury Proceedings}, 563 F.2d 577, 584 (3d Cir. 1977) ("To accomplish its purpose the privilege must bar evidence of legislative act or speech; thus an admission of criminal complicity by a legislator during a debate cannot be introduced into evidence against him."). But see \textit{Gravel} v. United States, 408 U.S. 606, 629 n.18 (1972) ("If it proves material to establish for the record the fact of publication [for which we perceive no basis for inquiry] at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose.").

Conversely, in motive analysis as well as other contexts, when an inquiry into legislative acts is permitted, the legislative record is admissible as a source of proof. See, e.g., Barenblatt \textit{v. United States}, 360 U.S. 109, 118 n.9, 122 n.20, 125 n.24 (1959) (examination of debate in Congressional Record to determine legitimacy and scope of congressional investigation); accord United States \textit{v. Rumley}, 345 U.S. 41, 47-48 (1953); McGrain \textit{v. Daugherty}, 273 U.S. 135, 162, 179 n.20 (1927) (consideration of Senate debates). The legislative history of statutes also has been considered in countless cases seeking to construe statutes by divining the underlying legislative intent. See cases cited \textit{supra} note 262. As in motive analysis, the propriety of the courts' inquiry permits use of the legislative record.


265. For a discussion of state administrative (or "decisionmaker") privilege in federal court, see \textit{infra} notes 326-36 and accompanying text.

266. \textit{Arlington Heights}, 429 U.S. at 268. The Court stated that "[t]he legislative or administra-
administrative body, the Court did not indicate that its discussion was limited to noncongressional decisionmakers.\textsuperscript{267} Rather, in discussing the possibility of compelling decisionmakers to testify at trial, the Court specifically referred to the potential conflict with the speech or debate clause.\textsuperscript{268} Moreover, the Court also has considered legislative history to be probative of congressional purpose in determining the constitutionality of federal legislation.\textsuperscript{269}

In permitting the use of legislative history to prove the motives of decisionmakers, the Court implicitly has determined that the resulting pressures on the decisionmaking body are justifiable. The use of such materials, however, often will put substantial pressure on decisionmakers to account for the content of their statements and to contest the accuracy or theory of plaintiffs’ proofs.\textsuperscript{270} Although this potential pressure long has been considered tolerable in the context of statutory interpretation,\textsuperscript{271} decisionmakers are likely to feel more responsibility to respond in motive cases;\textsuperscript{272} in most of the reported cases, decisionmakers have testified voluntarily about their motives for the challenged

tive history may be highly relevant; especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” \textit{Id.}

The Court also suggested that legislative motive could be proven by the historical background of the decision, the specific sequence of events leading up to the challenged action, departures from the normal procedural sequence, substantive departures, and testimony of the decisionmaker. \textit{Id.} at 267-68. The various sources of evidence listed by the Court may implicate legislative acts and motives that the speech or debate clause, in other circumstances, places beyond the Court’s power to review.

\textsuperscript{267} \textit{Arlington Heights} noted that United States v. \textit{O’Brien}, 391 U.S. 367, 381-86 (1968), might imply that congressional purpose is irrelevant to the constitutionality of a statute. \textit{Arlington Heights}, 429 U.S. at 265. In concluding that the decisionmakers’ purpose was a necessary inquiry, however, \textit{Arlington Heights} made no effort to distinguish \textit{O’Brien} on the grounds that the law in \textit{O’Brien} was enacted by Congress. In addition, several Court decisions concerning the motives of state legislators in enacting laws failed to mention the federal common-law immunity afforded state legislators, which is closely analogous to the protection provided by the speech or debate clause. \textit{See, e.g., Personnel Adm’t v. \textit{Feeney}, 442 U.S. 256 (1979); see also supra note 241 (state constitutions providing speech or debate privileges).

\textsuperscript{268} \textit{Arlington Heights}, 429 U.S. at 268.


\textsuperscript{270} Even the \textit{Congressional Record}, a supposedly verbatim account of congressional proceedings, often has been criticized for unreliability. \textit{See, e.g., For the Record, Less Distortion, N.Y. Times, March 5, 1978, at 2, col. 6; Neuberger, The Congressional Record Is Not a Record, N.Y. Times, Apr. 20, 1958, \S 6 (Magazine), at 14, reprinted in 104 CONG. REC. 6816-18 (1958). When a record of the proceedings does exist, the context of a statement may be examined to prevent distortion of meaning.

\textsuperscript{271} Furthermore, legislators may anticipate that courts will use legislative history and similar materials to interpret a statute, given the long history of doing so, but justifiably may not expect the same materials to be used to interpret motive. \textit{See infra} notes 559-67 and accompanying text.

\textsuperscript{272} Typically, when a court interprets a statute it strives to determine whether an otherwise valid law applies to a particular set of facts. In contrast, when a court examines motive it considers the very validity of the enactment process, and by extension the integrity of the decisionmaking body. Legislators therefore may feel a strong urge to prevent the statute’s constitutionality. \textit{See, e.g., May v. \textit{Cooperman}, 572 F. Supp. 1561 (D.N.J. 1983) (intervention as party-defendants by New Jersey legislators to defend constitutionality of “moment of silence” law).

There may be instances in which decisionmakers feel more strongly about a statute’s interpretation than about its constitutionality. Legislators occasionally have filed amicus briefs in statutory interpretation cases urging acceptance of their views. \textit{See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); \textit{Skelly v. General Motors Corp.}, 660 F.2d 311 (7th Cir. 1981). Unlike statutory interpretation, however, analyzing motive questions the integrity of the decisionmaking
action. Furthermore, there is a significant difference, in regard to separation of powers analysis, between using legislative history in statutory construction and for inquiring into motive. In the former, the court is attempting to ascertain legislative will to help bring it to fruition; in the latter, determination of the decisionmaker's intent may lead to invalidation of the legislation.

Although the use of legislative history may be more threatening to the separation of powers in motivation analysis than in statutory construction, the Court implicitly resolved these concerns by holding legislative purpose relevant to constitutionality. Thus, in both contexts, to the extent that examination of motive is valid and necessary, the speech or debate clause privilege does not prohibit the use of legislative history. When a record of legislative deliberations is either unavailable or inadequate, the court should permit third-party testimony about legislative debates and any other matters relevant to legislative purpose. It is not the use of such evidence, per se, that might offend the privilege, but the purpose for which the evidence is used. Using the legislative record in motivation analysis is justified to the same extent that the court's inquiry it-

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274. These differences may justify compelling legislators to testify in motive cases but not in statutory construction cases.

275. "Third-party testimony" refers to the testimony of any witness, including a legislator, who testifies voluntarily about the legislative acts or motivations of other legislators.

276. Third-party testimony about legislative debates probably will cause legislators to respond to any inaccuracy or omission of context even more than use of the legislative record. Without resort to the privilege, courts could minimize this problem by using only the most reliable of the methods available for establishing the facts in each instance. In the congressional setting these methods may include the Congressional Record (for floor debates), hearing records and committee reports (for committee and subcommittee action), and even videotapes of House of Representatives deliberations, which are televised by the Cable-Satellite Public Affairs Network (C-SPAN). See J. Morehead, Introduction to United States Public Documents 138-46 (1983).

277. Third-parties could testify on a potentially infinite number of matters, besides statements actually made in Congress, relevant to the decisionmaker's motivation. Within that range are certain broad categories, the admissibility of which may vary with respect to both privilege and relevance. Testimony about a legislator's statements to the press or to constituents would not be privileged under the speech or debate clause. See, e.g., Hutchinson v. Proxmire, 443 U.S. 111 (1979). Furthermore, other categories of evidence that ordinarily would be privileged under the clause are admissible to show legislators' motivations. See supra notes 261-76, infra notes 278-80 and accompanying text. Third parties also might testify about a legislator's personal beliefs and associations, which might imply illicit motivation in a particular legislative action. Objections to such testimony would be addressed more appropriately to the relevance and scope of the examination than to the privilege. See infra note 534.

278. Although the Court has deemed the inquiry into legislative motive relevant in some constitutional cases, the clause still would bar a damage action against a legislator for his illicit intent. The clause also would prohibit requiring legislators themselves to defend a suit seeking to invalidate enacted legislation, despite the relevance of their motives in such an action. The voluntary choice of legislators to intervene as defendants, without testifying, in actions challenging the constitutionality of a statute should in itself have little effect on the applicability of the privilege. See infra notes 394-98 and accompanying text. Furthermore, the imposition on legislative time, energy, and attention when a court attempts to ascertain legislative purpose would be much less intrusive than if legislators were party defendants.

self is justified; the Supreme Court correctly has recognized that any threat to legislative autonomy from either the inquiry or the use of the evidence is subordinate to the judiciary's obligation to review. Numerous courts have made proper use of decisionmakers' statements made both in the course of deliberative proceedings and in other circumstances to infer unconstitutional motivation.

In addition to creating pressure to respond, the compelled production of internal legislative history also may impinge on legislators' legitimate interests in time and confidentiality. Lower echelon legislative employees, however, nearly always will be responsible for searching for and copying documents, delivering them to court, and laying a foundation for their admission in response to a subpoena. Thus, the speech or debate clause should not bar disclosure of these materials simply to protect the legislators' interest in being free from time constraints. The necessary protection of legislators' time, when they themselves perform the tasks necessary to respond to subpoenas for documents, need not be provided by an absolute privilege but may be accomplished by a qualified privilege and by the various rules of civil procedure that guard against burdensome demands for the production of evidence.

The Supreme Court never has considered whether the speech or debate clause protects the confidentiality of congressional deliberations. Those courts that have addressed the issue, however, generally have concluded that the speech or debate clause does not protect the confidentiality of legislative processes. Thus, when the disclosure of confidential congressional records


282. See Powell v. McCormack, 395 U.S. 486, 505 (1969); Kilbourn v. Thompson, 103 U.S. 168 (1881) (allowing actions to proceed against legislative functionaries despite the time and energy that would have to be expended in their defense).

283. See infra notes 298-302 and accompanying text.

284. See, e.g., FED. R. CIV. P. 26(b)(1), 26(c) & 30(d). At least one court has held that the safeguards against unduly burdensome discovery in the Federal Rules of Civil Procedure protect legislators' time interests in a motivation analysis case. See May v. Cooperman, Civ. No. 83-89 (D.N.J. March 14, 1983) (denying plaintiffs' motion to compel answers to interrogatories and granting interveners' motion to quash notice of depositions).

285. See, e.g., Paisley v. CIA, 712 F.2d 686, 697 n.51 (D.C. Cir. 1983) ("[The speech or debate clause is designed to protect against direct interference with the activities of legislators; it is not intended to protect the mere confidentiality of their materials."); In re Grand Jury Investigation, 587 F.2d 589, 596-97 (3d Cir. 1978); United States v. Helstoski, 576 F.2d 511, 523 (3d Cir. 1978); In re Grand Jury Proceedings (Ciantrani), 563 F.2d 577, 584 (3d Cir. 1977) ("The privilege is not one of nondisclosure, like that of husband and wife, or lawyer and client, because in most instances the legislative act or utterance is already a matter of public record easily introduced in a court."); In re Possible Violation of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211 (D.D.C. 1980); cf. In re Grand Jury Impaneled, 541 F.2d 373, 377 (3d Cir. 1976) (rejecting contention that state judiciary could withhold records filed with it from federal grand jury scrutiny). But see United States v. Ehrlichman, 389 F. Supp. 95, 95-97 (D.D.C. 1974) (disclosure of transcript of legislative deliberation barred by speech or debate clause), aff'd on other grounds sub nom. United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977); Note, supra note 189, at 1286 n.30 (confidentiality should be
realistically would not interfere with legislative independence, the clause should not provide an absolute bar to their discovery and admissibility. When disclosure of confidential legislative documents would threaten legislative autonomy, the clause probably should protect against such disclosure, to the extent that the legislative conduct revealed is not itself being reviewed by the court. The confidentiality of legislative deliberations, however, cannot be absolute when the court is reviewing those deliberations to determine whether illicit motives affected their outcome. Therefore, legislative documents that expose Congress' deliberations should be disclosed to the extent necessary to review properly those deliberations.

A court should compel the disclosure of congressional records more readily than the testimony of legislators, since the former involves only the inquiry into what the court is obligated to review, without subjecting legislators to any additional intimidation from public cross-examination.

The voluntary testimony of legislators or third parties as well as the comp-

aspect of speech or debate clause). Rather than threatening the functioning of the legislature, disclosure, even if compelled in many instances, may help the legislature to fulfill its obligation to inform the public about crucial aspects of government and national affairs. See In re Grand Jury Investigation, 587 F.2d at 597 (“[T]o the extent that the Speech or Debate Clause creates a testimonial privilege as well as a use immunity, . . . [i]t is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited tolerance for secrecy.”). For a system of self-government to be viable, the people must be fully informed about their government so that they may exercise meaningfully their right to vote and to “free public discussion of the stewardship of public officials.” New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

287. See, e.g., Paisley v. CIA, 712 F.2d 686 (D.C. Cir. 1983) (documents “intimately related to a Congressional investigation” were sought through a request to third parties pursuant to the Freedom of Information Act, and were held not privileged under the speech or debate clause). In Paisley the court concluded that because the suit did not involve an individual member of Congress and did not threaten to interfere with ongoing legislative activity, the speech or debate clause was inapplicable. The court, however, noted:

Even if this suit did present a direct challenge to the Congressional investigation into Paisley's death (which it does not), that fact alone would not shield Congress' action from judicial scrutiny: “the Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute.” United States v. American Telephone & Telegraph Co., 567 F.2d 121, 129 (D.C. Cir. 1977).

Id. at 697 n.50.

288. See supra notes 230-34 and accompanying text.

289. Whether congressional records are absolutely privileged from disclosure under the speech or debate clause depends on the same general considerations that govern the scope of the testimonial privilege. Although Congress frequently has asserted a privilege not to submit to subpoenas for documents in its possession, in most cases Congress has authorized the disclosure.

Professor Kaye has made an excellent and exhaustive analysis of the issues involved in the disclosure of congressional documents in two companion articles: Kaye, supra note 281, and Kaye, supra note 85. Noting the virtual absence of judicial precedent on this question, Professor Kaye suggests that the speech or debate clause creates an absolute privilege of nondisclosure of legislative documents. Id. at 571. He derives this suggestion from the conclusion that the clause absolutely protects legislators from compelled “questioning.” Id. Although Kaye's conclusion is at odds with that of this Article, he did not consider the applicability of the speech or debate clause to cases in which the court already had determined to review the constitutionality of legislative deliberation. Thus, within the context of his limited inquiry, Professor Kaye is correct. As this Article demonstrates, however, when the court inquires into the validity of legislative deliberation, both testimony and the disclosure of documents should be compelled by the court to the extent necessary for its review. Furthermore, the differences between compelled disclosure of documents and compelled testimony suggest that courts should be more willing to order production of the documents. See infra note 412 and accompanying text.
pelled testimony of legislators or disclosure of documents also may risk revealing confidential congressional communications. Although legislators have a legitimate interest in preventing the disclosure of such communications, the speech or debate clause never has protected that interest absolutely, nor should it, when the court is reviewing the legislators' actions. A qualified privilege derived either from the speech or debate clause or directly from the doctrine of separation of powers, however, should protect the confidentiality of legislative communications. This privilege, like that recognized by the Supreme Court for the executive branch in *United States v. Nixon*, should balance Congress' need for secrecy against a litigant's particularized need for evidence. Even congressional records and third-party testimony that reveal confidential information should not be absolutely privileged from disclosure.

It is more difficult to determine whether and under what circumstances a court properly might compel a legislator to testify about the motivations underlying a legislative action. Compelled testimony requires a greater expenditure of a legislator's time and potentially a greater exposure of legislative deliberations than other modes of proof. Compelling testimony also may be sufficiently coercive to violate separation of powers principles. Moreover, subjecting legislators to cross-examination in court about the motives that prompted a legislative act seems to contradict the literal prohibition of the clause. For the same reasons underlying proper judicial inquiry into motive, however, testimony of legislators should be compelled to the extent necessary for judicial review.

Judicial review of the motives of legislators threatens legislative independence tremendously. Determining the constitutionality of a controversial law by an inquiry into the motives of the lawmakers who enacted it must have a marked effect on legislative deliberations. Motivation analysis probably influences not only legislators' debates but also their votes. For example, some legislators surely will refrain from supporting a law that they otherwise would favor to avoid the possibility of having their motives characterized by the courts as racially discriminatory. Such inquiry was prohibited for much of this country's

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290. The applicability and scope of a privilege for confidential congressional communications is beyond the scope of this Article. Moreover, even if such communications were absolutely privileged from disclosure, decisionmakers could continue to provide a broad range of probative evidence to establish unconstitutional purpose. See infra notes 540-49, 577-81 and accompanying text.

291. See Note, supra note 189, at 1286 n.30.

292. See Kaye, supra note 85, at 576-79; supra notes 208-09 and accompanying text.


294. For example, when nonprivileged sources of evidence are available to litigants, a court should not compel disclosure of confidential communications. See infra notes 606-19 and accompanying text. Conversely, when communications constitute state secrets, they should be protected absolutely from disclosure, regardless of a litigant's need for the information. See, e.g., United States v. Reynolds, 345 U.S. 1 (1953); see also infra note 357 and accompanying text (balancing need of the litigant for information against harm that disclosure will cause government).

295. When a third party has heard an ostensibly confidential communication, the privilege for confidentiality may have been waived. See infra note 404 and accompanying text.

296. No analytical differences exist under the speech or debate clause privilege among compelling a decisionmaker to testify about his own motivations, those of fellow decisionmakers, or those of the decisionmaking body as a whole. Each type of testimony will have a different probative value and resulting degree of intrusion that may affect the applicability of an implied privilege.
The speech or debate clause arguably prohibits the compelled testimony of legislators about motive because such testimony offends either or both of two interests that the clause was intended to protect: freedom from time-consuming distraction and freedom from intimidation. Freedom from distraction, however, never has been considered sacrosanct under the speech or debate clause. Legislators have no general immunity from service of process, whether as a defendant or witness.298 Even when the clause is potentially applicable, legislators have not been "absolved of the responsibility of filing a motion to dismiss,"299 or of demonstrating that the privilege applies to the particular circumstances. More importantly, the Supreme Court has not held that legislators or their aides are protected against distraction from their official duties when review of the underlying conduct itself is proper,300 and the courts consistently have compelled the testimony of close legislative aides not only when the activity was reviewable by the courts, but also to assist the courts in determining whether the activity was reviewable.301 Only when the Court has determined that the requested review of legislative action is prohibited by the clause (and thus, the doctrine of separation of powers) has the Court cited the threat to legislators' time as a rationale for the prohibition.302 It therefore is apparent that the clause does not protect the time of legislators per se, but rather guards against the chilling effect on legislative behavior that could result from judicially imposed distractions, which

297. See supra notes 51-55 and accompanying text.

298. The Supreme Court has stated that a member of Congress may be served with process as a defendant in a civil action, Long v. Ansell, 293 U.S. 76, 82-83 (1934), and as a defendant or witness in a criminal case, Gravel v. United States, 408 U.S. 606, 626 (1971). See supra note 85.

299. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 511 n.17 (1975). The Eastland Court, however, noted that the interests underlying the clause require courts to treat such motions in an expedited manner. Id.


301. See, e.g., United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1270 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1975). In Eastland plaintiffs had moved in the trial court to compel the Senate subcommittee counsel to give testimony. The Senate passed a resolution, S. Res. 478, 91st Cong., 2d Sess., 116 CONG. Rec. 36378 (1970), authorizing the counsel to testify only about matters of public record. Plaintiffs moved to compel additional testimony and the district court denied the motion. The United States Court of Appeals for the District of Columbia Circuit reversed, concluding that the trial court should consider the extent to which it should require the counsel to testify about nonlegislative conduct, which the court properly could review.


This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry.

Id. at 511.
conceivably might cause legislators to alter their behavior to avoid the possibility of burdensome demands on their time.

The extent to which compelling testimony of members of Congress about legislative purpose will chill legislative independence is debatable. As evidenced by the reported decisions, nearly all the legislators and administrative decisionmakers who have been subpoenaed to testify about the purpose for official action have not claimed the privilege. Although decisionmakers might not consider such testimony intrusive, compelled testimony can seriously chill legislative action and debate. It has the potential to be significantly more intrusive than the judicial inquiry into motive itself. Subjecting members of Congress to cross-examination about the constitutionality and propriety of their reasons for official action could be much more intimidating than using less confrontational sources of evidence.

When separation of powers principles require the courts to review the constitutionality of enacted legislation, however, any resulting threat to legislative independence is subordinate to the necessity for review. The only reason not to compel testimony is that it would pose an even greater threat to legislative autonomy. The courts, once having accepted their obligation to review legislation, however, never have balanced their commitment against the possible threat to legislative independence. At that point, legislative activity is subject to “questioning” by the courts because the entire basis for the speech or debate clause privilege—protection from the threat to legislative autonomy—has been considered as part of the court’s initial decision to review. Thus, that one mode of proving legislative purpose intimidates legislative freedom more than others will not reverse the balance dictated by the Constitution’s separation of powers. Indeed, the mode of proof most intimidating to legislators often is that which is most probative in establishing unconstitutional purpose, but unquestionably that intimidation does not justify prohibiting the most probative sources of evi-

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303. The author has discussed this question with many attorneys who would have been likely to have confronted it. They have confirmed that decisionmakers claim the privilege infrequently in motive cases.

304. In Harris v. McRae, 448 U.S. 297 (1980), Representative Henry Hyde was served with a subpoena duces tecum in an effort to prove that a purpose of the Hyde Amendment, which drastically limited medical funding for abortions, was to establish a particular religious viewpoint in violation of the First Amendment. Hyde did not move to quash the subpoena and allowed himself to be cross-examined about the purposes of the amendment. It is doubtful that legislators do not invoke the speech or debate clause because they are not aware of it or believe that it is inapplicable. It is more likely that they welcome public exposure and believe that their own verbal and argumentative skills will protect their personal and institutional interests.

305. Even if decisionmakers fail to claim the privilege because they fear appearing to have “something to hide,” allowing an absolute privilege to refuse to testify would not wholly alleviate this issue. Because decisionmakers can waive their privileges, see infra notes 391-93 and accompanying text, such an appearance of impropriety still would exist. Thus, the nearly universal failure to claim the privilege probably reflects, to some degree, legislators’ belief that their independence is not threatened.

306. To the extent that the compelled testimony of members of Congress would not intrude on legislative independence, however, barring the testimony would not serve any purpose. Thus, when the degree of interference with legislative autonomy is minimized, courts should be less willing to recognize the privilege.

307. Legislators often probably would prefer compelled testimony to the evidentiary use of remarks made to third parties or in the heat of legislative debate. In addition, there will be many
instances in which legislators will welcome the opportunity to testify to rebut other evidence of unconstitutional motive and, therefore, will not claim the privilege. See supra notes 303-04.

308. Numerous evidentiary privileges, such as the attorney-client privilege or the fifth amendment privilege against self-incrimination, exclude particular sources of proof but not other sources for the same facts. Such prohibitions protect certain societal and constitutional interests that compelled disclosure would harm. In the context discussed in the text, however, the court already has considered and overridden the interests underlying the privilege by determining that the actions and motives in question are subject to judicial review. With these other privileges, the actions and motives of protected witnesses and parties also are subject to judicial review, but in finding that review appropriate, the court does not consider the interests underlying the privileges. Thus, unlike the situation in the text, it must consider those interests independently when a party raises any evidentiary privilege.

309. If the courts accepted the foregoing conclusion that the speech or debate clause does not provide legislators an absolute privilege to refuse to testify about legislative purpose, and legislators found that to be overly intrusive, Congress may well have the power to create its own evidentiary privileges. See Fed. R. Evid. 501 ("Except as otherwise required . . . Act of Congress . . . the privileges of a witness . . . shall be governed by the principles of the common . . .") (emphasis added). If Congress does have that power, the courts should feel less trepidation about compelling members of Congress to testify about legislative acts and motives. As the Supreme Court noted analogously in Brewster:

We . . . see no substantial increase in the power of the Executive and Judicial Branches resulting from our holding [that a legislator's promise relating to a legislative act in return for a bribe can be prosecuted]. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its members from the ambit of federal bribery laws . . . .

Brewster, 408 U.S. 501, 524 (1971). Exempting legislators from statutory requirements as in Brewster is quite different from creating a statutory privilege that realistically could foreclose judicial review of the constitutionality of certain laws. Cf. Ammerman v. Hubbard Broadcasting, 89 N.M. 307, 551 P.2d 1354 (1976) (under New Mexico Constitution, journalism privilege and other evidentiary rules cannot be imposed on courts by legislature); Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Ga. L. Rev. 125, 167 (1973) (If Congress attempted to impose proposed amendments concerning judicial notice or to require adjudication according to evidentiary rules deemed by the court to be unjust, it might be infringing on the constitutional grant of judicial power.). Such a statutory privilege may conflict with the doctrine of separation of powers for much the same reasons as would interpreting the speech or debate clause as an absolute evidentiary privilege.

Similarly, Congress might seek to exempt its members from the contempt power of the lower federal court. The source of the judicial contempt power to punish persons who disobey process or insult the courts is not entirely clear. It does stem, in part, from a practice employed by the English Crown and court. Filtering its way into the American judicial system, the contempt power now often is labelled an "inherent ability" of the courts and has been substantiated further through various legislative acts such as the Judiciary Act of 1789 (giving federal courts the power to punish by fine and imprisonment) and the Federal Rules of Civil (Fed. R. Civ. P. 45(f)) and Criminal Procedure. (Fed. R. Crim P. 17(g)). See R. Goldfarb, The Contempt Power 20 (1963). Congress perhaps could limit the scope of judicial contempt statutes to exclude members of Congress. State legislatures have limited by statute the contempt power of courts. Id. at 37.

Alternatively, Congress arguably could remove the contempt power, against members of Congress, from the lower federal courts by limiting their jurisdiction. In that event even if a legislator were ordered by the court to testify, the order would be unenforceable. See generally Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895 (1984); Hart, The Power of Congress to Limit the Jurisdiction of
The Supreme Court recognized the relevance of legislative purpose partly to
protect laws from being invalidated simply because of their effects.\textsuperscript{310} One of
the reasons that the Court viewed motivation analysis as necessary is that legis-
lators have become sophisticated enough to obscure the true purposes underly-
ing legislative action.\textsuperscript{311} As motivation analysis becomes more common in
constitutional adjudication, legislators are even more likely to shape the legisla-
tive history of a statute to present an acceptable public appearance.\textsuperscript{312} This pro-
cess only serves to increase the importance of compelled testimony and
discovery as aids to the courts in determining motive.

Members of Congress, however, should not always be subjected to judicial
intrusion in motive cases. The courts' interference with legislative independence
is justified only to the limited extent necessary for the courts' review. Legislators
should be privileged to refuse to testify and submit to discovery about motive
except when other evidence of legislative purpose is unavailable and the evidence
from the compelled testimony or discovery significantly assists the plaintiff.\textsuperscript{313}

power to limit the jurisdiction of lower federal courts from Article III \textsection{1} of the Constitution, which
establishes Congress' ability to create these courts. Congress has sought to limit the jurisdiction of
the lower federal courts over certain controversial issues such as busing and school prayer. \textit{See}, e.g.,
Eisenberg, \textit{Congressional Authority to Restrict Lower Federal Court Jurisdiction}, 83 \textit{Yale L.J.} 498
this Congressional power to withdraw selectively jurisdiction from the federal courts has been up-
held by the Supreme Court, \textit{see Ex Parte McCord}, 74 U.S. (7 Wall) (1868), this power is not
unlimited. \textit{See}, e.g., Hart, \textit{supra}; Sager, \textit{The Supreme Court Term–Constitutional Limitations on
Congress' Authority to Regulate the Jurisdiction of the Federal Courts}, 95 \textit{Harv. L. Rev.} 17 (1981);

310. \textit{See}, e.g., \textit{Washington v. Davis}, 426 U.S. 229, 245-48 (1976); \textit{supra} notes 60-66 and accom-
panying text.

\textit{supra} notes 221-23 and accompanying text.

312. This process already has evolved with statutory construction. Knowing that the courts will
look to legislative history in interpreting a statute, it is common for legislators to "manufacture"
legislative history, not only in debate but by postdebate insertions into the \textit{Congressional Record}. \textit{See}
J. \textit{Morehead}, \textit{supra} note 276, at 142-44. Because the chilling effect on legislative debate is far
greater in motivation-analysis cases than in statutory construction ones, legislators probably will
make great efforts to prevent the courts from finding illicit purpose. Not only will legislators with
illicit motives attempt to mask them, legislators with benign intent also may modify their debate for
fear of judicial misinterpretation.

313. If decisionmakers refuse to testify or produce records after the court orders them to do so,
the court has a number of options for persuading them to comply or punishing the continued
disobedience of its order. Courts have imposed issue-preclusive sanctions against the government when,
as a party, it has refused to obey an order for the production of relevant material. \textit{See}, e.g., \textit{Smith v.
Schlesinger}, 513 F.2d 462, 467 (D.C. Cir. 1975). Similarly, when a court orders disclosure of the
identity of an informant over the prosecution's claim of privilege and the informant does not appear,
the court's decision whether to suppress evidence, when the issue is probable cause for an arrest or
search, or to dismiss the prosecution, depends on whether the government made reasonable efforts to
secure his attendance. \textit{See}, e.g., \textit{United States v. Nutile}, 550 F.2d 701, 703-04 (1st Cir. 1977); \textit{United
States v. Hart}, 546 F.2d 798, 799-801 (9th Cir. 1976), \textit{cert. denied}, 429 U.S. 1120 (1977); \textit{United
States v. Cervantes}, 542 F.2d 773, 775-76 (9th Cir. 1976). Such sanctions most often will be inappro-
priate when the court is considering the constitutionality of legislative and administrative decisions.
\textit{See infra} note 410.

Although it is not settled, courts should be able to enforce their orders against decisionmakers
President could be held in contempt was unresolved and "could engender . . . protracted litiga-
tion"). Presumably, administrative decisionmakers who may be sued directly for an injunction have
This balance can be best achieved through a qualified privilege that balances the degree of intrusion into legislative independence against the need for and probative value of legislators' testimony.\textsuperscript{314}

B. Administrative Privileges

Courts also have recognized various privileges protecting administrative decisionmakers from civil damage actions, compelled testimony, and the production of documents. The parameters of these privileges are beyond the scope of this Article.\textsuperscript{315} Even if these privileges create absolute immunity from suit for administrative decisionmakers, the preceding analysis demonstrates that decisionmakers still could be compelled to testify and produce documents when such evidence was critical for the courts' effective review of the constitutionality of administrative decisions. The privileges available to administrative decisionmakers, however, probably provide less protection than the speech or debate clause provides legislators. Therefore, courts should compel testimony or the production of documents from an administrative decisionmaker when there is a somewhat lesser need than that required to compel evidence from members of Congress. Even if the speech or debate clause absolutely barred compelling testimony from members of Congress, administrative and lower-level legislative decisionmakers should be entitled to only a qualified evidentiary privilege.

\textsuperscript{314} See infra notes 406-629 and accompanying text.

Although members of Congress are protected by the speech or debate clause, no explicit constitutional privilege protects administrative or executive officials against suit. Nevertheless, the Supreme Court consistently has granted some form of immunity to executive officials from suits for damages. The Court has recognized an implied constitutional immunity that absolutely prohibits civil damage actions against the President for acts within the "outer perimeter" of official presidential responsibility. The Court also has extended an absolute immunity from civil damage actions to federal and state executive officials engaged in prosecutorial, adjudicative, or legislative functions, reasoning that officials who perform especially sensitive functions must be protected absolutely from threats to their independence. The function performed by the official, not his mere status, however, controls the quality of the immunity granted. Thus, the same official might be absolutely immune when performing some governmental actions but not others. The Supreme Court has applied this functional approach generally and extended absolute immunity to lower echelon officials engaging in actions deemed worthy of protection.

316. In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court recognized a qualified executive privilege protecting against the disclosure of presidential communications. The Court said the privilege was "rooted in the [Constitutional doctrine of] separation of powers." Id. at 708. Similarly, in Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982), the Court cited separation of powers concerns in holding that the former President was absolutely immune from civil suits challenging his official acts.


318. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). This absolute immunity from civil suit challenging actions within the "outer perimeter" of presidential responsibility encompasses civil immunity beyond that which the speech or debate clause affords members of Congress. Legislators are protected only for actions "essential to legislating," not those merely related to the legislative process. See supra note 94 and accompanying text.

319. See Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (State prosecutors possess absolute immunity against challenges to the initiation and pursuit of prosecution.); Butz v. Economou, 438 U.S. 478, 508-12 (1978) (recognizing that absolute immunity applies to Agriculture Department officials whose job responsibilities are very similar to those of criminal prosecutors).


321. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979) (nonelected employees of bi-state agency have absolute immunity from federal damage action for legislative functions). One commentator has criticized this extension of absolute immunity from liability under § 1983 as unwarranted. See, e.g., Note, A New Perspective, supra note 315. The Court also has extended absolute immunity to state supreme court justices, acting in their legislative capacity in promulgating the state code of professional responsibility. See Supreme Court v. Consumers Union, 446 U.S. 719, 734 (1980).


323. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), however, the Court recognized the President's constitutional status as a factor requiring absolute immunity. Id. at 749-50; see also Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of "absolute immunity." ").

324. See, e.g., Forsyth v. Kleindienst, 599 F.2d 1203, 1214-15 (3d Cir. 1979) (prosecutor is not absolutely immune when acting in capacity of administrator or investigative officer).

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, however, the Court explicitly left open the question whether government decisionmakers performing legislative functions at the local level should be afforded absolute immunity from federal damage claims.

The Court has refused to extend absolute immunity to officials engaged in less sensitive functions. It has granted only a qualified immunity from damage actions to cabinet officials, presidential advisors, governors, and other officials performing discretionary functions that the Court concluded did not merit absolute immunity. Furthermore, the Court has not granted to any executive or administrative official, including the President, immunity from injunctive or declaratory relief, and most executive or administrative officials generally are not immune from criminal prosecution.

Even if local administrative decisionmakers acting in a legislative capacity, such as members of municipal zoning boards or school boards, are immune from damage suits, they may be sued for equitable relief. Moreover, many decisionmakers whose motives are relevant in constitutional cases will not be acting in a capacity that triggers absolute immunity from damage actions. Thus, the
immunity afforded administrative decisionmakers is significantly less than the absolute immunity that the speech or debate clause provides members of Congress. This difference appropriately embodies separation of powers principles; although enacted legislation may be challenged by suing enforcement officials, administrative decisionmakers often are responsible both for "legislating" and enforcing their decisions. Unless those decisionmakers could be sued, at least for injunctive relief, the constitutionality of their official actions might be insulated from judicial review. To the extent that administrative officials can be sued for injunctive relief or damages for the alleged violation of constitutional rights, the absence of immunity must suggest that as defendants to the litigation they generally are not privileged to refuse to give relevant testimony, submit to discovery, or produce documents. In the absence of immunity from suit, it is difficult to envision an evidentiary privilege that would protect absolutely administrative decisionmakers from testifying.

The Supreme Court has expressed a reluctance to inquire into the mental processes of administrative decisionmakers. In United States v. Morgan plaintiff challenged certain rate orders that the Secretary of Agriculture had issued. At trial the Secretary was examined at length about the process by which he made his decision, including the manner and extent of his study of the record and his consultation with subordinates. The Supreme Court stated that the Secretary should not have been questioned because his deliberations were functionally equivalent to those in a judicial proceeding. Even if this reluctance is characterized as a privilege of administrative decisionmakers to refuse to testify

first amendment rights. The Court analyzed the school board's motives to determine whether plaintiff's exercise of first amendment rights affected the board's decision.

337. The Supreme Court has recognized explicitly that alternative remedies may check excesses of official power in its immunity cases. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731, 757-58 (1982) (noting that formal and informal remedies exist to protect public against abuse of absolute immunity by President); Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

338. See, e.g., United States v. Morgan, 313 U.S. 409, 422 (1941); United States v. American Tel. & Tel. Co., 524 F. Supp. 1381, 1387 (D.D.C. 1981). As the court noted in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), aff'd on opinion below sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (per curiam), cert. denied, 389 U.S. 952 (1967): "This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others . . . ."

339. 313 U.S. 409, 422 (1941).

340. Id. at 422. The Court concluded:

The Court, however, has stated that a strong showing of bad faith or improper behavior by administrative officials would justify inquiry into their mental processes even if administrative findings made at the same time as the decision are available to the court. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); see also United States ex rel. West v. Hitchcock, 205 U.S. 80, 85-86 (1907) (court cannot inquire into mental processes of Secretary of Interior);
about their mental processes, the Supreme Court has concluded that decisionmakers may be examined about their deliberations when necessary for effective judicial review. In *Citizens to Preserve Overton Park v. Volpe* the Court held that the Secretary of Transportation could be compelled to explain his actions in the absence of administrative findings that would disclose the manner in which he construed the evidence before him in authorizing the routing of an interstate highway through a public park. Since *Overton Park*, numerous lower courts have compelled the testimony of administrative decisionmakers and the production of administrative documents when the courts considered such evidence necessary for an adequate review. Because administrative deci-

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341. In practice, the courts have refrained from probing the deliberative processes of administrative decisionmakers only to the extent of a qualified privilege that "is but 'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies." Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW § 11.06, at 63 (1958)).


343. *Id.* at 420; cf. Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280, 281-84 (1955) (testimony regarding factors Board of Immigration Appeals considered in refusing to grant petitioner's application to suspend deportation).

344. The "policies supporting the privilege must be balanced by the Court's obligation to truth-seeking and full disclosure, keeping in mind that the deliberative process privilege is a qualified privilege, to be applied as narrowly as possible, consistent with efficient administrative operations." Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 43 (N.D. Tex. 1981). Thus, lower courts have permitted discovery and compelled testimony about mental processes of administrative agency decisionmakers in a number of circumstances. First, "[w]hen there is 'such a failure to explain administrative action as to frustrate effective judicial review,' the court may 'obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary . . . .'" Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982) (citing Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (per curiam)); see also Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981) (noting that court may look beyond record to discover rationales for agency decisions if required for complete judicial review); Texas Steel Co. v. Donovan, 93 F.R.D. 619, 621 (N.D. Tex. 1982) (even if complete record is before court, plaintiff may conduct discovery beyond record if necessary to explain reasoning of agency's decision) (dictum); *In re Department of Energy Stripper Well Exemption*, 520 F. Supp. 1232, 1269-70 (D. Kan. 1981) (permitting depositions of primary decisionmakers to determine rationale for their decision).


Third, even if an administrative record appears to disclose the reasons for the challenged decision, the decisionmakers may be deposed if bad faith or improper motivation is shown. See, e.g., Public Power Council v. Johnson, 674 F.2d 791, 795 (9th Cir. 1982) (deposition of decisionmaker permitted on allegation of bad faith); Abbott Laboratories v. Harris, 481 F. Supp. 74, 78 (N.D. Ill. 1979) ("To conclude otherwise would be an abandonment of any meaningful judicial protection against arbitrary administrative action."). Thus, in motive cases, perhaps a plaintiff, as a matter of course, should be permitted to depose and call to the stand administrative decisionmakers who, the plaintiff can demonstrate—through independent evidence—acted for an illicit purpose. See *Brown v. City of Newark*, No. A-4958-82T4 (Sup. Ct. N.J. 1982). In *Brown* plaintiffs sought to demonstrate that a municipal council had enacted an antipeddling ordinance for the improper purpose of protecting local business interests from competition. See *id* at 1-2. The court initially prohibited deposing council members about their reasons for taking the challenged action, but ultimately per-
sionmakers are protected from questioning only about deliberative processes, when those processes themselves are the subject of the court's inquiry, there should be no privilege.

The Arlington Heights Court also suggested that privilege will not always bar the testimony of administrators and legislators about the purpose of official action. The Court's immediate reference to United States v. Nixon may indicate that competing interests should be balanced to determine whether a government official must testify. Therefore, as the preceding section concluded with regard to legislators, and as the Court has determined with regard to administrative decisionmakers, when the acts of decisionmakers are subject to judicial review and their motives are relevant to the court's inquiry, decisionmakers are not absolutely privileged to refuse to testify about the purpose of the challenged action. Rather, as with legislators, administrative officials should be privileged to refuse to give evidence of motive only to the extent that such evidence is unnecessary for the court's proper review.

Because the underlying privilege or immunity for administrative decisionmakers is less absolute than the speech or debate clause, however, a lesser showing of need should be required before the testimony is deemed necessary.

The Court has recognized additional privileges that protect against the

347. See infra notes 598-605 and accompanying text. In Nixon the Court concluded that whether the President's qualified privilege to refuse to disclose confidential communications applies is determined by balancing the need for the evidence against the threat of intruding on the function of the executive branch. Nixon, 418 U.S. at 703-13. Although Nixon considered only a privilege protecting against the disclosure of documents, Arlington Heights suggests an extension of the qualified privilege to testimonial evidence. Arlington Heights, 429 U.S. at 268. At least one lower court has concluded that the plaintiffs could depose former President Nixon in a civil damage action against him and other government officials for illegal wiretapping of plaintiffs' telephone. See Halperin v. Kissinger, 401 F. Supp. 272, 274 (D.D.C. 1975). Halperin was decided prior to Nixon v. Fitzgerald, 457 U.S. 731 (1982), however, which held the former President to be immune from civil damage suits for action taken within the "outer perimeter" of his official duties. Whether illegal wiretapping constitutes official action for which the former President would be immune is another question.

348. Overton Park's admonition that "such inquiry into the mental processes of administrative decisionmakers is usually to be avoided," Overton Park, 401 U.S. at 420, essentially states this principle. When such examination is unnecessary for the court's review, the privilege applies, and when it is necessary, as for example in Overton Park, because no formal record existed, direct inquiry is allowed.

349. See generally A. Bickel, supra note 7, at 214 ("Considerations of regard for 'the station' so strong when the Court reviews the work of the legislature, are surely not of the same intensity in the relationship between the Court and administrative officials."). Professor Bickel also has suggested that inquiry into the motives of administrative decisionmakers is more appropriate than the same inquiry into legislative motivation because administrative purpose can be ascertained more readily. See infra notes 622-24 and accompanying text.

350. It is impossible to set meaningful standards for the degree of necessity that is sufficient to overcome a claim of privilege in the myriad potential factual circumstances in the abstract. Thus, even if some decisionmakers are privileged less than others, the appropriate parameters should be developed by the courts on a case-by-case basis.

351. This Article considers only federal documentary privileges. Numerous others have been
disclosure of executive or administrative records containing state secrets,\textsuperscript{352} law enforcement and certain other investigatory files,\textsuperscript{353} inter-\textsuperscript{354} and intra-agency communications connected with policymaking and decisionmaking functions,\textsuperscript{355} and confidential presidential communications.\textsuperscript{356} Of these, only the state secrets privilege is absolute. Whether the others apply is determined on a case-by-case basis by balancing the needs of the litigant for the information against the harm that disclosure will cause the government.\textsuperscript{357} A pressing need for evidence may override even the constitutionally based privilege protecting against the disclosure of confidential communications between the President and his senior aides.\textsuperscript{358} Although all of these privileges potentially may be claimed when little


\textsuperscript{353} The state secrets privilege protects military and diplomatic secrets of the government when a reasonable danger exists that disclosure would reveal "military matters which, in the interest of national security, should not be divulged." United States v. Reynolds, 345 U.S. 1, 10 (1953). Once recognized, the state secrets privilege is absolute, extending even to third parties whom the government may prevent from disclosing the secret. See id. at 7-8; see also Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978) (privilege belongs to United States and can be asserted by United States even when United States not a party); Sigler v. LeVan, 485 F. Supp. 185, 193 (D. Md. 1980) (Once it is established that a state secret exists, the government can prevent litigant from disclosing the secret.); Aspin v. Department of Defense, 453 F. Supp. 520 (E.D. Wis. 1978) (government met burden of showing that information requested from Department of Defense fell within exemption from disclosure under Freedom of Information Act). See generally M. Larkin, \textit{FEDERAL TESTIMONIAL PRIVILEGES} § 5.02 (1984) (discussion of purpose and scope of executive privileges); C. MCCORMICK, \textit{HANDBOOK OF THE LAW OF EVIDENCE} § 107, at 262 (3d ed. 1984) (discussion of common-law privilege for military and diplomatic secrets); J. WEINSTEIN & M. BERGER, \textit{EVIDENCE} 509[1]-[4] (1982) (discussion of Supreme Court Standard 509 concerning privilege for state secrets); J. WIGMORE, \textit{ supra} note 300, § 2378, at 794-96 (discussion of privilege for state secrets and official information); J. WRIGHT & A. MILLER, \textit{FEDERAL PRACTICE AND PROCEDURE} § 2019, at 158-60 (1970) (discussion of privilege for state secrets).

\textsuperscript{354} Although the Supreme Court in \textit{Reynolds} explicitly left open whether the state secrets privilege derived from the Constitution, the Court's recognition in United States v. Nixon, 418 U.S. 683 (1974), that the executive privilege is constitutionally based, see \textit{infra} note 358 and accompanying text, suggests that the state secrets privilege also is constitutionally grounded.


\textsuperscript{358} See United States v. Nixon, 418 U.S. 683 (1974). In \textit{Nixon} the Court concluded that, in the context of a criminal trial, the constitutionally based interest in the availability of all relevant evidence, combined with the prosecutor's demonstrated specific need, overcame the President's quali-
gants seek administrative records in motive cases, the privileges that protect inter- and intra-agency deliberative communications almost always will be implicated.

The privilege applying to inter- and intra-agency deliberative communications or official information protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." This privilege reflects two concerns: encouragement "of open, frank discussion between subordinate and chief concerning administrative action" and protection from judicial interference with the executive branch. It essentially is a documentary counterpart to the testimonial privilege recognized in United States v. Morgan. Exemption 5 of the Freedom of Information Act, which basically exempts from the Act's general requirements of disclosure those intragovernmental opinions and recommendations protected by the common-law privilege, also reflects these


361. See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1967), aff'd on opinion below sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (per curiam), cert. denied, 389 U.S. 952 (1967). The privileges have been stated to derive both from the separation of powers doctrine, see, e.g., Black v. Sheraton Corp. of America, 564 F.2d 531, 541 (D.C. Cir. 1977); Soucie v. David, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971), and from the common law, see, e.g., Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 482 F.2d 710, 717-18 (D.C. Cir. 1973), rev'd, 421 U.S. 168 (1975). It essentially is a documentary counterpart to the testimonial "privilege" recognized in United States v. Morgan, 313 U.S. 409 (1941); see supra notes 338-41 and accompanying text.

362. 313 U.S. 409 (1941).
The courts have imposed three categorial limitations on the official information privilege, both for intergovernmental opinions and recommendations, and exemption 5. First, the privilege does not protect factual information that can be redacted from deliberative materials. Second, the privilege does not cover administrative records created after, rather than before, an official decision is made. Last, when administrative records reveal the "working law" of the agency—the reasons why administrative policy actually was adopted—the privilege does not protect them. Thus, the information in a great number of records, from which the purpose for an administrative action reasonably could be inferred, should be subject to disclosure under existing law. Numerous cases have concluded that the privilege protects against the disclosure of predecisional advisory materials prepared "to assist an agency decisionmaker in arriving at his decision." In those cases, however, the courts were not reviewing the deliberative processes of the administrative bodies to determine whether illicit motives had affected the decisions. As the Supreme Court recognized in Overton Park, when courts are obligated to inquire into the deliberative processes of decisionmakers, those processes cannot remain shielded absolutely.

363. These privileges, as well as those for state secrets and investigatory files, have been substantially affected by the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). FOIA requires disclosure, in one form or another, of virtually every document generated by a federal agency, unless the document is within one of FOIA's nine exceptions. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975). Although FOIA itself does not create or redefine any testimonial or evidentiary privileges, the nine specified exceptions reflect congressional policy as to the common-law privileges paralleling the exceptions. In particular, exemption 5, 5 U.S.C. § 552 (b)(5) (1982), provides that the general disclosure requirement does not apply to "inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency." Because this exemption essentially incorporates the common-law privilege for such information, cases interpreting the parameters of exemption 5 are instructive of the reach of the common-law privilege. See, e.g., EPA v. Mink, 410 U.S. 73, 91 (1973).

364. In addition, courts also have concluded that administrative officials waive the protection of exemption 5 by disclosing information within its scope to outsiders. See, e.g., Cooper v. Department of Navy, 594 F.2d 484, 487-89 (5th Cir. 1979); North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 180-82 (8th Cir. 1978).


367. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-54 (1975). The Sears Court also noted that if any otherwise privileged information is incorporated expressly in a final administrative decision, it no longer is protected from disclosure. Id. at 161; see also Ash Grove Cement Co. v. FTC, 511 F.2d 815, 816-18 (D.C. Cir. 1975) (portions of agency minutes containing policy determinations subject to disclosure); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971) (agency orders and interpretations must be disclosed to prevent development of secret law).

368. See infra notes 509-54 and accompanying text.

369. Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); see also Washington Research Project, Inc. v. HEW, 504 F.2d 238, 249-52 (D.C. Cir. 1974) (consultant's statements exempt from disclosure as part of deliberative process), cert. denied, 421 U.S. 963 (1975); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 603-05 (5th Cir. 1966) (communications between NLRB Regional Director and General Counsel were advisory opinions and exempt from disclosure).

370. 401 U.S. 402 (1971); see also supra note 344 (judicial inquiry into decisionmaking process necessary under some circumstances).
from judicial scrutiny. Rather, they must be disclosed to the extent necessary for effective judicial review.

C. Waiver

To the extent that privileges protect legislative and administrative officials from being compelled to testify about the purpose for an official action, officials should be free to waive those privileges. Decisionmaking bodies should not be permitted to prevent their members from testifying voluntarily either about their own motives or the motives of the body. The courts, however, should set a very high standard for determining when a privilege has been waived voluntarily.

A number of commentators have assumed that individual decisionmakers may testify voluntarily about the purpose for which a governmental decision was made, and numerous decisionmakers have done so without formal objection from the bodies of which they were members. Presumably, the speech or debate and corresponding administrative privileges may be waived to the same extent as all other evidentiary privileges. Generally, an evidentiary privilege can be waived only by the holder of the privilege, or on the holder's behalf by someone with express authority to do so, but never over the holder's objection. There is little consensus, however, on who holds the speech or debate privilege. Congress, the courts, and commentators all have debated whether it resides with the individual legislators or the institution as a whole; no one has considered extensively who holds the analogous administrative privileges.

The purposes underlying the speech or debate and administrative privileges are served most faithfully if both the individual decisionmakers and their respective bodies hold the privileges to the extent that abrogation of the privileges would threaten impermissibly the functional independence of either. In the context of motivation analysis, however, a decisionmaking body generally should not be allowed to prevent its members from testifying voluntarily.

Congressional members, following English precedent, have argued that the speech or debate privilege resides with both individual legislators and the institution. Under this view, the privilege could not be waived without the

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372. See supra note 303.
373. See, e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888); United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979); United States v. Lilley, 581 F.2d 182, 189 (8th Cir. 1978); C. McCORMICK, supra note 352, § 83, at 198 (communicating spouse may waive privilege for marital communications), § 93, at 223 (attorney-client privilege may be waived by client); J. WIGMORE, supra note 300, § 2327 (waiver of marital privilege).
374. See supra note 373.
375. The following discussion therefore will center on the speech or debate clause. The principles set forth, however, apply equally to the administrative privileges discussed previously.
377. See, e.g., 87 CONG. REC. 8933 (1962) (statement of Rep. Celler). Representative Fish was served with a grand jury subpoena, which he presented to the House. In discussing the dual nature of the privilege, Representative Celler stated:
assent of both parties, and thus, an individual legislator could not disclose information if the institution forbade it. Although the Supreme Court has implied that the privilege is primarily personal, it has never decided whether the privilege is held by the individual or the institution. Furthermore, the Court never has had to decide whether an individual can waive the privilege over the body's objection. The Court, however, has faced the opposite question whether the institution can waive the privilege for individual legislators over their objections. This question has arisen several times in the context of indictments of congressmen pursuant to section 201 of title 18 of the United States Code, which makes it a criminal offense for public officials to accept bribes. In each of these cases the government has contended that Congress, in enacting the statute, institutionally waived the speech or debate privilege for individual legislators charged with bribery. Although the Court consistently has declined to resolve this issue, it has expressed its concern that institutional waiver would enable a

[There are two privileges involved: One the privilege of the House and one a personal privilege that is conferred upon the Member . . . If, after the House gives its consent or authority for a Member to testify, then the question becomes one of personal privilege, in contradistinction to the privilege of the House. See also 4 CONG. REC. 1847 (1876); Kaye, supra note 280, at 59-61 (privilege may not be waived without consent of House). Of course, a judicial determination of how this privilege can be waived will prevail over Congress' view. See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Powell v. McCormack, 395 U.S. 486 (1969).

378. See United States v. Brewster, 408 U.S. at 507 (privilege was intended "to protect the integrity of the legislative process by insuring the independence of individual legislators"); see also Coffin v. Coffin, 4 Mass. 1, 27 (1808) (state legislative privilege analogous to speech or debate clause; "the privilege secured by it is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house"); infra note 383.

379. The language of the speech or debate clause suggests that the privilege belongs to individual members of Congress. The courts, however, always have given the clause a functional rather than a literal interpretation. See supra notes 206-08 and accompanying text.

380. Two circuit courts have addressed this question in the context of criminal prosecutions of state legislators. In United States v. Craig, 528 F.2d 773, rev'd per curiam, 537 F.2d 557 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976), a state congressman, indicted for violations of the Hobbs Act, testified before the grand jury and gave statements to other government agencies. When he later moved to suppress his testimony and statements, claiming that they were obtained in violation of the federal and state speech or debate clauses, the government contended that the legislature had waived any protection to which he was entitled. In resolving this issue, a panel of the United States Court of Appeals for the Seventh Circuit noted that because the legislature's independence derives from the independence of its members, the privilege must belong to both the individual legislators and the institution as a whole. Id. at 780. The court therefore concluded that an individual legislator can waive the privilege only to the extent that such a waiver will not threaten the independence of other legislators or the body as a whole. On rehearing en banc, a majority of the full court determined that neither the speech or debate clause nor common-law immunity protected a state legislator being prosecuted for an alleged violation of federal law. United States v. Craig, 537 F.2d 957, 958 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976). In In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977), on the other hand, the United States Court of Appeals for the Third Circuit held that the privilege belonged entirely to the individual legislator rather than to the institution. It thus recognized a personal privilege that individual legislators could claim to exclude evidence of their legislative acts from criminal proceedings. The court emphasized that individual legislators, not the institution, are subject to criminal proceedings and consequently need this privilege to protect themselves in the exercise of their duties.


382. The Court has held only that evidence of legislative acts may not be used against a legislator being prosecuted under § 201. See United States v. Helstoski, 442 U.S. 477, 447 (1979).
Commentators are divided on whether the institution can abrogate the privilege against the will of the individual. Although several echo the Court's concern and assume that Congress cannot strip individuals of the privilege, others have advocated a circumscribed institutional waiver in particular circumstances.

Whether the institution ever should be permitted to waive the privilege for individual legislators is debatable. This issue need not be resolved, however, in the context of motivation analysis. As a practical matter the question will not arise because only the views of the majority of the decisionmaking body that voted to take the challenged action are in issue, and it is highly unlikely that the body would waive the privilege of one of its members who refuses to testify about the purpose of the action. In motive cases the pertinent issue is whether an individual decisionmaker can waive the privilege over the objections of the body. This depends initially on whether the individual can waive the privilege at all, even without objection from the decisionmaking body. The Supreme Court expressly reserved this issue in United States v. Helstoski. Prior to his trial for bribery, Congressman Helstoski testified at grand jury proceedings and produced documentary evidence about his actions. When he later moved to dismiss the indictment against him, invoking the speech or debate privilege, the government argued analogously that the speech or debate clause should not shield any unconstitutional acts on the part of legislators. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 518 (1975) (Douglas, J., dissenting); Doe v. McMillan, 412 U.S. 306, 327 (1973) (Douglas, J., concurring); Tenney v. Brandhove, 341 U.S. 367, 381-83 (1951) (Douglas, J., dissenting).

383. In United States v. Helstoski the Court stated:

We recognize that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause from being "questioned" by the Executive in the courts. The controversy over the Alien and Sedition Acts reminds us how one political party in control of both the Legislative and the Executive Branches sought to use the courts to destroy political opponents.

Id. at 492-93; see also United States v. Brewster, 408 U.S. 501, 563 (1972) (White, J., dissenting) (institutional waiver of speech or debate privilege violates separation of powers).

384. See, e.g., Reinstein & Silverglate, supra note 94, at 1166 ("Congress should not be able to collectively circumscribe the constitutional rights of its individual members."); see also Cella, supra note 94, at 41-42 (legislator who delivers speech inside halls of Congress entitled to legislative privilege); Note, Speech or Debate Clause, 9 SETON HALL L. REV. 861, 874 (1978) (speech or debate privilege is personal, can only be waived by individual congressman); Note, supra note 189, at 1293 n.74 (concern for institutional integrity of legislative branch would limit permissible scope of statutory waiver by entire Congress of speech or debate clause rights). These commentators have viewed the privilege as belonging to individual legislators.

385. Several commentators argue that Congress should be able to waive the speech or debate privilege for legislators who abuse their office or violate the law. If the protection of an individual legislator depends on the will of the institution, he well may be intimidated. See, e.g., Comment, Brewster, Gravel and Legislative Immunity, 73 COL. L. REV. 125, 151-52 (1973) (Congress should be able to specify instances in which a representative can be punished in court for abuse of immunity); Comment, supra note 94, at 816-19 (Congress should permit statutorily private suits against legislators for damages for unconstitutional conduct.); Note, A Statutory Proposal for Case-By-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases, 3 CARDOZO L. REV. 465, 516 (1982) (After congressional investigation reveals that a legislator probably has accepted a bribe, Congress should allow judicial prosecution.) [hereinafter cited as Note, A Statutory Proposal]; Note, The Bribed Congressman's Immunity From Prosecution, 75 YALE L. J. 335, 348-49 (1965) (Courts should be allowed to prosecute Congressmen accused of bribery.) [hereinafter cited as Note, Immunity]. Justice Douglas has argued analogously that the speech or debate clause should not shield any unconstitutional acts on the part of legislators. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 518 (1975) (Douglas, J., dissenting); Doe v. McMillan, 412 U.S. 306, 327 (1972) (Douglas, J., concurring); Tenney v. Brandhove, 341 U.S. 367, 381-83 (1951) (Douglas, J., dissenting).

ment contended that he had waived his right to protection.\textsuperscript{387} The Supreme Court held only that Helstoski's conduct was not a waiver,\textsuperscript{388} and therefore avoided having to decide whether an individual legislator constitutionally can waive the privilege.\textsuperscript{389}

Whether an individual legislator should be able to waive the protections provided by the speech or debate clause should depend on whether such a waiver would support or hinder the fulfillment of the purposes underlying the privilege. The primary function of the privilege is to safeguard legislative independence by preventing the intimidation of individual legislators. Therefore, if legislators voluntarily waive the privilege and Congress does not object to their testimony, the purpose for the privilege will not be infringed since neither the individual legislators nor the institution will have felt sufficiently intimidated to have claimed the privilege.\textsuperscript{390} To the extent an individual's waiver threatens impermissibly the functional independence of the institution, the decision should not be made solely by the individual legislator. Rather, both the individual and the institution should hold the privilege so that either can prevent the waiver and its resulting chill. For example, if a member of Congress waived his own immunity and allowed himself to be a defendant in a suit to enjoin ongoing legislative activities of the body, the body still should be able to invoke its privilege and preclude injunctive relief.

In motive cases, however, a legislator's voluntary testimony about the purpose of an action will not impermissibly threaten the institution, and thus an individual legislator should be free to waive the privilege. When individuals seek

\begin{itemize}
\item \textsuperscript{387} Id. at 490.
\item \textsuperscript{388} Id. at 492; see also infra notes 393-97 and accompanying text (standard governing waiver of speech or debate privilege). The Court did not refer to an earlier hint in United States v. Gravel, 408 U.S. 606 (1972), that individual legislators might be able to waive the privilege. In Gravel, in determining that the privilege extends to a legislator's aide and can be invoked "by the Senator or by the aide on the Senator's behalf," \textit{id.} at 622, the Court had stated in a footnote: "It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator." \textit{id.} at 622 n.13. If the aide's privilege is viewed as merely an extension of the senator's privilege, the legislator similarly should be entitled to waive his own privileges.
\item \textsuperscript{389} Many commentators have argued or assumed that individual legislators, as holders of the speech or debate privilege, can waive the clause's protections. \textit{See, e.g.}, Reinstein & Silverglate, \textit{supra} note 94, at 1169-70; \textit{see also} Oppenheim, \textit{Congressional Free Speech}, 8 \textit{LOYOLA L. REV.} 1, 22 n.80 (1955-56) ("only reasonable" that individual legislator should be able to waive privilege); Note, \textit{supra} note 384, at 884-85 (speech or debate privilege is personal, can be waived only by individual congressman); Note, \textit{supra} note 189, at 1293 n.74 (waiver by individual congressman would seem constitutional).
\item \textsuperscript{390} This point, however, must be tempered by two caveats. First, even though the majority of either house of Congress might not vote to object to an individual legislator's waiver, there could be numerous members of Congress who nevertheless would be intimidated by the individual's waiver and subsequent testimony. In the context of motive analysis, however, not even the objections of the entire institution should prevent an individual's waiver. Second, legislators may feel more threatened by public reaction to their invocation of the privilege than that from their testifying, \textit{see supra} note 305, and therefore waive their privilege despite its intimidating effect. If legislators could claim that it was impossible to waive, or that though they wanted to waive, this pressure would not exist. In reality, however, this pressure probably is quite small or nonexistent. More importantly, because legislators are free, as guaranteed by the first amendment, to speak to the press about the purpose for which an official action was taken, and because such statements would constitute nonlegislative acts unprotected by the speech or debate privilege, \textit{see} Hutchinson v. Proxmire, 443 U.S. 111 (1979), the same pressures also would exist with respect to public accountability.
\item \textsuperscript{391} Moreover, to the extent such testimony may threaten to disclose confidential congressional
to testify voluntarily about their own conduct and motives, the legislative body should not be intimidated and should not be allowed to interfere. The privilege also will not be undermined by allowing legislators to testify about the institution's motivation. Nontestifying legislators have a legitimate speech or debate clause interest only in being protected from the chill resulting from an inquiry into legislative motivation. The Court, however, already has determined that any chill to legislative autonomy resulting from such judicial inquiry is subordinate to the necessity for effective review. Nonprivileged evidence of institutional purpose may not be precluded from use merely because of its chilling effect on legislative behavior. Thus, there is no reason to treat the voluntary testimony of a legislator any differently. Once the threat to the individual legislator who testifies is dispelled by a voluntary waiver, the body is not threatened by this testimony any more than by other equally probative evidence of motive. A legislative body, for example, should no more be able to prevent the voluntary testimony of a legislator about what transpired in legislative debates, than that of a third party who was present during the deliberations. An individual decisionmaker should be entitled to testify about the purpose of an official action regardless of the objection of the decisionmaking body.

The Supreme Court already has determined what standard should govern the validity of a waiver of the speech or debate privilege. In Helstoski the Court held that if a waiver of the speech or debate privilege was allowable, it would require "explicit and unequivocal renunciation of the protection." Concerned with possible judicial encroachment on legislative independence, the Court determined that a more stringent standard of voluntariness than for other rights must be satisfied to waive the speech or debate clause privilege. Thus, a legis-

communications, other legislators may be able to prevent it. See infra notes 399-403 and accompanying text.

392. See United States v. Craig, 528 F.2d 773, rev'd per curiam, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976) (individual can waive privilege to extent that his or her conduct does not threaten independence of other members or of the institution); see also Note, supra note 189, at 1293 n.74 (voluntary waiver should not pose threat to function of clause).

393. When little or no other evidence is available to prove legislative purpose, the voluntary testimony of legislators will be more intimidating. That threat to the independence of the legislature, however, would result from the use of any evidence of illicit motivation without which the court could not properly review. Therefore, this additional threat would not overcome the Supreme Court's implicit determination that a court's obligation to examine motive outweighs the resulting intimidation.


395. The Court stated:


The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities.

Helstoski, 442 U.S. at 491. But see United States v. Craig, 528 F.2d 773, 781 (because privilege does not affect fairness of trial, lesser standard of voluntariness applies) (citing Schneckloth v. Bus-
lator's statements to the press, for example, should not constitute a waiver.\textsuperscript{396} The court should recognize a waiver, however, once decisionmakers testify voluntarily about the purpose of a challenged action.\textsuperscript{397} When decisionmakers testify for either the plaintiff or the government in a motive case, they should have to submit to cross-examination by the opposing party. Moreover, each party should be required in advance of trial to present a list of those legislators who have agreed to testify so that the opposing party will have an opportunity to depose them. When legislators intervene as defendants in an action, without testifying, they should not be deemed to have waived the privilege, but should be permitted to assist the court in adjudicating the constitutionality of an action without putting their motives in issue. Intervenors should be free to argue, for example, about the effect of a challenged action or plaintiffs' standing without renouncing the privilege.\textsuperscript{398}

Finally, determining whether the privileges protecting against the disclosure of confidential legislative and administrative communications are waived entails somewhat different considerations. Generally, evidentiary privileges that protect confidential communications reside with the communicator of the confidence.\textsuperscript{399} Thus, unlike with the speech or debate clause, individual legislators should be able to object to the in-court disclosure of their confidential statements by other legislators or third parties, since only the communicator can waive this privilege. Similarly, only the creator of confidential documents, such as interlegislative and personal memoranda, should be able to waive any privilege protecting them from disclosure. The privilege for documentary evidence generated by Congress as an institution should belong to the body, and Congress as a whole should determine whether to waive it.\textsuperscript{400}

Because waiver of this privilege does not implicate the same separation of powers concerns as waiver of the speech or debate clause,\textsuperscript{401} it need not be governed by the same demanding standard of explicit and unequivocal renunciation. Instead, waiver of the privilege prohibiting the disclosure of confidential legisla-

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396. The court should consider a legislator's willingness to speak publicly about the purpose of an official action in measuring the degree of intrusion that will result from compelled testimony. See infra notes 411-14 and accompanying text.


398. See, e.g., May v. Cooperman, No. 83-89, slip op. at 40 (D.N.J., March 14, 1983) ("I do not think [the legislators] entrance in the case constitutes a complete waiver from their immunity to discovery, but they will be required to provide all discovery which will enable plaintiffs to prepare for trial. If a legislator expects to testify at trial, he will be required to submit to deposition."); cf. United States v. Reynolds, 345 U.S. 1, 12 (1953) (The government's consent to be sued, such as under the federal tort claims act, does not implicitly waive any of its privileges.).

399. See supra note 373.

400. The executive branch possesses analogous governmental privileges protecting confidential communications. See, e.g., United States v. Nixon, 418 U.S. 683 (1974) (executive privilege belongs to President and may be waived by head of agency or chief executive officer responsible for department in question); Roviaro v. United States, 353 U.S. 53 (1957) (informant's identity privilege belongs to government); United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (state secrets privilege belongs to and only can be waived by the government).

401. See supra note 394-98 and accompanying text.
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tive and administrative communications should be determined in the same man-
ner as the waivers of other governmental and individual privileges protecting
confidentiality of communications. Those privileges are waived either by the
holder's voluntary revelation or by his failure to object to his own or another
witness' disclosure when he has an opportunity to object.\footnote{402} Thus, as long as
decisionmaking bodies and individual decisionmakers act reasonably to safe-
guard the confidentiality of their communications, they should not be considered
to have waived their privilege.\footnote{403}

Practically, however, legislators may be unable to prevent colleagues from
disclosing outside of court the legislators' confidential remarks. Generally,
when the nonholder of a privilege discloses the holder's confidential communi-
cations, the holder nevertheless can protect against evidentiary use of the privi-
leged information.\footnote{404} This "use immunity," prohibiting further use against
the holder of the privilege of already disclosed information, ensures that communi-
cation within confidential relationships is not chilled. For example, if a client's
communication to his attorneys could be used against him after the attorney
revealed the information, clients undoubtedly would be less candid with their
attorneys. When disclosed confidences are used against a third party rather than
against the holder of the privilege, however, there would be no such chilling
effect. Once confidential information has been revealed, the holder will not be
harmed further or intimidated by its use in litigation in which he is not
involved.\footnote{405}

\footnote{402. \textit{See}, e.g., United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979) (attorney-client privi-
lege waived when attorney, with client's consent, voluntarily discloses information); United States v.
Lilley, 581 F.2d 182, 189 (8th Cir. 1978) (spousal privilege waived when confidential communication
disclosed by holder); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 460-61 (N.D. Cal. 1978)
(attorney-client privilege waived by voluntary disclosure during discovery); \textit{see also} \textit{Weil} v. Invest-
ment/Indicators, Research & Management, Inc., 647 F.2d 18, 23-25 (9th Cir. 1981) (attorney-client
privilege waived by inadvertent disclosure during discovery); United States v. Dien, 609 F.2d 1038,
1043-44 (2d Cir. 1979) (spousal communications privilege waived by failure to assert it during sup-
pression hearing); United States v. Figueroa-Paz, 468 F.2d 1055, 1057 (9th Cir. 1972) (spousal privi-
lege waived by failure to object to testimony violating privilege); \textit{C. McCormick, supra} note 352,
\S\ 93, at 223-24 (client alone may waive attorney-client privilege).

403. Some courts have found waiver when a privilege holder negligently fails to keep a confi-
dence. \textit{See}, e.g., \textit{In re Horowitz}, 482 F.2d 72, 82 (2d Cir.), \textit{cert. denied}, 414 U.S. 867 (1973); \textit{In re
Cir.) (although presence of third party ordinarily waives attorney-client privilege, presence of client's
father during interview did not waive privilege when parties intended communications to remain

404. For example, the attorney-client privilege still exists even though an attorney voluntarily
discloses the client's confidences out of court. \textit{See} J. \textit{Wigmore, supra} note 300, \S\ 2325, at 632; \textit{see also}
\textit{Fed. R. Evid.} 512 (proposed rule, Advisory Committee Note) ("Confidentiality, once de-
stroyed, is not susceptible of restoration, yet some measure of repair may be accomplished by
preventing use of the evidence against the holder of the privilege. The remedy of exclusion is there-
fore made available when the earlier disclosure was compelled erroneously or without opportunity to
claim the privilege.").

405. J. \textit{Wigmore, supra} note 300, \S\ 2374, at 766 (once informer's identity known, privilege
protecting identity is "merely an artificial obstacle to proof"); \textit{see also} Cooper v. Department of
Navy, 594 F.2d 484, 487-89 (5th Cir. 1979) (privilege is waived once general access to confidential
information has been permitted); North Dakota \textit{ex rel. Olson} v. Andrus, 581 F.2d 177, 180-82 (8th
Cir. 1978) (government waived privilege by disclosing information to private party); Mead Data
Cent., Inc. v. Department of Air Force, 566 F.2d 242, 253-58 (D.C. Cir. 1977) (once government
discloses to outsiders material that otherwise would be exempt from disclosure under the Freedom of
Information Act, government waives right to claim exemption).
The use, however, is not harmless in suits challenging the constitutionality of governmental actions. Regardless of whether administrators and legislators are parties to the action, they have a strong interest in any challenge to the legitimacy of their motives. Such an action not only may disclose evidence of their motives, but that evidence may be a critical factor in the invalidation of their conduct. Invalidation will be based on a finding of unconstitutional intent, and thus the evidentiary use of confidential communications to show such motives, even though those communications already have been disclosed, is likely to intimidate the holder further. Disclosure of confidential legislative and administrative communications by nonholders of the privilege therefore should not waive the holder's privilege when those communications are sought to be used in motive cases.

III. DETERMINING THE CLAIM OF PRIVILEGE

To the extent that privileges protecting against compelled testimony of decisionmakers and disclosure of confidential information are not absolute, courts must use some mechanism to determine whether the privileges apply in specific cases. The procedures employed to facilitate this determination should be designed to expose and balance the competing interests favoring and opposing application of a privilege. These privileges generally help to maintain the separation of powers by guaranteeing the functional independence of the decision-making bodies. In a specific case, however, the degree of intrusion on these governmental interests varies with the type of evidence sought and the manner in which it is presented or discovered.

On the other hand, these interests conflict with the litigants' need to present, and the courts' need to consider, all relevant facts when adjudicating the constitutionality of government action. Thus, the need for the evidence, its relevance and probative value, and the importance of the proof must be balanced against the degree of harm that the government will suffer from the

406. See supra notes 84-370 and accompanying text.
407. Fed. R. Evid. 401 provides that "relevant" evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
408. The probative value of evidence is the extent to which the evidence actually proves the facts sought to be proved; it is the degree to which evidence furnishes, establishes, or contributes toward proof. See C. McCormick, supra note 352, § 185, at 542.
409. The claimant of the privilege generally bears the burden of persuasion that an absolute privilege applies. See, e.g., In re Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983); FTC v. TRW, Inc., 628 F.2d 207, 213 (D.C. Cir. 1980); United States v. Landorf, 591 F.2d 36, 38 (9th Cir. 1978). Thus, the government bears the burden of demonstrating that confidential communications between government officials are within the official information privileges, and thus not subject to categorical exception. See, e.g., Smith v. FTC, 403 F. Supp. 1000, 1016 (D. Del. 1975); United States v. Article of Drug, 43 F.R.D. 181, 190 (D. Del. 1967). Congress also allocated this burden to the government in proceedings under FOIA. See, e.g., National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1025-26 (D.C. Cir. 1978); Ray v. Turner, 387 F.2d 1187, 1191-95 (D.C. Cir. 1978). Commentators have suggested that this allocation in the FOIA suggests that the government should bear the burden even in non-FOIA cases.

It would make little sense to place upon the litigant, whose need for information is immediate and at least presumptively real, the burden of proving his entitlement to it, when Congress has directed that the government bear the converse burden of proving a matter to be
intrusion into decisionmakers' independence or the disclosure of confidential information.

Even if the compelled testimony of decisionmakers about the motive underlying an action will be very intimidating, their privilege to refuse to testify should yield if such testimony is probative and critical to a litigant's case. If exempt from disclosure under the FOIA, where the need of the party seeking the information is not even a factor in his entitlement.


As with an absolute privilege, the party invoking a qualified privilege bears the initial burden of demonstrating that the evidence is within the privilege. Thereafter, the opposing party bears the burden of persuading the court that the litigant's need for the evidence should override the privilege. Thus, in United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court held that when the President claims the privilege, the trial court should treat the material as presumptively privileged and "require the Special Prosecutor to demonstrate that the Presidential material was 'essential to the justice of the [pending criminal] case.'" Id. at 713. Similarly, the criminal defendant who seeks disclosure of an informant's identity bears the burden of showing a specific need for the information. See, e.g., United States v. Whitney, 633 F.2d 902, 911 (9th Cir. 1980), cert. denied, 450 U.S. 1004 (1981); United States v. Pantohan, 502 F.2d 855, 858-59 (9th Cir. 1979); United States v. Toombs, 497 F.2d 88, 93 (5th Cir. 1974).

The Supreme Court has not considered how to allocate burdens under a speech or debate clause claim of privilege. At least one circuit court, however, has concluded that a legislator who invokes the privilege as to information in his sole possession, which the court needs to determine whether his acts are legislative, bears "the burden of going forward and of persuasion by a preponderance of the evidence." In re Grand Jury Investigation, 587 F.2d 589, 597 (3d Cir. 1978); see also In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 213 (D.D.C. 1980) (congressman required to submit index of subpoenaed documents). Placing the burden on the legislators to establish that their conduct was legislative and therefore within the speech or debate clause privilege is consistent with the courts' allocation of burdens for other privileges.

If the courts permit a litigant's need for the evidence to overcome a decisionmaker's claim of privilege, they should adopt such an allocation of burdens. Decisionmakers should bear the initial burden of showing that they are entitled to a qualified privilege. The litigant seeking the evidence then should bear the burden of persuasion that his need for the evidence overrides the privilege.


If a claim of [official information] privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

Courts have exercised each of these options at one time or another. See, e.g., United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) (when government was required to produce exculpatory material, court noted that it could dismiss the action to ensure a fair trial), cert. denied, 429 U.S. 1120 (1977); United States v. Polizzi, 500 F.2d 856, 893-94 (where nondisclosure under the Jencks Act would not result in harmless error, remedies such as striking testimony or calling a mistrial may be invoked), cert. denied, 419 U.S. 1120 (1974); Smith v. Schlesinger, 513 F.2d 462 (1975) (failure on court order to produce documents claimed to be privileged resulted in issue preclusive sanctions against government).

When the government is prosecuting a criminal action, it may not assert a claim of privilege to prevent disclosure of materials relevant to the merits of the defense; it either must waive its privilege or dismiss the prosecution. See, e.g., United States v. O'Connor, 273 F.2d 358, 360-61 (2d Cir. 1959); United States v. Grayson, 166 F.2d 863, 870 (2d Cir. 1948); United States v. Ehrlichman, 376 F. Supp. 29, 35-36 (D.D.C. 1974), aff'd, 546 F.2d 910 (D.C. Cir.); cert. denied, 429 U.S. 1120 (1976). One circuit also has applied this rule when the material claimed to be privileged was relevant for impeachment but not the merits of the defense. See United States v. Beekman, 155 F.2d 580, 583-84 (2d Cir. 1946). This procedure also has been followed in some civil cases in which the government
decisionmakers will not be intimidated by public examination of the specific mo-


Courts occasionally have ruled against the government, as a civil defendant, when a privilege properly prevented the disclosure of relevant evidence. See, e.g., Liuzzo v. United States, 508 F. Supp. 923, 940-41 (E.D. Mich. 1981) (if protection of privileged material deprives plaintiff of material evidence, government is liable on affected issues; hearing necessary to determine whether plaintiff deprived of material evidence). When courts sustain a party's or witness' claim of privilege to refuse to testify or answer particular questions, however, they virtually never impose sanctions, or permit the trier of fact to draw an adverse evidentiary inference. See, e.g., Griffin v. California, 380 U.S. 609 (1965) (fifth amendment privilege prevents prosecutor from commenting adversely on defendant's failure to testify); United States v. Tapia-Lopez, 521 F.2d 582, 584 (9th Cir. 1975); United States v. Black, 497 F.2d 1039, 1042 n.3 (5th Cir. 1974). But see United States v. Tsinjiljinnie, 601 F.2d 1035, 1039-40 (9th Cir. 1979) (when party holding privilege to prevent witness from testifying argues to jury that adversary failed to call witness, court can inform jury that privilege prevented adversary from calling witness).

Three principles can be distilled from these cases to assist courts in determining the effect of upholding a decisionmaker's claim of privilege. First, as with the initial determination whether a claim of privilege should prevail, the court should balance the competing interests on an ad hoc basis, while being guided by the remaining two rules.

Second, the courts correctly have been more willing to impose issue-preclusive sanctions when the government instigates the litigation either as a plaintiff in a civil suit or as the complainant in a criminal action. The government should not be permitted to institute criminal and civil suits while simultaneously secreting away information needed by the defendants. Cf. Brady v. Maryland, 373 U.S. 83, 83 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment; irrespective of the good faith or bad faith of the prosecution"); United States v. Ramirez, 513 F.2d 72, 78 (5th Cir. 1975) (noting "abhorrence of the concealment of material arguing for innocence by one arguing for guilt"). In criminal prosecutions, such activity even might violate statutory or constitutional rights. See, e.g., The Jencks Act, 18 U.S.C. § 3500 (1982) (requiring disclosure of prosecution witness' pretrial statements after witness testifies); Alderman v. United States, 394 U.S. 165 (1969); United States v. O'Connor, 273 F.2d 358 (2d Cir. 1959). When legislative or administrative motivation is relevant, the decisionmakers either would be defendants or would not be parties at all. See supra notes 143-76 and accompanying text. Thus, the named defendants may have no control over a decisionmaker's choice to invoke the privilege. Under those circumstances, an individual witness' decision to assert a privilege should not be imputed to the defendants. This distinction generally will weigh against the imposition of sanctions when a decisionmaker's claim of privilege is sustained.

Third, and most important, the courts properly have distinguished between the varying effects that should follow from the assertion of various privileges. When the privilege invoked prevents disclosure of official information in criminal cases, courts routinely impose sanctions on the government in exchange for recognizing the privilege. In criminal cases in which the government successfully asserts the informant's privilege, however, courts do not impose such sanctions. This difference in treatment arises from the different justifications for the respective privileges and variations in the corresponding procedures for balancing the competing needs for and against disclosure. When the government claims the privilege not to disclose official information, and it has a sufficient need for confidentiality, the information should not be disclosed regardless of the litigant's need. See, e.g., Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168 (1975) (advisory materials exempt from disclosure); United States v. Reynolds, 345 U.S. 1, 11 (1953) (state secrets privilege). In contrast, the government's need to keep secret the identity of an informant always appears to succumb to a sufficient showing of need by the accused. See, e.g., United States v. Ayala, 643 F.2d 244, 246-47 (5th Cir. 1981); United States v. Silva, 580 F.2d 144, 146-47 (5th Cir. 1978); United States v. Tucker, 552 F.2d 202, 206-09 (7th Cir. 1977). All cases that disallow disclosure of the informants' identities do so because the accused has not shown sufficient need, not because the government's interest in nondisclosure outweighs the accused's need. See, e.g., United States v. Anderson, 627 F.2d 161, 164 (8th Cir.), cert. denied, 449 U.S. 1021 (1980) (informant not only eyewitness to transactions in issue); United States v. Garcia, 625 F.2d 162, 165-66 (7th Cir.) (need of accused for informant's name "relatively slight"); cert. denied, 449 U.S. 923 (1980); United States v. Webster, 606 F.2d 581, 584-85 (5th Cir. 1979) (informant was "mere tipster").

When the government's claim of privilege for official information or state secrets is upheld, the
tive in question, or the procedures for eliciting the evidence are less intrusive, however, a less demanding demonstration of need should overcome the court should consider imposing issue-preclusive sanctions, at least when the government is the plaintiff or complainant. The government should pay some price for inhibiting its opponents' ability to prove their case. Cf. Calley v. Callaway, 519 F.2d 184, 220 n.60 (5th Cir. 1975) (successful invocation of congressional privilege to prevent disclosure of prior congressional testimony of criminal prosecution witness perhaps may require government to dismiss case if accused is denied essential evidence). On the other hand, when the government's assertion of the informant's privilege, or the decisionmaker's privilege proposed by this Article, is sustained, the privilege is upheld precisely because the information sought was not sufficiently necessary, probative, or important to the plaintiff's case. Thus, the government should not be penalized for invoking these privileges since nondisclosure should not have a significant adverse effect on the litigant or the court's decision. Furthermore, it arguably is more important for the court to find the facts accurately in actions adjudicating the constitutionality of laws than in civil suits seeking damages. Thus, it may be appropriate in some circumstances to require the government to pay the price of secrecy by imposing civil liability against it for damages. When determining the constitutionality of enacted legislation, however, the government should not be penalized for its successful claim of privilege because the law at issue may be beneficial and valid. Furthermore, since decisionmakers either will be nonparty witnesses or defendants, rather than plaintiffs or prosecutors, sanctions for the successful assertion of privileges are inappropriate.

Courts should be sensitive to the stigma attending the particular illicit motive. Proof that a decisionmaker's racially prejudiced motive caused a governmental action could be severely intimidating. Proof that a city counsel restricted street vending to shield local businesses from competition, however, may be received tolerantly, if not approved, even though such motive might render the restriction unconstitutional. Cf. Moyant v. Borough of Paramus, 30 N.J. 528, 545, 154 A.2d 9, 18 (1959) (municipality's police power to regulate soliciting cannot be used to shield local businesses). Local decisionmaking bodies frequently have taken action for purposes, though unconstitutional, that reflect the desires of the community. See, e.g., McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982). In these circumstances, the exposure of the "illicit" purposes is hardly intimidating. The most controversial purposes probably would be those that infringe fundamental rights or discriminate against suspect classes. Thus, when the magnitude of the right is greater, the heightened need for evidence may counterbalance a deeper intrusion. See infra note 605.

Requiring decisionmakers to testify probably is more intrusive than subjecting them to discovery. The scope of permissible questioning in discovery, however, is much broader than at trial. The information sought in discovery need not be admissible at trial; it only must appear reasonably calculated to lead to discovery of admissible evidence. See Fed. R. Civ. P. 26(b). Thus, discovery may be more intrusive than in-court testimony. At least in the breadth of examination. The Supreme Court has imposed the stricter requirement that materials subpoenaed prior to trial must be relevant and admissible when the information is subject to a claim of presidential privilege. See, e.g., United States v. Nixon, 418 U.S. 683, 714-15 (1974); see also Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973) (President's conversations within scope of his official duties presumptively privileged; presumption fails if great need shown). If this standard applied to discovery of all evidence subject to a qualified privilege, testimony in court almost always would be more intrusive. In Nixon, however, this requirement seemed to derive from the Special Prosecutor's subpoena of the material under Fed. R. Crim. P. 17(c), which the courts have interpreted to require relevance and admissibility before such evidence can be discovered. Cf. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE (Criminal) § 274 (1969) (party seeking pretrial production of materials under Fed. R. Crim. P. 17(c) should bear burden of showing good cause). Although it is uncertain whether this standard would apply in discovering presidential or executive communications in a civil case, see, e.g., Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975) (per curiam) (declining to do so), the Court in Nixon implied that it might be appropriate by noting that the President's interest in confidentiality should be accorded greater deference than that of ordinary individuals. Nixon, 418 U.S. at 708-09, 715-16.

Although discovery should be restricted to some extent to accommodate the interests protected by legislative and administrative privileges, it probably is not necessary to impose a hard and fast requirement, such as admissibility. If decisionmakers' responses to discovery reasonably will lead the plaintiff to other critical evidence, discovery should be permitted. As when determining whether a decisionmaker should have to testify, the need, probative value, and importance of the information sought should be balanced against the likely degree of intrusion on a case-by-case basis.

Decisionmakers probably will view giving deposition testimony as interfering more with their independence than answering interrogatories. In many jurisdictions, however, interrogatories require the party answering them to obtain the necessary information from his agents, employees, and
privilege. Similarly, when evidence subject to a qualified privilege goes toward the motives of the institution as a whole rather than of particular decisionmaker under examination, the lesser degree of intrusion should justify overriding the privilege more readily.413 In these circumstances, there is less interference with the governmental interests that the decisionmakers' privilege protects.

The elements that a plaintiff must prove to be entitled to relief, and the ways in which he may prove them, dictate the probative value of and need for evidence of decisionmaker intent. One commentator has suggested that the important questions in motivation analysis now are all evidentiary.415 The answers

413. It should not be very intimidating, for example, for a decisionmaker to have to testify about the public debate of an action. Conversely, when an action was taken by a close vote, and the motives of a single decisionmaker affected the outcome, compelling his testimony will be more intimidating. In that instance, however, there will be a high probative value to the evidence of the individual decisionmaker's motives. See infra text accompanying notes 484-85. Frequently, the plaintiff's need for the evidence will correspond similarly with the strength of the applicable privilege; such correspondence is common in the law of evidence. For example, in the area of other-crimes evidence, the similarity between the crime for which the accused currently is being tried and the prior crimes the prosecution seeks to offer into evidence increases simultaneously both the probative value and the prejudiciality of such evidence.

Between these extremes of proving purely institutional and proving purely individual motivation is a spectrum of encroachment on legislative and administrative independence. For example, when a five-member decisionmaking body voted four to one to take a challenged action, focusing on the motivations of one decisionmaker in the majority is probably less intimidating than if the vote had been three to two, because the vote being examined would not constitute a "but for" cause of the body's action.

414. Measurement of the degree of intrusion on governmental interests must take into account both objective and subjective factors. To the extent that the court seeks to minimize distractions from a decisionmaker's legislative duties, it should consider his particular circumstances and availability. On the other hand, when the court determines the degree to which its present decision to compel testimony will intimidate decisionmakers in the future, and interfere with legislative independence, its determination should be objective. The court should decide whether its present actions would intimidate "reasonably independent decisionmakers" into altering their legislative behavior to avoid having to testify in the future. If the intrusion will not intimidate decisionmakers to that degree, it will not harm significantly the interests underlying the privilege.

415. See Simon, supra note 371, at 1130.
to some of these evidentiary questions, however, depend on the theoretical framework of motivation analysis, which is not yet complete.

A. What is Unconstitutional Purpose?

Not surprisingly, there is no consensus among either commentators or the courts on what constitutes unconstitutional purpose. The definitions of unconstitutional purpose derive from the underlying theories of the role of motive in constitutional analysis. No single theory has been accepted conclusively and the Supreme Court has not articulated a complete and coherent theory of its own. Differences in the various theories of how and why certain impermissible motives taint governmental action and inaction have generated a number of unresolved issues regarding the definition and proof of unconstitutional motive. The manner in which these issues ultimately are resolved will affect profoundly the probative value of and need for different kinds of evidence of unconstitutional purpose.

Three essential issues in defining unconstitutional motivation remain unresolved. First, what motives are impermissible? Second, what role did the impermissible motive play in the decisionmaking process? Resolution of this issue will depend both on who harbored the motive and how it affected the decision. Last, is the impermissible motive measured objectively or subjectively? Although these issues are related, the courts and a number of commentators have confused and distorted them in debating the distinction between motive and purpose, which itself confuses what unconstitutional motive is with how it can be proved.

In considering the constitutionality of governmental actions, the Supreme Court repeatedly has distinguished between legislative purpose and legislative motivation. In Washington v. Davis the Court made such a distinction in an ambiguous passage that has received considerable attention. The Davis Court discussed its refusal five years earlier, in Palmer v. Thompson, to consider whether a decision of the Jackson, Mississippi city council to close rather than desegregate the public swimming pools was unconstitutional because it was motivated by racial animus. The Davis Court described Palmer as holding that "the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations." Although the Court appeared to distinguish between evidence of the motivation of an institution and that of individual decisionmakers, the significance of that distinction is uncertain. Was the
or "goals that the decisionmakers seek to achieve by the operation of their decision." See, e.g., Eisenberg, supra note 2, at 106 n.321; cf. Clark, Legislative Motivation and Fundamental Rights in Constitutional Law, 15 SAN DIEGO L. REV. 953, 956-63 (1978) (comparing definitions and usages of terms "motivation" and "purpose" and concluding that "legislative purpose" and "legislative motivation" are functionally identical although Supreme Court makes a distinction); Ely, supra note 2, at 1221 (difficult to distinguish between motive and purpose; even if distinction could be made motive irrelevant); Note, Legislative Purpose and Constitutional Adjudication, 83 HARV. L. REV. 1887, 1887 n.1 (1970) ("Commentators have made much of the distinction between 'motive' and 'purpose'. . . . It is probably fruitless to attempt a principled articulation of the distinction . . . .") [hereinafter cited as Note, Constitutional Adjudication]. For example, the Court used "purpose" and "motive" as functional equivalents in Arlington Heights:

[Washington v.] Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern . . . . When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.


Some commentators have attempted to discern differences between the two terms, with motive meaning the subjective volition or reason for an act, and purpose, in contrast, meaning the act's foreseeable effect. E.g., A. BICKEL, supra note 7, at 209. Bickel noted:

Some of the difficulty [about resort to legislative motive] is due to confusion between, on the one hand, a finding of motive properly speaking . . . and, on the other, a determination of "purpose" which . . . is either the name given to the Court's objective assessment of the effect of a statute or a conclusory term denoting the Court's independent judgment of the constitutionally allowable end that the legislature could have had in view.

Id.; see also Eisenberg, supra note 2, at 106 n.321 (commentators distinguish between "motive" and "purpose"); Ely, supra note 2, at 1217-21 (suggesting that legislator's "purpose" in passing law is his immediate aim, while his "motive" is his more distant aim); Heyman, The Chief Justice, Racial Segregation, and The Friendly Critics, 49 CALIF. L. REV. 104, 115-21 (1961) (distinguishing between legislative motive and legislative intent in enacting segregation legislation); MacCallum, Legislative Intent, 75 YALE L.J. 754, 756-57 (1966) (distinguishing various meanings of term "legislative intent"); Note, Constitutional Adjudication, supra, at 1887-88 n.1 (commentators distinguish between "motive" and "purpose"); Note, supra note 7, at 1091-92 (determination of legislators' purposes is "objective": determination of legislators' motives "involves going beyond these generally objective criteria and attempting to discover the state of mind of the legislators when they enacted the measure"); Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 YALE L.J. 328, 328 n.2 (1982) (commentators distinguish terms "intent," "purpose," and "motive") [hereinafter cited as Note, The Intent Standard].


The argument of Professor Eisenberg and others that nothing of constitutional significance turns on the suggested distinction between these terms is persuasive. Eisenberg, supra note 2, at 41; Ely, supra note 2, at 1207 n.1, 1217-21. The Court has failed to distinguish explicitly between these words. Brest, supra note 14, at 104 n.55; Clark, supra, at 955-62; Note, The Intent Standard, supra, at 316 n.2.

Any shades of difference in the meaning of these terms (and thus of the necessary inquiry) may affect substantially the resulting evidentiary issues. Since "purpose," as defined by these commentators, is determined primarily from the terms of a statute, its operation, and the legal and practical context in which it was enacted, see Note, Constitutional Adjudication, supra, at 1887 n.1, a court need not consider (and even may find irrelevant) evidence of the subject intent of legislators. A court only need consider the language of the statute, its probable effects, prior law, accompanying legisla-
such a showing may be made, or, more likely, was it confusing the two?\textsuperscript{422} Moreover, the Court also confused who must share the illicit motive with whether the motive must be measured objectively or subjectively. The Court may have been attempting to state that for illicit motivation to invalidate an official action, it must be shared by or be attributable to the decisionmaking body as a whole. Under this view, a single decisionmaker's impermissible purpose, "but for" which the action would not have been taken, would not make out a constitutional violation. Only evidence of illicit motives shared by the entire institution would be admissible.\textsuperscript{423} Even with that requirement of institutional intent, however, the motives of individual decisionmakers still would be relevant, because at a minimum, if all the individual members of the body acted because of illicit purpose, that would seem to establish the institution's illicit purpose.\textsuperscript{424}

On the other hand, Davis' discussion of Palmer may be interpreted to mean that in Palmer, because the council's decision did not have disproportionate racial consequences and did have an ostensibly legitimate purpose,\textsuperscript{425} the motivation of the council was irrelevant to the constitutionality of the challenged action.\textsuperscript{426} Under that interpretation the Court would not be intending to distinguish between individual and institutional intent.\textsuperscript{427}

\textit{tion, enacted statements of purpose, and formal public pronouncements. Id.; see also H. Hart \& A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1413-16 (1958) (in inferring purpose courts should consider legislatures' probable reason for replacing old law with new, the context of the law, the post-enactment constructions of the law, and if necessary, general policy presumptions); Note, supra note 7, at 1077, 1091 (in inferring purpose courts "may properly consider not only the language of the statute but also general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, enacted statements of purpose, formal public pronouncements, and internal legislative history").}

\textsuperscript{422} Professor Clark has suggested that the Court's effort to distinguish between legislative "purpose" and legislative "motivation" "seems to mean that the Court disbelieves the possibility of clearly demonstrating by direct evidence, such as legislative history, that a majority of individual legislators intended unconstitutional goals." Clark, supra note 421, at 973-74. Clark apparently believes that the Court was discussing \textit{how} to prove legislative motivation and not \textit{what} legislative motivation is. Clark, however, also seems to be assuming that according to Davis legislative purpose denotes the shared purpose of a majority of the individual decisionmakers, not just a purpose without which the legislature would not have acted. Thus, his views seems to support the position that the Davis Court merged its views on what constitutes legislative purpose with how that purpose can be proved.

\textsuperscript{423} See infra notes 487-90 and accompanying text.

\textsuperscript{424} See infra notes 467-72 and accompanying text.

\textsuperscript{425} Davis noted that, "[w]hatever dicta the [Palmer] opinion may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences." Davis, 426 U.S. at 243.

\textsuperscript{426} Professor Eisenberg has noted that, "[i]f the mere existence of a legitimate purpose for a statute (as opposed to actual reliance on a legitimate purpose) precludes impeachment by evidence of illicit legislative or administrative motive, discriminatory motive will never have a significant role in constitutional adjudication because some legitimate purposes will almost always exist." Eisenberg, supra note 2, at 112. Subsequent decisions by the Court, however, controvert, to some degree, his pessimistic interpretation.

\textsuperscript{427} The ultimate issue in a motivation case is whether a decisionmaker or decisionmaking body would have made a particular decision \textit{but for} an unconstitutional motive. See infra notes 451-72 and accompanying text. The Supreme Court suggested a procedure for resolving this issue in Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). If the plaintiff can establish that an illicit purpose "played a substantial part" in the challenged decision, the burden shifts to the defendant to show "by a preponderance of the evidence that it would have reached the same decision," absent those impermissible considerations. Id. at 287; see Board of Educ. v. Pico, 457 U.S.
Finally, the Court probably was approaching the distinction that it ultimately drew in *Mount Healthy City School District Board of Education v. Doyle*\(^{428}\) between illicit purposes that played merely some role in the institution's action, and those purposes without which the action would not have been taken. As *Davis* notes, the *Palmer* Court had accepted the finding that the city council did close the pools for legitimate reasons.\(^{429}\) Thus, that individual council members also may have had illicit motives was irrelevant, since the Court had concluded tacitly that the council would have taken the action anyway "to preserve peace and avoid deficits."\(^{430}\)

In a more recent case a plurality of the Court, rather cryptically appeared to draw this same distinction, thereby bolstering this interpretation of *Davis*. In *Michael M. v. Superior Court*\(^{431}\) a male minor challenged California's "statutory rape" law, which imposed criminal liability only on men,\(^{432}\) alleging in part that the "true" and impermissible purpose of the law "was to protect the virtue and chastity of young women." The Court, citing *Davis*’ discussion of *Palmer*, stated that "even if . . . one of the motives of the [statutory rape law was] impermissible," the statute would not be struck down "on the basis of an alleged illicit legislative motive."\(^{433}\) Although the Court's pronouncement is less than perfectly clear,\(^{434}\) its citations to passages in several other cases imply that it again

853, 871 n.22 (1982). At least in equal protection clause cases, the defendant's failure to meet this burden does not end the inquiry. The court still must apply its traditional strict scrutiny analysis to determine whether any compelling state interest justifies the challenged classification. *See* Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982).

Shaping an appropriate remedy in motivation cases presents both jurisprudential and evidentiary problems. The courts generally should try to put successful complainants in the position they would have occupied had the illicit purposes not been considered. In some instances the court simply should vacate the challenged decision and remand the matter to the decisionmaker for possible further action untainted by the illicit motivation. In other cases, such as *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), in which the challenged action was in part a denial by the defendants of relief that the complainants sought, a court might consider a more "activist" approach. In those circumstances when it can be determined from a decisionmaker's past and current practices that a different decision would have been reached absent the constitutionally offensive considerations, a court could order the decisionmaker to make that particular decision. *See* Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1143 (1978). Although such relief is intrusive, that in itself should not bar an essentially "make whole" remedy.

If complainants are unable to prove both discriminatory impact and illicit motivation, should some remedy still be available? If it was proven that racial prejudice affected a legislature's decision, but the decision had not had any discriminatory impact on the complainants other than the dignitary harm from the deliberations themselves, perhaps some remedy, less than invalidation, could compensate the plaintiff for that dignitary injury. Similarly, if a legislature considered racially discriminatory factors in enacting a statute that disproportionately affects complainants, but the racial animus was not a "but for" cause of its passage, perhaps the court could fashion a remedy to ameliorate both the dignitary harm from the illicit consideration of race and the injury from the disproportionate impact. The nature and availability of these remedies would dictate in part the relevance and probative value of various categories of evidence that the plaintiffs could offer to establish a basis for relief.

430. *Id.* at 243.
432. *Id.* at 472 n.7.
433. *Id.* (emphasis added) (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).
434. Since the Court decided *Michael M.* after it had articulated the "but for" causation concept in *Mount Healthy*, *Michael M.*'s failure to cite *Mount Healthy* undercuts this interpretation of
Michael M. Michael M., however, presumably does not mean that even if the legislature enacted the challenged statute with an impermissible purpose, that purpose is wholly irrelevant to the constitutionality of the law. The Court was not reversing, in Michael M. or subsequent cases, its numerous holdings that impermissible purpose is a critical element of unconstitutionality in many contexts. The Court may have been intentionally ambiguous in Michael M., as perhaps it was when it distinguished Palmer in Davis, because of its own confusion or internal disagreement about the proper role of impermissible motivation in constitutional adjudication.

Given that uncertainty, Michael M. can be interpreted in two alternative ways. First, as in Palmer, perhaps the challenged action did not have a discriminatory effect on the group against which the alleged illicit purpose was directed. In Michael M., although there was a discriminatory effect on men, the petitioner challenged the law's motive as an illicit paternalistic desire to protect women. The petitioner, however, did not allege that the legislature intended to benefit women at the expense of men. Thus, the Court may have concluded that the alleged discriminatory purpose was unrelated to the discriminatory consequences.

Second, the Court noted that petitioner had conceded that the state had a "compelling interest" in preventing teenage pregnancy, Michael M., 450 U.S. at 473 n.7, an interest that the Court found was "at least one of the 'purposes' of the statute." Id. at 470. Thus, even if the legislature enacted the law with discriminatory intent, the discrimination could be justified by its concededly compelling interest. See supra note 427. To the extent the government has a legitimate compelling interest that justifies discrimination, the action probably would be taken anyway even absent illicit purpose, especially when the Court finds that that was an actual purpose of the law. Furthermore, Michael M. may suggest that, when the government has a compelling interest for its action, courts should not attempt to determine the body's "true" motives, because even if the action would not have been taken but for a discriminatory purpose the compelling interest outweighs the discrimination.

435. Arlington Heights, 429 U.S. at 270 n.21:
Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.

Id. (citing Mount Healthy, 429 U.S. at 283).

436. 446 U.S. 55, 91 (1980) (Stevens, J., concurring):
I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention. The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace.

437. The Court's citation to United Staes v. O'Brien, 391 U.S. 367 (1968) also is consistent with this reading of Michael M. O'Brien concluded that an otherwise constitutional statute should not be voided "on the basis of what fewer than a handful of Congressman said about it." Id. at 384. Thus, although O'Brien suggests that legislative purpose is irrelevant in equal protection analysis, see Arlington Heights, 429 U.S. at 252, O'Brien also recognizes the difference between individuals' motives that merely played some part in the decision and the purpose with which the body acted. The citation to O'Brien probably meant no more than this, since O'Brien essentially denied, in what has been called "gibberish," that official motivation ever is relevant. See J. Ely, supra note 8, at 140.

In Orr v. Orr, 440 U.S. 268 (1979), which Michael M. also cited, the Court made no attempt to determine whether the challenged action was impermissibly motivated. Such an analysis was unac-
Heights noted, this distinction is dispositive of the propriety of judicial interference with the challenged decision. Thus, if the government can demonstrate from the outset that it would have made the same decision for legitimate reasons, the illicit motives of decisionmakers did not affect the decision and are irrelevant.

In addition, Davis' discussion of Palmer apparently suggests that evidence of the motives of individual decisionmakers is inappropriate to establish the purpose of the body. One commentator has noted that the Davis Court's failure to distinguish between the probative value and the admissibility of evidence of individual as opposed to institutional motivation has "create[d] what is probably the mistaken impression that evidence of the motivation of individual members is broadly inadmissible to prove institutional motivation, rather than, as is undoubtedly true, that such evidence may sometimes be beyond the plaintiff's power to produce because government officers may be privileged not to testify."

Similarly, many commentators have argued that the Court's distinction between motivation and purpose derives solely from its perception of whether either is ascertainable: "The difference between motivation and purpose in terms of their meaning is therefore nonexistent; the difference is that the Court uses 'motivation' to denote goals which it cannot identify with enough certainty to act on and 'purpose' to denote goals which it can so identify." Moreover, it has been noted that within the context of this distinction, proof of legislative or administrative "purpose" must be by objective evidence.

Whatever the purpose or motive of the Court in differentiating between the two, the distinction is at best unproductive. Recent decisions appear to address more cogently the important questions that Davis obscures in its motive-purpose distinction. In these cases, although the Court has not retreated explicitly from its previous discussions of motive and purpose, it has begun to build the framework for developing a sound definition of unconstitutional motivation.

essay because the government was unable to demonstrate that the objectives which the statute even arguably served were substantially related to the achievement of important governmental goals. Id. at 284


439. If the city council members in Palmer had decided unanimously to close the public pools, proof of the motives of an individual decisionmaker would be little help in establishing that the decision would not have been made but for an illicit purpose. See infra notes 547-48 and accompanying text.

440. Simon, supra note 371, at 1105.

441. See, e.g., Clark, supra note 371, at 961-62.

442. Id. at 962 n.20.

443. See, e.g., A. BICKEL, supra note 7, at 209-10; Ely, supra note 2, at 1220 n.50. In fact, the two concepts are interrelated because objective evidence of decisionmaker intent usually will be more available than subjective evidence, and therefore "purpose" usually will be more readily ascertainable than "motivation." Professor Bickel's comment that because administrative intent can be proven more easily, the courts should be more willing to inquire into administrative motivation, reflects the fact that objective evidence of intent often is determined more easily for administrative actions than legislative decisions. A. BICKEL, supra note 7, at 217; see Ely, supra note 2, at 1285; infra notes 622-25. If the court recognizes the decisionmaker's privilege to be only qualified, of course, as Part III of this Article suggests, evidence of decisionmaker's subjective motives will be obtained more easily.
To determine whether a legislative enactment or administrative rule had an unconstitutional purpose, the first step is to decide which motives are forbidden. Motives are deemed forbidden because they infringe normative values protected by corresponding constitutional commands. For example, Professor Simon has described the motive of racial prejudice, a motive that the equal protection clause prohibits, as "[a]n attitude or emotion composed of two essential characteristics: The group against which prejudice is directed is regarded negatively, and this negative attitude is categorical—that is, it is directed against anyone who is a member of the group simply because of his membership."

It is not always easy, however, to define an impermissible motive. For example, it is unclear whether unconstitutional purpose must consist of a desire to harm the particular group in question or merely a willingness to permit the group to suffer some adverse effect to promote a legitimate societal goal. In Personnel Administrator v. Feeney the United States Supreme Court adopted the former meaning. This decision properly generated severe criticism.

The manner in which various permissible and impermissible motives are defined is one of the major determinants of the relevance of evidence offered to prove them. The substantive elements of all causes of action determine the relevance of evidence offered to prove those elements. Therefore, although differences in the definitions of proscribed purposes will affect the probative value of and need for different evidence, this dynamic creates no difficult questions in making these assessments.

It is considerably more difficult to determine what role an impermissible motive must have played in a governmental action before a court can invalidate

444. Not all motive theories prohibit the consideration of unconstitutional purposes. Motive theories instead or also may delineate certain motives that the decisionmaking body must consider in reaching its decision. See Alexander, Introduction: Motivation and Constitutionality, 15 SAN DIEGO L. REV. 925, 934-36 (1978).

445. See, e.g., Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). In Kassel a majority of the Court agreed that the "protectionist" purpose of promoting parochial state interests violates the commerce clause. See id. at 678.

446. Simon, supra note 371, at 1047.

447. As Professor Brest commented, "[T]here is much room for debate about precisely what motives are constitutionally proscribed under various circumstances." P. Brest, Reflections on Motive Review, 15 SAN DIEGO L. REV. 1141, 1141 (1978); see Clark, supra note 421; Eisenberg, supra note 2, at 99-168; Ely, supra note 2.


449. See, e.g., Schnapper, Two Categories of Discriminatory Intent, 17 HARV. C.R.-C.L. L. REV. 31 (1982). In Professor Schnapper's view the Feeney Court erred by failing to recognize the difference between ends and means. In deciding that offering veterans a competitive edge was a legitimate goal, the Court failed to consider "[w]hy the legislature was willing to accept that cost" (social cost of harming women). Id. at 44; see Note, supra note 80.

450. Different kinds of governmental decisions therefore will require different methods of proving illicit purpose. For example, when the prescribed purpose of an action such as jury selection is to produce random results, showing disparate impact may be more significant in proving a decision-making body's illegitimate purpose than if the body legitimately may pursue a broader range of goals. If jury commissioners must create a juror pool of a random collection of the community, only illicit motivations or the inability to achieve a random selection process would explain the commissioners' willingness to accept a nonrandom result. The government here, unlike in Feeney, could not offer another permissible purpose that would justify its actions "in spite of" the foreseeable effect. See infra note 496-97 and accompanying text; cf. Castaneda v. Partida, 430 U.S. 482, 494 n.13, 496 n.17 (1977) (applying statistical analysis of jury pools).
that action. Is one official’s illicit motive, “but for” which the challenged action would not have been taken, sufficient to warrant invalidation, or must the illicit motive have been shared by some larger portion, presumably a majority, of the decisionmaking body? The motive theorists are roughly divided between these two views.451

To the extent that considerations of impermissible motive that are a “but for” cause of the challenged enactment are sufficient to warrant invalidation, the most minimal quantum of illicit motive of a single decisionmaker can render an official action unconstitutional. Assume that a ninety-nine member legislature voted to create an electoral structure that diminished minority voting strength, and that the structure would be unconstitutional only if the legislature acted because of discriminatory intent.452 Assume further that the motives of every legislator are known, and that the actions of ninety-eight of the decisionmakers, who voted forty-nine for the law and forty-nine against it, were wholly unaffected by racial prejudice. If the ninety-ninth legislator, who himself was torn between supporting and opposing the enactment, decided to vote for the law only because of a fraction of one percent of racial prejudice, that prejudice would be a “but for” cause of the legislature’s action. The law arguably should be invalidated as unconstitutional because it would not have been enacted but for racial prejudice. The same argument can be made about the principal proponents of a governmental action and even the chief executive who signs a law into effect: if the drafter or the sponsor of a law did so for an impermissible purpose, the law never may have been introduced or enacted but for the illicit intent, and the law thus should be invalidated.453

Although this result may appear unjustified, it follows logically from a causation-based motivation theory. That theory in turn is the result of particular views about the injury that results from a decisionmaking body’s consideration of unconstitutional purpose, the manner in which the illicit purpose caused the plaintiff’s injuries, and the appropriateness of various remedies.454

Whether the “but for” motives of individual decisionmakers are sufficient to invalidate an enactment or some “institutional purpose” must be shown ulti-

451. Even in a motivation theory requiring that the illicit motives have been shared by a majority of the decisionmaking body, the motives presumably also would have to constitute a “but for” cause of the challenged action. If the decisionmakers would have taken the same action in the absence of illicit motivation, the consideration of such motives will have been harmless. See supra note 428 and accompanying text. A number of Supreme Court justices have recognized explicitly this “same decision” test as a harmless error test. See, e.g., Codd v. Velger, 429 U.S. 624, 630 (1977) (Brennan, J., dissenting); id. at 635 (Stevens, J., dissenting). A theory of unconstitutional motivation also might deem any consideration of illicit motivations by the decisionmaking body as a constitutionally cognizable harm, regardless of its effect on the ultimate decision.


453. The response that someone else might have drafted the law anyway is unconvincing. The same argument can be made when the entire institution’s intent was a “but for” cause of its actions, since the same body or a future body might have enacted the same law in the future without illicit intent. Thus, in both circumstances the court must determine whether the decisionmaking body would have taken action on a particular occasion but for an impermissible purpose. See Brest, supra note 426, at 1142.

454. See supra note 427.
mately should depend on the underlying substantive theories that mandate inquiry into motivation. Professor Alexander has correctly recognized that the improper motive of one decisionmaker may be sufficient to invalidate an action, despite the proper motives of all decisionmakers, "assuming it is the causal relation of certain motives to the passage, repeal, or failure to pass or repeal the rule which is in issue."\footnote{Alexander, supra note 444, at 938.} Whether unconstitutionality requires only this mere causal connection between illicit motives and the challenged action or something more depends on the core values that invalidation would protect and the degree to which decisionmakers' consideration of impermissible motives infringes those values.

Consider the injury caused by a governmental decision that would not have been made but for racial prejudice. Professor Simon has suggested that two harms may result from a decisionmaking body's consideration of racial prejudice: a distortion of the democratic process and dignitary harm to the members of the group discriminated against.\footnote{Simon, supra note 371, at 1049-59.} Although the prejudice of a single decisionmaker may have little bearing on the manner in which the body deliberates or may not be significantly insulting given the body's benign intent, it may control the body's ultimate action. Racial prejudice may be considered so intolerable that any consideration of it which affects a governmental action should render the action invalid. When unconstitutional considerations are a "but for" cause of an official action, the result of the democratic process will have been distorted. Assuming that such distortion causes further harm, such as discrimination in hiring or segregated schools, invalidation of the action would appear to be the proper remedy.\footnote{The availability of appropriate remedies also affects an analysis of the unconstitutionality of illicit motivation. For example, if a legislature considers racial prejudice in enacting a law that it would have passed anyway, perhaps some remedy nevertheless should compensate for the dignitary harm that results from any consideration of prejudice. Similarly, some remedy should be available when racial prejudice affects the outcome of the deliberative process, but the plaintiffs have suffered no injury other than the dignitary harm from the institution's prejudiced actions. A court at least could require the decisionmaking body to reconsider its action without considering the illicit purposes. Such a procedure, however, is potentially futile. See supra notes 48-50 and accompanying text. Thus, even after determining the underlying values implicated by a legislature's consideration of impermissible motives, the practical absence of an appropriate remedy may influence an analysis of how such illicit considerations offend the Constitution. See supra note 427; Simon, supra note 371, at 1056-59.}

Most, if not all, motive theorists appear to agree that the crucial issue is whether impermissible motives affected the outcome of the decisionmaking process.\footnote{See, e.g., Brest, supra note 14, at 120 n.124; Simon, supra note 371, at 1062.} When illicit motives have such an effect, they taint the decisionmaking process by producing a result that, by definition, would not have occurred in the absence of the impermissible objectives. Thus, if impermissible motives affected the action of any decisionmaker,\footnote{The court's process for determining whether considerations of illicit motivation affected the outcome of the deliberative process is the same, regardless of whether the relevant purpose is that of an individual decisionmaker or the entire decisionmaking body. The court must decide whether the decisionmakers, individually or collectively, would have made the same decision absent impermissi-} who in turn affected the outcome of the decision, that decision is unconstitutional. Although a number of commentators
have assumed this theoretical premise, they have not addressed the resulting evidentiary implications.

In a number of recent decisions the Supreme Court has come close to adopting this view of causality in motivation analysis. In Arlington Heights the Court stated that discriminatory motivation did not have to be the sole or dominant purpose of a decisionmaking body to constitute an impermissible purpose. Rather, "[p]roof that the decision . . . was motivated in part by a racially discriminatory purpose" would shift to the defendants "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." In Mount Healthy City School District Board of Education v. Doyle, decided on the same day as Arlington Heights, the Court reaffirmed that the ultimate issue is whether the decisionmaking body would have taken the same action but for an unconstitutional purpose. The Court indicated that if a plaintiff proves that an unconstitutional purpose played a substantial part in the body's decision, the government must establish "by a preponderance of the evidence that it would have reached the same decision absent the improper motive." If the government cannot meet this burden, its decision will be held unconstitutional. The Court, however, has not addressed whether the illicit motivations of one or a relatively small number of decisionmakers are sufficient to invalidate a governmental action.

Although, under a causality-based theory, any consideration of illicit motivation that is a "but for" cause of the challenged action is sufficient to invalidate the result, a number of commentators have argued that illicit motives, to be actionable, must have been shared by a majority of the decisionmaking body. For example, Professor Ely has suggested that "the only motivations on the
basis of which the Court would even consider [invalidating an official action]—or, indeed, a litigant would have the temerity to suggest that it do so—are those which can confidently be said to have been shared by a majority of the decisionmakers." Neither Professor Ely nor any other commentator has articulated in detail why the illicit motives of less than a majority of the decisionmaking body should not be sufficient to invalidate the law. It appears, however, that their view is based on a misplaced analogy to construing the legislative intent of a statute. In statutory construction, "legislative intent" means what the majority of the legislature intended a law to achieve. The majority model of legislative intent is ill-adapted to motivation analysis, however, since the issue is not what the legislature intended, but whether illicit considerations affected the outcome of the decisionmaking process; it is unnecessary to determine the consensus of the decisionmaking body in motivation analysis.

In an intermediate theory, impermissible motivations must have been a "but for" cause of the legislature's action yet a substantial portion, although less

468. Ely, supra note 2, at 1219-20. To the extent that the issue is whether the illicit motives were a "but for" cause of the action, Professor Ely appears to be mistaken. His later writing on this subject indicates that he may no longer ascribe to the majority requirement:

The considerations that make motivation relevant argue not for the discovery of the "sole" motivation (is there ever but one?) or even the "dominant" motivation (whatever that might mean), but rather for asking whether an unconstitutional motivation appears materially to have influenced the choice: if one did, the procedure was illegitimate—"due process of lawmaking" was denied—and its product should be invalidated.

J. Ely, supra note 8, at 138.

469. Professor Brest also makes this point. See Brest, supra note 14, at 120 n.124.

470. Cf. MacCallum, supra note 421, at 768-69, which Professor Ely has cited in support of his "majority" view:

[W]e have found very few authors showing any unwillingness to accept [the] condition . . . that a legislature should be acknowledged to have an intention vis-à-vis a statute in case each of the majority who voted for the statute had that intention. Virtually all the persons who have discussed the issue of legislative intent seem to assume that the fulfillment of this last condition is sufficient to support claims about the intention of a legislature.

471. Determining legislative intent in statutory construction assumes additionally that the legislature had a primary purpose that, if it can be ascertained, will aid the court in interpreting the statute. On the other hand, motive theorists and the courts apparently agree that in motivation analysis, illicit motives need not be the primary or dominant purpose of the decisionmaking body. See, e.g., Arlington Heights, 429 U.S. at 265 n.11 ("The search for legislative purpose is often elusive enough [citing Palmer], without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute." ) (quoting McGinnis v. Royster, 410 U.S. 263, 276-77 (1973)); Brest, supra note 14, at 119 ("[I]t is inappropriate to ask which of several possible objectives was 'sole' or 'dominant' in the decisionmaker's mind."). The motives need only be a purpose without which the action would not have been taken. Thus, whether that quantum of purpose that acts as a "but for" cause is concentrated in one decisionmaker, or dispersed throughout the entire body, should be irrelevant.

472. Professor Brest has suggested that this issue is largely academic because, "[w]ether the relevant class is a majority of the legislators or only those legislators whose votes are necessary for the enactment, neither head-count usually is feasible nor necessary." Brest, supra note 14, at 120 n.124. Professor Brest probably has overstated his case, however, because in many instances evidence of the motives of the decisionmaking body as a whole will be lacking, yet the motives of those decisionmakers whose votes were necessary for the enactment will be ascertainable. When the decisionmaking body is small or the vote is very close or both, evidence of individual decisionmakers' motives can be extremely probative of the role that illicit motivation played in the deliberative process. See infra notes 580-81 and accompanying text.
than a majority, of the decisionmakers must have shared the motivations.\textsuperscript{473} In a number of opinions, the Supreme Court has used language appearing to suggest such a theory. The Court alternatively has asked whether illicit motivation "has influenced the legislative choice,"\textsuperscript{474} or was a "substantial\textsuperscript{475} or "motivating factor"\textsuperscript{476} in the challenged decision. These standards, however, merely describe what a plaintiff must show to shift the burden to defendants to prove that the improper influence was not a "but for" cause of the action. Plaintiffs therefore must establish initially that illicit motivation may have had some influence on the deliberative processes of a decisionmaking body. Moreover, the Court's language seems to imply that the impermissible motives must be more than a de minimis influence to shift the burden to the government. These cases do not indicate, however, that illicit motivation must have been shared in some way to be an institutional purpose.\textsuperscript{477} Rather, apparently the plaintiff need only establish a probability or presumption, subject to rebuttal by the government, that impermissible motives were a "but for" cause of the administrative or legislative decision.

In \textit{Board of Education v. Pico},\textsuperscript{478} however, the Court embraced an intermediate standard requiring "but for" causation and "substantiality" of illicit purpose. \textit{Pico} held that whether the removal of books from public school libraries by the board of education was constitutional would depend on the motivation for the board's action. A plurality of the Court concluded that "[i]f [the board] intended by their removal decision to deny respondents access to ideas with which [the board] disagreed, and if this intent was the decisive factor in [the board's] decision, then [the board has] exercised [its] discretion in violation of the Constitution."\textsuperscript{479} The Court defined "decisive factor" as "a 'substantial factor' in the absence of which the opposite decision would have been reached."\textsuperscript{480}

\textsuperscript{473} Another model of legislative intent could be based on the type of evidence that could be used to prove decisionmakers' motives. If courts considered only objective evidence of motive, such as a law's foreseeable discriminatory impact, which would apply equally to all members who voted for the law, the portion of the body that must have shared illicit motives would be irrelevant. All evidence of illicit motivation would be probative of each decisionmaker's objectives to the same degree.


\textsuperscript{475} \textit{Mount Healthy}, 429 U.S. at 287.

\textsuperscript{476} Id.; \textit{Arlington Heights}, 429 U.S. at 270.

\textsuperscript{477} In \textit{Washington v. Davis}, 426 U.S. 229 (1976), Justice Stevens stated that it was "unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." \textit{Id.} at 253 (Stevens, J., concurring). One writer has construed this remark to mean that "a significant portion of the decisionmakers [must have been] at least 'partially motivated' by illicit considerations" to constitute unconstitutional purpose. Note, \textit{supra} note 80, at 1405. Justice Stevens, however, may have been suggesting nothing more than that the motive of a single decisionmaker may not affect the outcome of the institution's action. To the extent that he meant that a large portion of the decisionmaking body must share the illicit motives, even when an individual's illicit motive was a "but for" cause of the action, he seems to contradict other Supreme Court decisions and to be theoretically incorrect. Furthermore, his reference to atheists and clerics confuses the issue of what unconstitutional motivation is with whether evidence of the character of decisionmakers can establish such motivation. \textit{See infra} note 534.

\textsuperscript{478} 457 U.S. 853 (1982).

\textsuperscript{479} Id. at 871.

\textsuperscript{480} Id. at 871 n.22.
Thus, the Court required something more than mere "but for" causation; the impermissible intent also must be a "substantial factor" in the challenged action.

This "substantial factor" requirement suffers from both theoretical and practical deficiencies. First, it would be inappropriate to require that illicit motives were shared by some arbitrary portion of the decisionmaking body, for the same reasons that the majority model of intent is inapt. When the touchstone of unconstitutionality is causality, requiring that the illicit motivations which affected the outcome of the decisionmaking process also be in some sense "institutional" is superfluous.481 Second, even if there were a sound theoretical basis for such a requirement, it would be difficult to define the requisite degree of shared intent.482 Other than requiring that a majority of the decisionmakers shared the illicit motives, it is not easy to draw the line of substantiality.

The crucial question, then, is whether illicit motivations influenced the decisionmaking process, and if so, whether that influence was harmless or decisive. The action should be invalidated if the impermissible motivation, regardless of who shared it, was a "but for" cause of the legislative enactment or administrative decision. Thus, in a three-to-two vote of a decisionmaking body, the influence of illicit motives, without which the challenged action would not have been taken, would be sufficient to invalidate the action whether they were wholly attributable to only one of the three-member majority, or to a portion or a majority of the five, or were distributed evenly among all of them.483

Professor Alexander has suggested that the "major issues here are evidentiary, not conceptual, because each theory of which motives are important and why they are important should generate its own answers to the conceptual problems surrounding rules produced by collective bodies."484 Although Alexander is correct that evidentiary questions exist within the context of each theory, those theories that dictate the resolution of the evidentiary issues are themselves shaped by concerns about the substantive values involved. The un-

481. Professor Eisenberg suggests to the contrary that "a particular motive may be properly ignored because it was not shared by enough legislators to warrant judicial recognition." Eisenberg, supra note 2, at 152. Professor Eisenberg probably has erred in the same manner as Professor Ely by suggesting that illicit motives are not actionable unless shared by a majority of the decisionmaking body. See supra notes 467-72 and accompanying text. Both writers appear to be borrowing inappropriately the concept of institutional intent from statutory construction cases. This conclusion is evidenced by Eisenberg's citation to P. Brest, supra note 447, at 139-40, which discusses the methodological problems presented by inquiring into the intent of the Framers. Such inquiries, like those into the intent of legislators in the statutory construction context justifiably seek the institutional or majority intent of the decisionmakers.

482. One decisionmaker's illicit motives that were a "but for" cause of his actions would be a dispositive factor in a one-member decisionmaking body, and presumably a "substantial" factor in a two or three-member decisionmaking body assuming that "substantiality" refers to less than a majority. At some point, however, which undoubtedly will differ among courts, the dividing line between substantial and insubstantial influence, or the number of decisionmakers that must have shared the improper motives, will become unclear. Furthermore, the court also may have to consider the strength of impermissible intent in individual decisionmakers. Thus, even if the court could determine the motives of every decisionmaker, which is the major problem in ascertaining legislative or administrative purpose under any standard, defining the requisite degree of influence would be haphazard.

483. But see infra notes 581-82 and accompanying text (erstwhile supporters may vote against measure to counter supporters with illicit motives).

484. Alexander, supra note 444, at 938.
derlying motivation theory determines what must be proven; following from this is the evidentiary issue of how to prove it. Therefore, the relevance and probative value of different types of evidence, such as that of individual decisionmakers' motives, will vary with the underlying substantive theory of why such motives are important.

To the extent that considerations of illicit motivation which affect the outcome of the decisionmaking process are sufficient to require invalidation of the challenged action, the motives of individual decisionmakers will be of greater probative value. If invalidation requires a sharing of impermissible motive by the institution, however, evidence of individual decisionmakers' motives will be less important. Even if a court were to rule as Professor Ely suggests, that a majority of the decisionmakers must share improper motives to mandate invalidation, the motives of a single decisionmaker still would be relevant and might be highly probative if the body was small. Individuals' motives would be irrelevant only if a court held that the institutional motive only could be proven by evidence equally applicable to all members of the institution, such as evidence of a law's foreseeable discriminatory effect. Furthermore, decisionmakers can testify not only about their own individual motives but about those of the institution.

A final question with regard to what must be proven to warrant invalidation of an official action is whether the official's objective or subjective intent is at issue. This question should be resolved by the theoretical foundation of each motivation theory. Since no single theory has been accepted universally, however, the lower courts have diverged on whether unconstitutional motivation must be objective or subjective and have developed various tests for proving unconstitutional motive that reflect their respective answers to this question.

Some courts have developed an objective test for unconstitutional motivation, focusing on evidence such as the reasonably foreseeable effects of a gov-

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485. Similarly, whether legislative or administrative purpose should be measured objectively or subjectively sometimes will depend on the context of the particular impermissible motives. See Davis, 426 U.S. at 253 (Stevens, J., concurring). The Court has recognized that in jury selection cases, for example, evidence of a statistically significant exclusion of minorities may be sufficient to demonstrate discriminatory intent, "because in various circumstances the discrimination is very difficult to explain on nonracial grounds." Id. at 242; cf. Castaneda v. Partida, 430 U.S. 482 (1977) (statistical disparities in jury selection established prima facie case); Schwemm, From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. Ill. L.F. 961, 1040 ("Castaneda reinforces the notion that what constitutes proof of discriminatory purpose will vary in different contexts."). In Davis, however, the Court considered such objective evidence of discriminatory impact insufficient to establish discriminatory purpose, in part because of alternate explanations of the disparate employment impact were available.


To the extent that a court focuses only on objective evidence of decisionmakers’ intent, all evidence of motivation would apply equally to each member of the decisionmaking body; the individual-institutional distinction would be irrelevant. Evidence sufficient to sustain a finding that the action would not have been taken but for illicit motives would establish the institution’s intent. There would be no need to ascertain which or how many decisionmakers shared that intent. Objectively defined institutional intent, however, is a fiction. Although evidence such as the reasonably foreseeable consequences of an action may imply the institution’s intent, some decisionmakers probably will have voted for the action because of those foreseeable consequences, and some will have voted for it in spite of those consequences. Therefore, defining unconstitutional motivation by restricting the kinds of evidence that may prove it is circular. That definition derives from a pretense that the decisionmaking body is of one mind; that pretense is supported by an evidentiary rule that admits only evidence from which that inference can be drawn.

Some lower courts have defined unconstitutional motivation as the decisionmakers’ subjective intent and others have developed various hybrid tests containing both objective and subjective elements. Commentators have identi-
tified two major problems with a subjective approach to unconstitutional intent. The first is that already discussed with regard to the effect of illicit motives on the decisionmaking process—must the illicit motivation have been held by a majority, plurality, or by individual decisionmakers whose motives were a "but for" cause of the challenged action? The second is the potentially greater difficulty of proving subjective motivation. Nevertheless, a subjective test of unconstitutional motivation flows necessarily from the same motive theories that dictate the "but for" causal definition of unconstitutional motivation. To the extent that any decisionmakers' illicit motives which affect the outcome of the deliberative process are sufficient for invalidation, the subjective intent of those decisionmakers—in effect, why they supported the action—is the crucial question.

The Supreme Court seems to have articulated a subjective standard of intent. In Personnel Administrator v. Feeney the Court concluded that unconstitutional motive must be subjective in the context of an equal protection challenge. The Court noted that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Thus, Feeney appears to state that evidence of the improper objective intent of a decisionmaking body may be insufficient to demonstrate unconstitutionality. The plurality opinion also focused on the decisionmakers' subjective motivation in City of Mobile v. Bolden, a racial vote-dilution case.

Although the Court has stated that the decisionmakers' subjective intent controls, it has recognized correctly that objective factors may prove subjective

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493. See supra notes 451-84 and accompanying text.
494. See, e.g., Comment, supra note 417, at 325-26. That article suggests that crucial evidentiary problems arise in attempting to discern subjective motivation. The biggest problem is that subjective intent generally must be gleaned from circumstantial evidence. Furthermore, several distinct motivations may contribute to any one act, leaving the judge much discretion in determining intent.

495. If a decisionmaker's action results in improper discrimination, the fact that the decisionmaker subjectively intended to benefit those individuals whom the law is harming will not stop its invalidation. Therefore, in most circumstances a decisionmaker's subjective intent will not operate as a defense. A law prohibiting abortion that the legislators enacted because they believed that the women affected ultimately would benefit more from giving birth, nevertheless would be unconstitutional. Those situations differ significantly, however, from a law, neutral on its face, that effectuates a constitutionally prohibited purpose. In that case, knowledge of the decisionmakers' motives is crucial in determining the law's validity.

496. 442 U.S. 256 (1979); see also Keyes v. School Dist. No. 1, 413 U.S. 189, 201 (1973) (Actions of school authorities which tended to show racial motivations were collectively sufficient to prove that the school authorities subjectively "carried out a systematic program of segregation affecting a substantial portion of the students, teachers, and facilities within the school system.").

497. Feeney, 442 U.S. at 279.
499. Justice Stevens, however, has argued that the Court's focus on subjective intent in the context of racial vote-dilution was misplaced. Id. at 90 (Stevens, J., concurring in the judgment); Rogers v. Lodge, 458 U.S. 613, 637 (1982) (Stevens, J., dissenting). Justice Stevens instead has suggested an "objective" test of unconstitutionality. This debate, which has been treated extensively, see, e.g., Hartman, Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards, 50 GEO. WASH. L. REV. 689 (1982), is beyond the scope of this Article.
motivation. As some courts and commentators have noted, however, such proof is not always easy to establish. When courts are reluctant to infer decisionmakers' subjective intent circumstantially, there will be a greater need for evidence, such as decisionmakers' testimony, that can establish directly subjective intent. Even when courts do not require direct evidence of decisionmakers' motives, such evidence may be so much more probative of subjective intent than other available evidence that it should be admitted over a claim of privilege. For example, the foreseeable discriminatory impact of a law may tend to expose circumstantially the motives of those who enacted it. As Feeney noted, however, decisionmakers may enact a law "in spite of" rather than "because of" that foreseeable impact. Thus, by itself, the probative value of such evidence may be minimal. On the other hand, direct evidence of decisionmakers' subjective intent, such as their credible admissions, may not only have greater probative value by itself, but also may elucidate the extent to which circumstantial evidence, such as foreseeable consequences, is probative of subjective intent.

Until the Supreme Court clearly articulates the definition of unconstitutional motivation in the various relevant contexts or until a unified theory of motivation is accepted, the courts will remain confused about what unconstitutional motivation is and how it may be proved. Regardless of how the courts ultimately interpret unconstitutional motivation, the calculus for balancing the decisionmakers' privilege against the probative value of and need for evidence of their motives will be the same. The only elements that will vary with the theories will be the probative value of and need for certain types of evidence. Thus,

500. Objective evidence of decisionmaker intent, such as the foreseeability of discriminatory consequences, can raise a strong inference that the consequences were intended. See, e.g., Rogers v. Lodge, 458 U.S. 613, 618 (1982); Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979). In fact, discriminatory intent usually is proven by objective factors, several of which were outlined in Arlington Heights, 429 U.S. at 266-68.


502. See, e.g., Hartman, supra note 499, at 713 ("All the standard techniques for establishing legislative purpose in the absence of a decisionmaker's admission of racial motivation are fraught with inadequacies.").

503. This Article is presented in the context of a plaintiff's need for evidence to prove unconstitutional motivation as balanced against a decisionmaker's privilege to refuse to give such evidence. The defendants in a suit challenging the constitutionality of government action, however, also frequently will require the testimony of decisionmakers. In Castaneda v. Partida, 430 U.S. 482 (1977), a case challenging a Texas grand jury selection process, the Court determined that the selection process was unconstitutional because the state did not rebut plaintiff's prima facie case of intentional discrimination. The Court noted that the jury commissioners were "the only ones in a position to explain the apparent substantial underrepresentation of Mexican-Americans and to provide information on the actual operation of the selection process." Id. at 491. When decisionmakers are called to testify for the defendants about the purposes underlying their official actions, they rarely are likely to claim a privilege, since the defendants will be seeking to uphold both the decisionmakers' actions and their motives. In many instances the defendants will be the decisionmakers themselves. Because testifying for the government about their motives will subject decisionmakers to cross-examination by the plaintiff, see supra note 397 and accompanying text, however, they may attempt to assert the privilege. In that event, the court should balance the defendants' need for the evidence against the decisionmakers' need for the privilege, in the manner suggested by this Article.
in a ninety-nine member legislature voting fifty to forty-nine to enact a law, evidence of an individual decisionmaker's impermissible motives would be more probative when a court focused on subjective motivation or "but for" causation, and less probative when a court employed an objective or "majority" test. The equation for balancing the interests competing against a privilege, however, will yield the correct results within the framework of each theory.

B. Proof of a Decisionmaking Body's Unconstitutional Motivation

Virtually all of the motivation theorists have addressed, to some extent, the process of and the difficulties inherent in ascertaining the motives of a collective body. The arduousness of the task was one of the classic objections to judicial review of decisionmakers' motivation. When certain categories of evidence are used to prove the motives of a decisionmaking body, however, the inquiry is no more difficult than determining the motives of an individual. Moreover, it is generally these same categories of evidence that most often will be available and probative of impermissible purpose.

Nevertheless, even when "but for" motives are sufficient for invalidation, it frequently will be necessary to examine the motives of the institution as a whole, for several reasons. First, at times it may be impossible to prove any individual decisionmaker's motives. Second, when the decisionmaking body is large and the vote is not close, it may be impractical or impossible to establish, without other evidence, the motives of a sufficient number of individuals to prove that those motives affected the outcome of the deliberative process. Last, most of the types of evidence available to establish illicit motivation apply to the institution as a body and not to specific individuals. Thus, evidence that a school board continually adopted policies that increased segregation when other alternatives would have eliminated or lessened it, would suggest that all board members supporting the action may have had some discriminatory purpose. This evidence alone, however, reveals nothing about the motives of any individual decisionmaker.

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504. See e.g., Brest, supra note 14, at 119-24; Simon, supra note 371, at 1097-107.
507. See infra notes 512-14 and accompanying text.
508. This statement may respond to a question that Professor Alexander posed in his article, Alexander, supra note 444, at 947, about Professor Simon's observations on determining the motives of collective bodies. Alexander noted:

As I read Simon, he solves the evidentiary difficulties which attend attributing motives to institutions by asking what the probabilities of racial prejudice would be if the institution were but one person. He then says that the probability of racial prejudice attributable to one-person institutions can be attributed to each member of multi-member institutions quod erat demonstrandum.

* * *

One difficulty, which I believe can be surmounted, exists in such an approach. Suppose the probability of racial prejudice behind a five-member school board's action is one-third, insufficient to invalidate the action. Suppose, in addition, the action was approved by a three-to-two vote. Suppose, finally, that when the probability that a certain motive accom-
There are essentially two ways to prove an institution's motivation. First, evidence of the institution's actions and the circumstances that may have affected those actions may establish an institution's motivation. This evidence is probative of the institution's motivation because it substantiates the same inference of the motives of every decisionmaker who voted for a decision. For example, one way to establish illicit institutional intent is with evidence that a governmental action had a foreseeable discriminatory impact. Such evidence is equally probative of the institution's intent as it would be probative of an individual's intent because any actor may be considered to have intended the foreseeable consequences of his actions. Because a decisionmaking body may act "in spite of" rather than "because of" the foreseeable consequences of its actions, however, such evidence is not dispositive, and at times may not be very probative. The inference of intent from foreseeability, however, the action of three persons is one-third, it means that it is probable that one of the three members acted with this motive and that the other two did not so act. Therefore, where the vote was three to two, and the probability of the forbidden motive was one-third, the action would probably not have been taken but for that motive. Using Simon's method, however, the action would be upheld.

One response to this objection is that the probability of racial prejudice attributable to the whole decisionmaking body cannot be translated meaningfully to the intent of particular individuals. Using Alexander's hypothetical, the one-third probability of the school board's racial prejudice means that, although certain evidence indicates that some prejudice influenced the body, there nonetheless was a two-thirds possibility that the action would have been taken anyway. Evidence that implies these probabilities about an institution's intent implies nothing about the probabilities of an individual decisionmaker's intent. It is certain only that the racial prejudice of the body taken collectively was not a "but for" cause of the challenged action. Thus, there is no justification for reshuffling the probability of the collective intent, dealing it all to one individual, and assuming that his motive was a "but for" cause of his vote that in turn affected the body's decision. To do so would twist the evidence from showing that it was probable that the prejudice did not affect the vote to showing instead that it was likely that the prejudice did affect the vote. The evidence not only fails to justify that inference but negates it. Thus, although an individual decisionmaker's illicit motives can be a "but for" cause of an official action, all of the fractional percentages of illicit motive of each decisionmaker cannot be added up and attributed to one of them.

This analysis assumes that when the probability of racial prejudice was valued as one-third, there was only one-third chance that the decisionmakers would not have acted but for racial prejudice. The illicit motive still might have been a "but for" cause of the action if the one-third percentage tipped the otherwise undecided group towards action. If each of the three members who voted for the law was one-third racially prejudiced and two-thirds not, and the two-thirds nonprejudiced motives of each were divided one-third in favor of the law and one-third against, the racially prejudiced one-third would affect the outcome.

509. See, e.g., Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir. 1977); Armstrong v. O'Connell, 451 F. Supp. 817 (E.D. Wis. 1978). The commentators and courts also have identified a third method of proof, known as "generic institutional behavior." See, e.g., Simon, supra note 371, at 1097. Generic institutional behavior refers to the acts or conduct of the same institution at a prior point in time with different members. Courts have inferred the present body's intent from such past actions by viewing the institution over time as a single entity. See, e.g., Amos v. Board of School Directors, 408 F. Supp. 765, 819 (E.D. Wis. 1976).

510. See, e.g., Wattleton v. International Bhd. of Boilermakers, 686 F.2d 586 (7th Cir. 1982).

511. Professor Simon also makes this point. Simon, supra note 371, at 1097.


514. See Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir. 1983); Tanner v. McCall, 625 F.2d 1183, 1192 (5th Cir. 1980); Nevett v. Sides, 571 F.2d 209, 222 (5th Cir. 1978).
ever, will be of the same magnitude for all of the individual decisionmakers who supported an action as it would be if a single decisionmaker had acted alone.

Second, evidence of the intent of individual decisionmakers may prove the motives of a decisionmaking body. This evidence is relevant in two distinct but related ways: it may establish that one or more individuals who acted because of illicit motivation constituted a “but for” cause of the enactment, or the motives of the individual decisionmakers can be aggregated to establish the motives of the institution, or at least a majority of the institution, when such a showing is required. When decisionmakers admit that they acted for unconstitutional reasons, it makes it more likely that the institution acted for those reasons. Ultimately, the intent of the institution can be derived from the individual motives of its members. If a majority of the members of a decisionmaking body would not have voted for a law but for their belief that the law would cause segregation, it is difficult to argue that it was not the purpose of the decisionmaking body to cause segregation. If other sources of evidence demonstrate that the entire body had an illicit purpose, the need for evidence of the motives of individual decisionmakers might diminish, but the probative value of such evidence will not.

It is important to recognize from the outset that individual decisionmakers can testify not only about their own individual motives, but also about the purposes of the collective decisionmaking body. Decisionmakers can be questioned, in court and in discovery, about the alleged “permissible” purposes for their actions, the information on which the decisionmaking body acted, knowledge of less harmful alternatives, deviations from the procedural and substantive considerations that the body normally uses in making decisions, and any other facts that might be probative of the decisionmaking body's purpose. For evidence of the motives of both the individual and the body, the probative value of, need for, and importance of the evidence will vary widely, as will the degree of intrusion on governmental interests. In many instances, the importance of using both types of evidence will outweigh the importance of the decisionmaker's privilege not to be questioned.

C. Probative Value

Courts will face a threshold procedural problem in ascertaining the proba-

515. See supra notes 451-83 and accompanying text.
516. Professor Bickel even has maintained that the “only possibility of a solution” to the problem of determining legislative purpose “is cross-examination of each individual legislator.” A. BICKEL, supra note 7, at 215 (emphasis added).
517. But see Comment, supra note 417, at 332-37 (institutional intent of decisionmaking body should be inferred solely from actions of body as a unit); Note, supra note 486, at 733 (“[M]ultimember decision-makers, by their nature, cannot have a subjective intent; only their members can.”).
518. See infra notes 606-12 and accompanying text.
519. This point seems to have been overlooked by a number of commentators, who have considered the decisionmaker's privilege to refuse to testify solely as it related to the compelled testimony of individual decisionmakers' personal motives. See, e.g., Brest, supra note 14, at 124; Simon, supra note 371, at 1105.
tive value of the decisionmaker's testimony, before weighing it against a qualified privilege. When the relevance or probative value of a witness' proposed testimony is challenged, the proponent of that witness usually is able to make an offer of proof of what the witness will testify to, if permitted. Such an offer is possible because witnesses generally cooperate with the attorney calling them.\textsuperscript{520} With decisionmakers who claim a privilege and refuse to testify voluntarily,\textsuperscript{521} however, the attorneys calling them frequently will be unable to predict accurately what the witness will say, and thus, cannot evaluate the importance of the proposed testimony. To the extent that attorneys may depose prospective decisionmaker witnesses,\textsuperscript{522} of course, they will be better able to anticipate the decisionmakers' testimony.

Alternatively, courts could conduct \textit{in camera} examinations of decisionmakers to determine in advance the weight of their potential testimony. Although that procedure initially would subject the decisionmaker to a less public and therefore perhaps less intimidating procedure, some of the protection of the privilege still would be lost. Even this limited intrusion can outweigh the plaintiff's need for the testimony in a particular case. Nevertheless, \textit{in camera} examination of decisionmakers often will be appropriate to assist the court in determining the probative value of and need for their testimony.\textsuperscript{523}

Courts also frequently could determine the weight of potential testimony by

\textsuperscript{520} In practice witnesses often align themselves with the side that they believe their testimony will aid, and cooperate with that attorney.

\textsuperscript{521} The decisionmaking body may not assert a privilege to prevent individual decisionmakers from testifying voluntarily. See supra notes 390-93 and accompanying text.

\textsuperscript{522} See supra note 412.


The greater the showing of necessity by the party seeking the information, the more thoroughly the court will examine whether disclosure is appropriate. See, e.g., United States v. Reynolds, 345 U.S. 1, 11 (1953) (state secrets privilege). When \textit{in camera} inspection might defeat the purpose of the privilege by disclosing the confidential matters sought to be protected, however, the procedure should not be used. Id. at 10. The trial court has discretion to exclude parties or their counsel from the \textit{in camera} review, when their presence might compromise the confidentiality of the information. See, e.g., United States v. Anderson, 509 F.2d 724, 729-30 (9th Cir. 1974) (informant's privilege), cert. denied, 420 U.S. 910 (1975). Many courts, however, have noted the importance of allowing litigants, who are in the best position to recognize and advocate their need for particular items of evidence, to participate in the examination. See, e.g., United States v. Nixon, 418 U.S. 683, 715 n.21 (1974) ("If it lies within the discretion of the trial court to seek the aid of the Special Prosecutor and the President's counsel for \textit{in camera} consideration of the materials in issue").
assessing what the plaintiff hopes it will prove. Even that simple process will prohibit the use of much evidence that, if successfully elicited, either is available through nonprivileged sources or not sufficiently important to overcome the privilege. When the examination proceeds but is not fruitful, the testimony can be stricken, but not before the decisionmakers have been exposed to public cross-examination of their allegedly illicit motives. Any other standard would require the court to assess the likelihood of the success of the cross-examination. Although sometimes there may be reliable indicators of such success, the decision more often would be speculative.

There also may be some question about the efficacy of allowing plaintiffs to cross-examine adverse decisionmakers. Commentators have noted the facility with which decisionmakers can camouflage their impermissible motives. Although motives sometimes can be disguised more easily than other objective facts, such criticism probably underestimates the value of cross-examination. Litigants in numerous cases have elicited devastating admissions of illicit motivation, which have established the unconstitutionality of official actions. In

assumed that adverse party would not be allowed to participate in in camera review of documents sought under FOIA), cert. denied, 415 U.S. 977 (1974).

Courts also have conducted in camera hearings, with participation by adverse parties, to determine whether materials subpoenaed from members of Congress were within the speech or debate privilege. See, e.g., In re Grand Jury Investigation, 587 F.2d 589, 596-97 (3d Cir. 1978); In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211, 213-14 (D.D.C. 1980)

In camera hearings would be an appropriate tool whenever it otherwise was impossible to ascertain accurately the probable value of and need for the testimony of decisionmakers or the documents in their possession. Although decisionmakers sometimes would be questioned under circumstances that ultimately did not warrant overruling a claim of privilege, this minimal intrusion also would allow the court occasionally to uphold the claim of privilege when, in the absence of an in camera hearing, it might have overruled the claim. On balance, the assistance that in camera consideration can render to a court determining whether a claim of privilege should be overruled justifies the slight intrusion from inspecting records and even the greater intrusion from examining legislators. Moreover, courts also should allow counsel to participate in this procedure when it is necessary to measure effectively the importance of the evidence to the litigant's case.

524. See infra notes 606-12 and accompanying text.

525. Fed. R. Evid. 611(c) provides that leading questions may be used in federal court on cross-examination but not on direct, except to the extent necessary for the attorney to develop the testimony of the witness. See, e.g., United States v. Tsui, 646 F.2d 365, 368 (9th Cir. 1981); United States v. O'Brien, 618 F.2d 1234, 1242 (7th Cir. 1980), cert. denied, 449 U.S. 858 (1980); Morvant v. Construction Aggregates Corp., 570 F.2d 626, 635 (6th Cir. 1978). Many states have analogous provisions in their evidentiary codes. See, e.g., COLO. R. Evid., 611(c); FLA. STAT. § 90.612(3) (1979).

Under Fed. R. Evid. 611(c) leading questions also may be asked of a hostile witness—one whose testimony would evidence hostility, bias, or content that legitimately surprises the calling party, see, e.g., United States v. Shursen, 649 F.2d 1250, 1254 (8th Cir. 1981); United States v. Brown, 603 F.2d 1022, 1026 (1st Cir. 1979); United States v. Bensinger Co., 430 F.2d 584, 591 (8th Cir. 1970), and of an adverse party or a witness identified with (normally testifying on behalf of) an adverse party. See, e.g., Perkins v. Volkswagen of Am., Inc., 596 F.2d 681, 682 (5th Cir. 1979); see also C. Mccormick, supra note 352, § 25, at 57-58 (party may ask leading questions of an adverse party called as a hostile witness "as upon cross-examination").

Legislators testifying about legislative intent, called by a party attempting to prove unconstitutional motive, generally should be considered hostile within these rules. Legislators alleged to have harbored discriminatory motives are not likely to be friendly witnesses; their close association with the government officials who are defendants and their interest in the outcome of the suit generally will justify permitting cross-examination by plaintiff.

526. See, e.g., Brest, supra note 14, at 124.

527. As Professor Wigmore noted, "[cross-examination] is beyond doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, supra note 300, at 32-33.
Mieth v. Dothard\(^{528}\) the court concluded that minimum height and weight requirements for state troopers were purposefully discriminatory against women, relying in large part on the testimony of the Director of the Department of Public Safety, who testified that he believed women should not be state troopers.\(^{529}\) Later, in Armstrong v. O'Connell\(^{530}\) the court found the testimony of the Superintendent and Assistant Superintendent of Education very probative of intent. Those officials testified that the school board was "unalterably opposed to any form of forced integration and, from an educational point of view, [did] not believe in any substantial racial integration in the schools."\(^{531}\)

The difficulty in a particular case of eliciting helpful material from decisionmakers on cross-examination certainly will affect whether the attorney decides to subpoena them. Experienced attorneys will attempt to prove their cases through hostile or adverse witnesses only when absolutely necessary.\(^{532}\) When other evidence is lacking or when such testimony will be unusually probative, the difficulty that the examiner may encounter is not a sufficient reason to prohibit the testimony. Furthermore, this difficulty is far less pronounced in discovery when the examiner normally is not required to demonstrate the probative value or admissibility of the information sought.\(^{533}\) Despite these problems inherent in eliciting and ascertaining the weight of decisionmakers' testimony, when such evidence is adduced, it may have considerable probative value.\(^{534}\)

529. Id. at 1180.
531. Id. at 826-27; see also Perkins v. City of West Helena, 675 F.2d 201, 214 (8th Cir.) ("direct evidence of discriminatory intent" in testimony of two city alderman tended to show city's electoral system was maintained for a discriminatory purpose), aff'd mem. 459 U.S. 801 (1982).
532. Therefore, when a friendly witness can provide the same information—for example, of the arguments made in deliberation—an attorney is not likely to call decisionmakers against their will. In some circumstances, however, only a hostile witness can provide necessary testimony, as at times when the plaintiff is attempting to prove the illicit motives of the individual decisionmakers who voted for the challenged action or rule.
533. But see supra note 412 (discussing possible restrictions on normal course of discovery to accommodate interests protected by legislative and administrative privileges).
534. The balancing of probative value and need against the degree of harm likely to be suffered should govern not only whether to compel decisionmakers to participate in discovery or to testify, but also the permissible scope of discovery and examination. Courts must be careful to limit cross-examination to questions likely to elicit necessary and probative evidence of the decisionmaker's purpose for supporting the challenged action. Many of the preceding observations of the probative value of and need for evidence of illicit motivation apply equally to the permissible scope of the examination of decisionmakers. In addition, a number of issues are peculiar to the scope of examination, concerning the propriety of questioning a decisionmaker about a particular character trait from which illicit motivations can be inferred. For example, in an action alleging that a law was enacted for a racially discriminatory purpose, should a plaintiff be permitted to examine a decisionmaker about whether he is generally racist, or has made racist remarks unrelated to this law, or has voted for other laws with a foreseeable racially discriminatory effect?

All of the above examples of evidence would be offered to demonstrate that the decisionmaker was prejudiced, and therefore more likely to have supported the challenged enactment for racially discriminatory reasons. Evidence of a person's character offered circumstantially to prove that he acted in conformity with that character on a particular occasion generally is prohibited in both criminal and civil cases. See, e.g., Michelson v. United States, 335 U.S. 469 (1948) (to the extent character evidence is relevant, probative value outweighed by risks of prejudice, confusion, and waste of time); Fed. R. Evid. 404; C. McCORMICK, supra note 352, § 188, at 553-54; 2 D. Louisell & C. Mueller, FEDERAL EVIDENCE, § 142, at 151 (1978) ("character evidence considered irrelevant as circumstantial proof of conduct" in civil cases). Evidence of a person's character, in-
including his other acts, frequently is admitted in civil cases, however, when offered to prove intent or knowledge. See, e.g., Bohannon v. Pegelow, 652 F.2d 729, 733-34 (7th Cir. 1981); Doe v. New York City Dep’t of Social Services, 649 F.2d 134, 147 (2d Cir. 1981) (in civil rights actions in which foster child alleged agency’s failure properly to supervise placement, excluding evidence of abuse of plaintiff’s foster sister was error, since such evidence was “relevant to the agency’s notice and knowledge of risk of harm” to plaintiff).

Arguably, the intent that courts are determining when they accept character evidence differs in most cases from the intent in motivation analysis. In criminal cases, evidence of other crimes or bad acts often is admitted to prove the defendant’s intent when defendant concedes committing the act but claims it was an accident or mistake. Intent in those cases denotes purposeful rather than accidental conduct. Since Feeney concluded that proof of purposefulness does not warrant invalidation, more must be shown than that the decisionmakers knew that their actions would have discriminatory effects. Rather, the decisionmakers must have desired to bring about those particular results. Courts apparently also have admitted character evidence to prove that a person desired his actions to have particular effects. For example, evidence of prior and subsequent incidents of racial discrimination often is admissible in civil rights actions to show a pattern of discriminatory intent. See, e.g., Pennsylvana v. Porter, 659 F.2d 306, 320 (3d Cir. 1981); Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295, 1300-1301 (9th Cir. 1981).

Similarly, evidence that decisionmakers engaged in prior incidents of racial discrimination or have decidedly racist attitudes should be probative of whether they intended to discriminate. Evidence that a school board member was an officer in the Ku Klux Klan surely could assist the factfinder in determining whether the board member supported segregative school policies “because of” or “in spite of” their discriminatory effect. This evidence—that a decisionmaker was a member of the Ku Klux Klan—offered to prove that the decisionmaker was more likely to have acted with racially discriminatory motives on a particular occasion comes dangerously close to evidence of propensity, rather than intent. Evidence that the accused, on trial for one crime, has committed other crimes or bad acts is universally inadmissible in criminal cases, when the evidence is relevant only to establish that the accused had a propensity to commit crimes. See Fed. R. Evid. 404(b).

This rule of exclusion applies equally to civil cases, although the issue arises less frequently.

Nevertheless, evidence that a decisionmaker is an avowed racist, for example, logically suggests more than that he must have acted badly on the occasion in question because he is a “bad person.” A racist, by definition, regards members of other races negatively, simply because of their race. Cf. Simon, supra note 371, at 1047 (“Racial (or ethnic) prejudice is an attitude . . . composed of two essential characteristics: The group against which prejudice is directed is regarded negatively, and this negative attitude is categorical—that is, it is directed against anyone who is a member of the group simply because of his membership.”). Evidence of racism, therefore, can have a powerful tendency, rooted both in logic and history, to prove the intent behind an action that adversely affects racial minorities. In fact, the credo of many racists is to strive to bring about such adverse effects. Moreover, unlike some character traits, racial prejudice tends to differ less over time and in varying circumstances. When decisionmakers’ racist attitudes can be demonstrated clearly—for example, by a history of apparently prejudiced actions—courts should allow such proof. There was little question, from the series of actions taken by officials in cases such as Yick Wo v. Hopkins, 118 U.S. 356 (1886), that those decisionmakers were prejudiced against racial minorities. Other character traits may have a greater or lesser tendency to prove that illicit intent existed on a particular occasion. The probative value of such evidence therefore will vary greatly and at times may be outweighed by the traditional countervailing factors of prejudiciality, confusion, and waste of time. When that is not the case, however, character evidence tending to prove decisionmakers’ intent often should be admissible through nonprivileged sources.

Privilege usually should prohibit seeking such evidence of a decisionmaker’s character through the testimony of the decisionmakers themselves. First, this evidence frequently will be available from nonprivileged sources. Since the examiner must have a good faith basis for asking these disparaging questions, he often will have discovered that basis from another source, through which the evidence could be presented. Second, even if the character evidence is not available through nonprivileged sources, legislative or administrative privilege generally should prohibit accusations by the examiner of invidious character traits that are likely to intimidate severely the decisionmaker on the stand. Conversely, when an examiner can elicit character evidence from the decisionmaker in a less accusatory manner, and when the evidence is particularly probative, a court should be more inclined to admit it. Thus, evidence that a decisionmaker supported a series of similar actions with foreseeable racially discriminatory effects should be more readily admissible than the fact that the decisionmaker told several racist jokes. The former evidence is both more probative of the decisionmaker’s intent in the challenged action and less personally damning, since the decisionmaker may be able to offer some benign purpose for his actions. When the probative value of character
The Supreme Court in *Arlington Heights* stated that even when the testimony of decisionmakers is not barred by privilege, it should be permitted only "in some extraordinary instances." Because the Court was not considering privilege, it presumably based its miserly view of when officials could be compelled to testify on a determination that admissibility will be rare because the probative value of such evidence is characteristically too low, or the traditionally recognized countervailing factors associated with the evidence, other than those underlying the decisionmakers’ privileges, are too high. The Court, however, did not indicate that the broad spectrum of decisionmaker testimony will pose unusually grave dangers of prejudice, confusion, or waste of time or that such testimony consistently is of negligible probative value.

*Arlington Heights* simply may reflect the Court’s confusion, previously shown in *Davis*, over the distinction between the probative value and privilege issues. When the *Arlington Heights* Court stated that decisionmakers might be called to testify only in extraordinary instances, it probably was concerned with “intrusion into the working of other branches of government” that “judicial inquiries into legislative or executive motivation represent.” These interests, however, are precisely those that legislative and administrative privileges protect. If there were no privilege, decisionmakers probably would be called to testify and subjected to discovery on a routine basis. Unless such testimony generally was irrelevant or traditional countervailing factors normally outweighed its probative value, it often would be both admissible and helpful. Thus, the *Arlington Heights* Court probably weighed the interests underlying the privileges twice. It appears to consider those interests both in determining whether decisionmakers should be privileged to refuse to testify, and in noting that even if there is no privilege, decisionmakers should testify only on rare occasions. Alternatively, the Court may be grossly underestimating the potential probative value of the testimony of executive and legislative officials.

In either case, the Court’s admonition is overly protective. Although in many instances decisionmakers will be privileged to refuse to testify or submit to discovery, if a decisionmaker’s claim of privilege is overruled, he should testify. Only privilege considerations should determine when to compel a decisionmaker’s testimony, not whether other extraordinary circumstances exist. Moreover, it will be shown that to overcome a claim of legislative or administrative privilege, plaintiffs will have to demonstrate that the information they seek evidence does not clearly outweigh the risk of prejudice, confusion, or waste of time, however, the interests underlying the decisionmaker’s privilege always should militate against admissibility.


536. *See* FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). This rule vests the judge with broad discretion to exclude evidence, no matter how probative, when the countervailing factors are more likely to interfere with the factfinder’s determinations. The basic policy of the rules of evidence, however, favors the introduction of relevant evidence. *See* FED. R. EVID. 402.

537. The Court also confused these issues in *Davis*. *See* supra notes 416-43 and accompanying text.

that the specific circumstances of the case mandate use of the evidence. Thus, when a court rejects a decisionmaker's claim of privilege, it simultaneously will be deciding that the specific circumstances of the case mandate use of the evidence.

1. Individual Decisionmakers' Testimony About Institutional Intent

Courts and commentators continue to seek an appropriate methodology for ascertaining whether impermissible purposes affected the outcome of a government decision. In Arlington Heights the Supreme Court suggested a nonexclusive list of the kinds of evidence that are probative of a decisionmaking body's discriminatory purpose. The list included the impact of the official action, the historical background of the decision, the specific sequence of events preceding the challenged decision, the departures from normal procedural and substantive considerations, the legislative or administrative history of the decision, and the testimony of the decisionmakers themselves about the purpose of the official action. Courts presently consider all of these factors in determining a legislative or administrative body's purpose. Professor Simon has catalogued more specific-
cally the most prevalent categories of evidence of institutional purpose and has
discussed why and the extent to which they are probative.543 Courts also con-
sider these types of evidence, which overlap somewhat with those identified in
_Arlington Heights_, in discerning the intent of decisionmaking bodies.544 The
facts within each of these categories necessary to establish the decisionmaking
body's illicit purpose can be elicited from individual decisionmakers. In fact
decisionmaker testimony frequently will be the most credible and sometimes the
only source545 of such proof. For example, whenever a decisionmaking body
fails to keep a verbatim record of its proceedings, evidence of the information on
which the institution acted often will have to be elicited from the decisionmakers
themselves.546 Even when such a record exists, however, it may not include
critical data and arguments presented to the decisionmaking body outside the
official recorded deliberative processes. Most importantly, examination of deci-
sionmakers about the institution's reasoning for acting on the information that it
considered, its awareness of less discriminatory alternatives, the bona fides of the
body's asserted purpose, or most other facts probative of institutional intent,
presents a nearly unparalleled manner of determining the body's true

543. See Simon, _supra_ note 371, at 1097-99. As noted by Professor Simon, _id._, the factors are:
(1) overtly racial rules or regulations that may (a) be symptomatic of prejudice, (b) single out a
minority racial group or groups for clear disadvantage, or (c) have neither of these racial character-
isics, or share one or the other to some incomplete extent; (2) evidence that the action significantly
disadvantages a member or members of a minority racial group compared to others within the rele-
vant population (e.g., _Washington v. Davis_, 426 U.S. 229 (1976)); (3) an explanation of the purport-
edly innocent goals of the challenged action that is sufficiently peculiar within the context to warrant
disbelief (e.g., _Gomillion v. Lightfoot_ , 364 U.S. 339 (1960); _Dailey v. City of Lawton_, 425 F.2d 1037
(10th Cir. 1970)); (4) evidence that the action's purportedly innocent goals could have been accom-
plished by reasonably available alternative means with a significantly less racially disproportionate
effect (e.g., _United States v. School Dist._, 521 F.2d 530, 538 n.13, 540 n.20, 542-43 (8th Cir.), _cert.
denied_, 429 U.S. 946 (1975)); (5) judicial or administrative decisions that assign race as one of the
grounds of decision; (6) an institutional admission; for example, a legislative preamble that states a
racial purpose, or an admission by the counsel of the institution that took the challenged action (e.g.,
_Hawkins v. North Carolina State Bd. of Educ._, 11 RACE REL. L. REP. 745 (W.D.N.C. Mar. 31,
1966); cf. _Truax v. Raich_, 239 U.S. 33 (1915) (discrimination against aliens apparent on face of
legislation)); (7) evidence of a contextual peculiarity in the process leading to the challenged actions,
such as the omission of a required or customary hearing (see _Arlington Heights_, 429 U.S. at 267); (8)
evidence that the specific membership of the institution previously has engaged in racially prejudiced
actions (The courts do not seem to distinguish cases on the basis of whether the same or different
members took the prior official action. In _Keyes v. School Dist. No. 1_, 413 U.S. 189 (1973), twenty-
one different individuals had served on the seven-member school board during the period at issue);
(9) evidence of a social-political background or context suggestive of racial prejudice (e.g., _Reitman
v. Mulkey_, 387 U.S. 369 (1967); _Griffin v. County School Bd._, 377 U.S. 218 (1964)); and (10) evi-
dence of the data and arguments presented to the institution, whether by outsiders or members,
during the information-gathering and deliberative processes that led to the action (see _Arlington
Heights_, 429 U.S. at 268).

544. See _supra_ cases cited note 543.

545. See _infra_ notes 622-29 and accompanying text.

guidelines for Medicaid funding for abortion as interfering with the Establishment Clause of the Con-
stitution because "the only legislative purpose which may be hypothesized . . . is to adopt and
further a religious belief by impeding abortions as the equivalent of infanticides . . . ." _Id._ at 458-
59, 398 A.2d at 595. Because New Jersey is one of many states that does not keep any legislative
history, the decisionmakers were called to testify on the tenor of the debates prior to the law's
passage to aid in ascertaining legislative motivation.
purpose.\textsuperscript{547}

Because this evidence demonstrates the purpose of all members of a decisionmaking body who supported an action, it usually will be more probative than proof of individual decisionmakers' purposes in determining whether illicit motives were a "but for" cause of the challenged action. Furthermore, as the size of the decisionmaking body\textsuperscript{548} and the disparity of the vote increases, the probative value of evidence of the body's motive increasingly will exceed the probative value of evidence of individuals' motives. As the body grows larger and the vote more lopsided, the illicit motivations of one or even a small number of decisionmakers will be less likely to constitute a "but for" cause of the challenged action. Assume an eleven-member school board votes ten to one for a plan that results in segregated schools, claiming to be promoting a "neighborhood" school policy. The illicit motives of one, two, or three members will not have affected the outcome of the deliberative process;\textsuperscript{549} evidence of their individual motives will not reveal much about the institution's purposes. Evidence of the information on which the body acted, the body's debates, or evidence that the board knew it could have accomplished its purported purpose with a less discriminatory impact, however, may be much more probative of whether the illicit motive was a "but for" cause of the action.

Among the various categories of evidence of institutional intent, some will have greater probative value than others. After \textit{Feeney}, in which the Court held that unconstitutional purpose may be found only when a decision was made "because of" rather than "in spite of" its foreseeable consequences, an action's disproportionate impact may not be significant\textsuperscript{550} absent other evidence of un-

\textsuperscript{547} For example, in \textit{City of Memphis v. Greene}, 451 U.S. 100 (1981), Justice Marshall noted that the testimony of the responsible decisionmakers "strongly suggest[ed] that the city deviated from its usual procedures" in reaching its decision. \textit{Id.} at 142 (Marshall, J., dissenting).

\textsuperscript{548} The largest decisionmaking body is the electorate. Although the Supreme Court, in \textit{Hunter v. Erickson}, 393 U.S. 385, 392-93 (1969), held that a decision approved by the electorate may be judicially reviewed, at least one lower court has concluded that the first amendment protects voters from revealing the motives for their actions. \textit{Kirksey v. City of Jackson}, 663 F.2d 659, 662 (5th Cir. 1981).

\textsuperscript{549} This is true at least for their votes alone. The illicit motivation of one member might affect the institution more substantially through his lobbying for or sponsoring of the legislation. \textit{But see infra} notes 555-67 and accompanying text (discussing practice of ascribing individuals' intentions to entire decisionmaking body).


It continues to be true, however, "that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." \textit{Davis}, 426 U.S. at 242; \textit{see also Castaneda v. Partida}, 430 U.S. 482, 493-94 (1977) (same).
Other types of evidence are more probative of unconstitutional purpose because they tend to establish not only that unconstitutional motives played a role in the decisionmaking body's decision, but that they were a "but for" cause of it. For example, evidence that the decisionmaking body could have pursued its asserted goals by alternative, reasonably available means comparable in cost and political acceptability, and with a less disparate impact, suggests that the discriminatory intent was a "but for" cause of the decision. Similarly, Professor Simon has noted that proof of an action's racially disproportionate effects coupled with evidence disproving the government's claim of innocent purpose, such as the availability of less discriminatory alternatives, is sufficient to establish an inference that the action would not have been taken but for prejudiced motivation. Disproving the government's justifications for a challenged action is particularly powerful because it leaves unrebutted the inference that the illicit motives, which initially were established to have played some role in the deliberative process, were a "but for" cause of the actions. The probative value of decisionmakers' testimony therefore will depend on considerations such as these that dictate the weight of various evidentiary items.

Some kinds of evidence that in some contexts traditionally have been considered probative of a decisionmaking body's intent will have far less probative value in motivation analysis. The Supreme Court suggested in Arlington Heights that contemporary statements by members of the decisionmaking body may be highly relevant to prove the body's impermissible purpose. Such statements

551. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979) ("[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation."). In Columbus the Supreme Court affirmed the trial court's finding of segregative purpose, which was based largely on the foreseeability of discriminatory consequences. As one commentator has noted, however, the trial court had far more probative evidence of segregative intent before it. See Note, supra note 80, at 1392-95; see also Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979) ("We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination ... ").

552. Professor Simon discusses this issue in greater detail. See Simon, supra note 371, at 1097-1107.

553. Id. at 1099.

554. Cf. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 683-85 (1981) (Brennan, J., concurring) (rationale for truck length regulation was not safety but impermissible economic protectionism); Perkins v. City of West Helena, 675 F.2d 201, 214 (8th Cir.) ("Not one single alderman advanced the [rationale asserted in the litigation] for retaining [the challenged voting scheme] at the ... council meeting [in question]."), aff'd mem. 459 U.S. 801 (1982); May v. Cooperman, 572 F. Supp. 1561, 1571 (D.N.J. 1983) ("The purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill.").

Evidence, such as the availability of reasonable alternatives, which tends to disprove the government's claim of benign purpose, almost always will be that which applies to the decisionmaking body as an entity. Because the illicit motives of an individual decisionmaker are only one of potentially many factors contributing to the body's purpose, proof of such motives usually will indicate only that illicit considerations had some influence on the body's decision, and not that they caused it. Nonetheless, evidence of individual decisionmakers' impermissible purposes still may be extremely probative of causation. When a relatively large percentage of the decisionmaking body can be shown to have supported the challenged action because of their illicit motives, that evidence even may be conclusive. Moreover, a single decisionmaker's impermissible purpose may constitute a "but for" cause of the challenged action, or an individual decisionmaker's motives, in combination with other evidence of the institution's impermissible purposes, may demonstrate that the action would not have been taken "but for" an illicit purpose.
made during deliberation can be quite probative, by disclosing such things as the tenor and substance of that process and the information on which the body acted. Naked admissions of illicit motivation and individual arguments admittedly based on illicit motivation, however, may not operate in the same way. Although such admissions clearly would reveal individual motives, they would not tend to establish the body's motives.

Courts frequently interpret statutes by considering statements made in the process of decisionmaking.\textsuperscript{555} For that purpose, such statements have been considered very probative of the decisionmaking body's objectives.\textsuperscript{556} That practice, which ascribes individuals' intentions to the entire body, has been criticized as unwarranted on the theory of agency or adoption by silence.\textsuperscript{557} Nevertheless, in many instances statements made in debate are probative of the institution's intent. When the draftsman of a law or a committee chairman comments on the objectives or details of proposed legislation, the failure to contradict him often can be interpreted properly as acquiescence. The body frequently recognizes the expertise that various persons develop about a particular statute and accedes to their explanations of the intended operation of the legislation.\textsuperscript{558} Moreover, since legislators know that courts will consider individuals' unchallenged comments as probative of the body's intentions, silence in response to such statements in fact may constitute true adoption.\textsuperscript{559}

This practice of inferring the institution's purpose from remarks of individual decisionmakers made during or near the place and time of a decisionmaking body's deliberations also has been advocated and used in motivation analysis.\textsuperscript{560} Courts frequently have admitted these statements as relevant to and highly probative of the decisionmaking body's purpose. In \textit{Resident Advisory Board v. Rizzo},\textsuperscript{561} a challenge to the City of Philadelphia's failure to permit construction of a planned low-income housing project, the court accorded great weight to the

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\item \textsuperscript{556} Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564-65 (1976); \textit{In re Grand Jury Investigation of Cuisinarts, Inc.}, 665 F.2d 24, 34 (2d Cir. 1981); cert. denied, 103 S. Ct. 1520 (1983); Church of Scientology v. Department of Justice, 612 F.2d 417, 423-24 (9th Cir. 1979).
\item \textsuperscript{557} See, e.g., Brest, supra note 14, at 124; cf. MacCallum, supra note 421, at 77-84 (discussing majority and agency models of legislative intent).
\item \textsuperscript{558} See, e.g., Grove City College v. Bell, 104 S. Ct. 1211, 1218 (1984); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967); NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 66 (1964); National Ass'n of Metal Finishers v. EPA, 719 F.2d 624, 648 n.34 (3d Cir. 1983).
\item \textsuperscript{559} See MacCallum, supra note 421, at 784-85.

Professor Brest has suggested that because "the uncontested avowals of illicit motivation by the sponsors of a measure [often] are in fact typical of the views of many others who vote for the measure . . . [such statements] thus lend some support to an inference of illicit motivation . . . ." Brest, supra note 14, at 124. Professor Simon also has emphasized that statements of illicit motive made by a decisionmaker near the place and time of the decision or during the institution's deliberations would be circumstantial evidence of that motive's role in the institution's actions.
\item \textsuperscript{561} 564 F.2d 126, 142, 144 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).
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mayor’s public statements in determining that the City had acted with racially
discriminatory intent. Mayor Rizzo, while exploring possibilities of preventing
the project’s construction, had equated public housing with “Black housing”
and railed "against placing such housing in White neighborhoods."562 The
court determined that these remarks were relevant as part of the specific se-
quence of events leading up to the challenged decision.563 Similarly, in Arm-
strong v. O’Connell564 the court considered, as probative of the discriminatory
purpose of the school board and administration, numerous statements made by
school board or administrative officials during or around the same time and
place as their deliberations, that suggested such improper motivations.565

These statements by individual decisionmakers are evidence of the histori-
cal milieu in which a decision was made and of the information or arguments on
which the institution acted; they may be probative of the institution’s purpose in
the same way they would be probative for statutory construction. The circum-
stances surrounding the individual’s statements of intent may suggest that the
institution’s behavior, at least in part, was responsive to those statements. None-
theless, such statements generally will be less useful in discerning the decision-
making body’s intent in motivation analysis than in statutory construction. The
inference that other members of the decisionmaking body deferred to a detailed
explanation of the law is stronger than the parallel inference that the body de-
ferred to a member’s admission of illicit motive such as racial prejudice. The
agency model of legislative intent,566 which offers some justification for inferring
the institution’s deference to individuals’ expertise,567 is largely inapplicable to
motivation analysis. Although an individual’s admission of illicit motive may
affect the actions of other members, the body’s deference to such statements
generally should not be assumed,568 particularly since the courts’ practice of
deducing illicit motive is not yet entrenched. Unlike statutory interpretation in
which the courts’ established practice itself lends probative value to an individ-
ual’s statements, in motivation analysis there is much less reason to impute the
remarks of members to the body. If the courts began regularly to make such
deductions in motivation analysis cases, the assignment of probative weight
would become self-fulfilling. In those circumstances members of the majority
voting to take an action would feel compelled to contradict statements of illicit
motive, regardless whether they shared the motive, since failure to do so would
imply acquiescence.

Nevertheless, decisionmakers’ unchallenged statements of illicit purpose
even today should be considered probative to some extent of the institution’s

562. Id. at 142.
563. Id. at 144. This factor had been specified in Arlington Heights, 429 U.S. at 267.
565. See also Perkins v. City of West Helena, 675 F.2d 201, 213-14 (8th Cir.) (statements of
aldermen during or around same time and place as deliberations concerning at-large
566. Cf. MacCallum, supra note 421, at 780-84 (discussing agency model of legislative intent).
567. Id.
568. See, e.g., Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975) (noting
"the injustice of ascribing collective will to articulate remarks of particular bigots").
motives. A decisionmaker supporting an action for innocent reasons arguably should contradict on the record public assertions by other decisionmakers of improper purposes for the action. In some circumstances, it may be justifiable to infer the institution's deference to the purposes of pivotal decisionmakers.\(^{569}\) The effect on the decisionmaking body of the motives and arguments of legislative sponsors or committee chairmen will vary, as with other members, with their general influence and persuasiveness. At times there will be little reason for finding that a decisionmaking body gave greater deference to the unconstitutional motives of key members than to the motives of other decisionmakers.\(^{570}\) Nevertheless, in some circumstances the statements of a particular decisionmaker made during or prior to deliberations should be accorded greater weight than statements of other decisionmakers,\(^{571}\) because as a matter of political reality, decisionmakers sometimes will accede to the wishes of a more powerful member of the body. In such a case, deference to the motives of the key member should be inferred, at least when it appears that the body would not have reached the same decision absent the key member's support. A few courts, without explicitly stating their rationale, have focused on the statements and motives of key personnel in determining the purpose of a governmental action.\(^{572}\) Admissions of impermissible purpose by key decisionmakers, however,

\(^{569}\) See infra notes 571-74 and accompanying text. Members of the decisionmaking body may defer to the desires of influential decisionmakers for a number of reasons. The decisionmaker may persuade some that his illicit purpose should be fulfilled. Others may mindlessly follow the "party line," and still others may desire only to gain favor with the key decisionmaker. In all of these instances inferring deference to illicit motives is justified, as long as the same action would not have been taken absent the illicit motivation. Thus, when the institution blindly follows a single decisionmaker, if it would not have made the same decision absent his illicit motives, the decision should be ruled unconstitutional.

\(^{570}\) Professor Brest has observed that some decisionmakers who otherwise would support an action for proper purposes might reverse their position in response to others' illicit motives. See infra notes 581-82 and accompanying text. This may be particularly true when the legislation was initially written or introduced for unconstitutional objectives. In some circumstances such a reaction might be so probable that a factfinder would be justified in finding that any decisionmaker who voted for the challenged action must have shared the illicit intent of the drafter or sponsor.

\(^{571}\) See, e.g., Grosjean v. American Press Co., 297 U.S. 233 (1936). In Grosjean a statement signed by two key political figures that indicated their illicit motives for supporting the bill was circulated to the legislature during its deliberations. As Professor Ely has noted, "Grosjean is [the] unusual case. . . . in which reference to the remarks of two (critical) persons seems sufficient to seal an already plausible inference of unconstitutional legislative motivation." Ely, supra note 8, at 144.

\(^{572}\) See, e.g., Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 186-89 (7th Cir. 1982); McMillan v. Escambia County, 638 F.2d 1239, 1245 (5th Cir. 1981), vacated in part, 688 F.2d 960 (5th Cir. 1982), vacated per curiam, 104 S. Ct. 1577 (1984); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 142, 144 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (statements by mayor); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982). In McLean a state statute requiring public schools to teach both "creation science" and evolution was challenged as establishing religion. The court considered the publicly proclaimed views of the drafter of the law, who was not even a legislator, to be highly probative of the legislature's illicit purpose. The court concluded that the state legislature deferred to or adopted the drafter's purpose since the law was enacted with virtually no modification, the legislative findings of fact were identical to those of the drafter even though "no meaningful fact-finding process was employed by the [legislature]," and a state senator who described himself as a "'born again' Christian Fundamentalist" had introduced the law after receiving it from an evangelical group. Id. at 1261-63.

When a body is somewhat disinterested in whether it takes a particular action, and does so only after strong urging by an individual decisionmaker, the body's deference to that individual decisionmaker's purposes may be inferred. The actions and thus the motives of that individual decisionmaker properly may be interpreted as having had a significant impact on the deliberations.
if made at trial or in other circumstances when they could not have influenced the body, should not be deemed more representative or more probative of the body's purpose than similar remarks of other members. When other evidence indicates that the body knew of these motives prior to its decision, deference to these motives may be inferred more justifiably.

The foregoing discussion demonstrates that when evidence of individual decisionmakers' admissions of unconstitutional purpose is offered to show the effect of such admissions on the behavior of other members of the decisionmaking body, the probative value of such statements may vary greatly. In addition, such evidence merely suggests that the institution may have considered constitutionally impermissible factors. Although ultimately it may not overcome the government's proof of benign intent and prove that the illicit motivation was a "but for" cause of the decision, this evidence may play a significant role in shifting the burden to the government to demonstrate that the action would have been taken anyway absent the illicit motives. Without other evidence showing that considerations of illicit motivation were a "but for" cause of the challenged decision, evidence sufficient to shift the burden of proof to the government is critically important.

An exhaustive discussion of the gradations in probative value of all the categories of evidence relevant to a decisionmaking body's purpose is not within the scope of this Article. As courts continue generally to refine their understanding of this issue, the specific probative value of such evidence will vary greatly among cases. This evidence will not always be of sufficient weight to overcome a decisionmaker's claim of privilege. When these items create a strong inference of the institution's purpose and are unavailable through nonprivileged sources, their presentation through the compelled testimony of decisionmakers or the subpoena of legislative or administrative documents should be permitted.

Given the nature of the constitutional interests at stake, however, decisionmakers are not likely to be indifferent in the types of cases that mandate motive analysis.

573. In some instances, however, the illicit purpose of a pivotal decisionmaker can be a "but for" cause of the challenged action, and thus, the decisionmaker's admissions of impermissible motivation can be dispositive. See infra note 583 and accompanying text.

574. Statements of permissible purpose made by sponsors of legislation or other key decisionmakers are no more probative when offered by defendants on behalf of the constitutionality of a government action. Interesting problems would arise, however, if a decisionmaker was assigned by the body, or purported on his own, to testify about the permissible motives on behalf of some portion or all of the institution. Although the testimony of a true agent of the body who is authorized to speak for other members may be entitled to greater weight than that of an individual speaking on his own, such testimony would make adequate cross-examination about the body's intent very difficult. When the defendants' attorney claims an innocent purpose, cross-examination is foreclosed altogether, unless the plaintiff calls hostile decisionmakers to the stand for questioning. After a plaintiff makes a sufficient showing to shift the burden of proof to the government, however, the defendants no longer can rely on the representations of their attorney that the action would have been taken absent illicit purpose. Such representations by counsel are not evidentiary in nature.


576. See Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (after plaintiff has shown that the impermissible consideration was a "substantial" or "motivating" factor, the government must demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [illicit consideration]").
2. Evidence of Individual Decisionmakers' Motives

Evidence of the motives of individual decisionmakers may be relevant in two ways: as a "but for" cause of the challenged enactment or as a portion of the body's motives that may be aggregated with other motives to determine the majority's objectives. In the latter, a decisionmaker's testimony of individual impermissible motives can be probative because proof of the illicit objectives of each member incrementally increases the probability that the institution's actions were motivated similarly. Some courts have aggregated the motives of individual decisionmakers to deduce the purpose of the decisionmaking body.

When invalidation requires a showing merely that decisionmakers' illicit motives were a "but for" cause of the action, generally there will be a greater probative value to evidence of individual decisionmakers' motives. When the action was taken by a close vote, such proof can be enormously probative. Consider the adoption by a five-member school board of policies that increase school segregation. If the board voted three to two in favor of the policies, it is clear that if all three board members who voted for the policies, a majority of the entire body, had a discriminatory purpose, the policies should be invalidated whether the required showing is either "but for" causation or institutional purpose. Even if two of the three board members who voted for the law had impermissible motives, that would seem sufficient for invalidation under a majority model of legislative purpose.

If the illicit motives need only be a "but for" cause to require invalidation of the action, the motives of each of the three members voting for the challenged action are crucial. If only one of the three who voted for the law did so for illicit purposes, the law would not have been enacted but for the effects of these illicit purposes. Even if the applicable standard combines "but for" causality and substantiality of illicit purpose, as suggested by Pico, one decisionmaker's motives may be dispositive as both a "but for" cause and a "substantial factor"; his motives would represent one-third of the majority's purpose. Professor Brest has noted that "[t]his [result] should be qualified by the possibility that some [decisionmakers], who otherwise would support a decision for permissible purposes, might vote against it because others were supporting it for avowedly illicit reasons." Thus, even if two members of the three-member majority were proven to have acted for impermissible purposes, the two-member minority otherwise

577. The illicit motive of either an individual decisionmaker or the body need not be the sole or dominant objective to be relevant; it need only be a "but for" cause of the action.

578. See supra text accompanying notes 515-17.

579. See, e.g., Perkins v. City of West Helena, 675 F.2d 201, 213-14 (8th Cir.), aff'd mem. 459 U.S. 801 (1982); Armstrong v. O'Connell, 451 F. Supp. 817, 833-34 (E.D. Wis. 1978). In Perkins the court inferred illicit motivation from the remarks of all three alderman who had opposed efforts to modify the city's allegedly discriminatory at-large system of electing alderman.

580. But see infra notes 581-82 and accompanying text (noting counterargument that illicit motives would not affect result if decisionmakers, who otherwise would support a decision for permissible purposes, voted against it in response to other members' support for admittedly illicit reasons).

581. Brest, supra note 14, at 120 n.124. Even if the decisionmakers with impermissible motives did not admit them prior to the vote or action, other members of the body might reverse their support because they perceived that others' motives were illicit.
might have voted for the policies, and therefore the illicit motives would not have affected the result. This qualification, however, diminishes only the conclusiveness of such evidence; it demonstrates that the illicit motives of enough members who, if they had voted for the opposite result, would have prevented a majority, do not necessarily affect the outcome of the body's action. Nevertheless, that qualification does not diminish the high probative value of such evidence. The illicit motivation of those members whose support was necessary to comprise the majority may have dictated the result. When the impermissible purposes of that number of decisionmakers can be proven, the government action should be invalidated absent rebutting evidence that minority decisionmakers actually had switched their votes to counter the unconstitutional aims of those in the majority. This is particularly true when a majority or more of those who voted for the action can be shown to have acted on impermissible considerations.

Professor Brest's suggestion\(^{582}\) that this issue is largely academic because head-count is neither feasible nor necessary probably is overstated. When the decisionmaking body has relatively few members, plaintiffs often will be able to adduce\(^{583}\) through cross-examination\(^{584}\) or extra-judicial admissions\(^{585}\) the illicit motives of decisionmakers whose votes were necessary for the action. In the school board hypothetical, proof of the improper purposes of only one of the three members who voted to adopt the policies in question might be sufficient to warrant invalidation either by itself, absent contrary evidence, or together with other direct or circumstantial evidence of institutional intent.\(^{586}\) Such proof certainly should satisfy the plaintiff's initial burden of proving that the illicit consideration was a "substantial" or "motivating" influence.\(^{587}\)

Similarly, if invalidation requires only "but for" or "substantial" causation, the motives of pivotal decisionmakers, such as the draftsman or sponsor of a

\(^{582}\) Id.


\(^{584}\) To the extent that Professor Brest assesses head-count as infeasible because of a decisionmaker's privilege not to testify, this Article already has addressed that issue. Moreover, it often is not overwhelmingly difficult to elicit the impermissible motives of a decisionmaker on cross-examination. See supra notes 527-31 and accompanying text.

\(^{585}\) Professor Brest noted that decisionmakers occasionally will concede their impermissible objectives in a judicial proceeding without having been cross-examined. Brest, supra note 14, at 124 (citing Palmer v. Thompson, 403 U.S. 217, 253-54 (1971)); United States v. Morehouse Parish, Civ. No. 14429 (W.D. La. 1969) (purpose of abandoning coeducation was to prevent white flight); Banks v. St. James Parish, Civ. No. 16173 (E.D. La. 1969) (purpose of abandoning coeducation was to retain public support for desegregation).

\(^{586}\) See, e.g., Perkins v. City of West Helena, 675 F.2d 201, 214 (8th Cir.), aff'd mem. 459 U.S. 801 (1982).

The testimony of two of West Helena's white aldermen [of three who supported the challenged inaction] does not necessarily "condemn" the city's at-large voting scheme. It is, however, an important fact, in the totality of facts and circumstances, tending to prove that the at-large electoral system was maintained for a discriminatory purpose.

Id.

challenged law, may be dispositive of the law's purpose. If those key members 
had not acted on considerations of illicit purpose, the law presumably would not 
have been enacted, because it never would have been written or sponsored, at 
least at that time. 588 In Kassel v. Consolidated Freightways Corp. 589 the 
Supreme Court appeared to recognize the great significance of the motives of a 
key decisionmaker whose actions may have affected the outcome of a challenged 
decision. A plurality of the Court invalidated an Iowa statute limiting truck 
length, at least in part because the State was motivated by impermissible protectionist purposes. 590 Although the legislature had passed a bill that would have 
extended the permissible truck length, the Governor of Iowa vetoed the bill and 
thus preserved the prior challenged restriction while expressing an illicit purpose 
for his veto. 591 Neither the plurality nor the concurring opinion went so far as 
to conclude that the Governor's illicit motivations were a "but for" cause of the 
restriction, but both opinions found nearly conclusive his articulated purpose 
and the legislature's accession to it by not overriding the veto. 592

The courts may not conclude that the illicit purposes of pivotal decisionmakers, such as a governor who vetoes a law or the sponsor of a bill, in 
themselves can constitute a sufficient "but for" cause of a challenged action to 
warrant invalidating it. Courts have recognized, however, that the motives of 
key decisionmakers sometimes can be very probative of the body's purpose. 593 
Moreover, the impermissible motives of leading proponents of an action most 
often will be a "substantial" or "motivating" factor that justifies shifting the 
burden of persuasion onto the government, 594 and also should satisfy the "sub-

588. See supra note 453.
590. The concurring opinion of Justices Brennan and Marshall relied exclusively on the state's impermissible considerations, noting:

[A]lthough [the] plurality opinion does not give as much weight to the illegitimacy of Iowa's actual purpose as I do, . . . both that opinion and this concurrence have found the actual motivation of the Iowa lawmakers in maintaining the truck-length regulation highly relevant to, if not dispositive of, the case. Id. at 683 n.3 (Brennan, J., concurring).
591. The Governor stated:

I find sympathy with those who are doing business in our state and whose enterprises could gain from increased cargo carrying ability by trucks. However, with this bill, the Legislature has pursued a course that would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms and competitors at the expense of our Iowa citizens.

Id. at 677.
592. See id. at 677-78. The plurality commented:

The dissenting opinion insists that we defer to Iowa's truck-length limitations because they represent the collective judgment of the Iowa Legislature. . . . This position is curious because, as noted above, the Iowa Legislature approved a bill legalizing [larger trucks]. The bill was vetoed by the Governor, primarily for parochial rather than legitimate safety reasons. The dissenting opinion is at a loss to explain the Governor's interest in deflecting interstate truck traffic around Iowa.

Id. at 677 n.24; see also id. at 684-86 (Brennan, J., concurring) (governor's admitted purpose of curtailing interstate truck traffic to which legislature acceded was protectionist purpose impermissible under commerce clause).
593. See supra note 572 and accompanying text.
594. See, e.g., NLRB v. Transportation Management Corp., 103 S. Ct. 2469 (1983). The Transportation Management Court determined that illicit motives of the supervisor who made the initial
D. Need for the Evidence

Courts traditionally have recognized the need for relevant evidence to be a factor in determining generally the admissibility of evidence, and more specifically, in delineating the scope of qualified privileges. To some extent, a litigant's need for particular evidence encompasses the relevancy of that evidence, as well as indicating the availability of nonprivileged sources of evidence, and the importance of the evidence, or issue for which it is offered, to the case. If the proffered evidence is irrelevant or immaterial, the litigant does not need it; a party has less need for evidence of lesser probative value and greater need for evidence of higher probative value.

In weighing the importance of a privilege against the need for evidence, the courts have focused on two different aspects of that need. First, in deciding whether a privilege should be absolute or qualified, courts have balanced the interests underlying the privilege against the general needs of the judiciary and the parties for relevant evidence in litigation. In United States v. Nixon the Supreme Court addressed the conflict between the President's assertion of a general decision to discharge plaintiff were probative of the fact that antiamunition animus was a substantial or motivating factor of the challenged action. This finding was sufficient to shift the burden of persuasion to the employer, and was a critical factor in the Court's conclusion that plaintiff would not have been fired absent the employer's illicit motivation. Id. at 2475-76.

595. In many contexts, a litigant's need for relevant evidence is important in determining admissibility. Courts determining whether to admit evidence of other crimes regularly assess the necessity of such evidence to the prosecution's case. See, e.g., United States v. Beechum, 582 F.2d 898 (5th Cir. 1978); United States v. Baldarrama, 566 F.2d 560 (5th Cir. 1978); cf. Note, The Admissibility of Other Crimes in Texas, 50 Tex. L. Rev. 1409 (1972) (Texas considers only those factors relevant to the defense.). Similarly, in exercising their considerable discretion over the admissibility of circumstantial evidence, courts frequently weigh a party's need for the evidence. Certain exceptions to the hearsay rule, most notably the unavailability exceptions, are based on necessity. Cf. J. Wigmore, supra note 300, § 144, at 253 ("Since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it.").


597. Some courts determining admissibility also have considered need an aspect of probative value. See, e.g., United States v. Frick, 588 F.2d 531, 538 (5th Cir. 1979).

598. In balancing these competing general needs, courts almost always consider the need to ascertain the truth, which always conflicts to some degree with the privilege. Moreover, courts often also consider this generic search for the truth in determining whether a qualified privilege should prevail in a particular case. See, e.g., Frankenhausen v. Rizzo, 59 F.R.D. 339, 344 (D.D.C. 1973); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.) (per curiam), cert. denied, 389 U.S. 952 (1967).

eralized privilege of confidentiality and the generalized need for relevant evidence in criminal trials.\textsuperscript{600} The Court concluded that the legitimate needs of the judicial process may outweigh the President's interest in confidentiality and therefore held that the executive privilege was only qualified.\textsuperscript{601} This balancing, which considers only the general need for evidence, however, does not help determine whether the qualified privilege should apply in a particular case. The same generalized needs for evidence and the privilege will exist in every case; these conflicting constitutional interests already have been discussed, leading to the recommendation that a decisionmaker's privilege not to testify should be qualified.\textsuperscript{602}

Once the courts have established that the privilege in question is qualified, they should balance the likely degree of harm from nonrecognition of the privilege against the litigants' particular need for the evidence.\textsuperscript{603} In \textit{United States v. Nixon}, for example, once the Court had determined that the President's privilege was qualified, it required a demonstration of a \textit{specific} need for the evidence in a pending criminal trial.\textsuperscript{604} These courts logically have required that the proponent of the evidence that is sought to be discovered or admitted demonstrate that it was unavailable from nonprivileged sources and important to that party's proof.\textsuperscript{605} This requirement protects the interests underlying the privilege from needless intrusion.

Numerous decisions have held correctly that if nonprivileged sources can reveal the same evidence, a court should be less inclined to allow production or

\textsuperscript{600} \textit{Id.} at 713-14. It appears, however, that the \textit{Nixon} Court also included a general need for evidence in the interests balanced against the qualified executive privilege. Having addressed that issue, \textit{id.} at 707, the Court concluded that the qualified executive privilege protecting against the disclosure of confidential presidential communications succumbed to the need to develop all relevant facts in the adversary system of criminal justice, the importance of such development to the public confidence in the judicial system, and the criminal defendant's rights to confrontation, compulsory process, and due process of law. \textit{id.} at 709-11. Several commentators have discussed the implications of \textit{Nixon}'s articulation of "need." See, e.g., Henkin, \textit{Executive Privilege: Mr. Nixon Loses But the Presidency Largely Prevails}, 22 UCLA L. Rev. 40, 42 (1974); Ratner, \textit{Executive Privilege, Self Incrimination, and the Separation of Power Illusion}, 22 UCLA L. Rev. 92, 97-98 (1974).

\textsuperscript{601} \textit{Nixon}, 418 U.S. at 707.

\textsuperscript{602} \textit{See supra} notes 247-314 and accompanying text.


\textsuperscript{604} \textit{Nixon}, 418 U.S. at 707-10.

\textsuperscript{605} The magnitude of the rights that the challenged action allegedly infringed also might be considered in determining need. The court certainly should consider this factor in initially balancing the general need for evidence against the policies favoring a privilege to determine whether a particular privilege should be absolute or qualified. The court also should consider it with other specific needs of a litigant, in determining whether a qualified privilege should bar discovery or admission of evidence in a particular case. Perhaps an equal protection challenge alleging infringement of fundamental rights should weigh more heavily against the decisionmakers' privilege than an equal protection action alleging the abuse of discretion in distributing benefits.
presentation through privileged ones. For example, cases balancing an accused’s need for the identity of an informant against the government’s privilege of nondisclosure often have upheld the privilege when the informant was not the only nonparty eyewitness. This aspect of the litigant’s need for evidence should be viewed primarily as a test for whether ultimately to exclude the evidence. Standing alone, the unavailability of nonprivileged sources of evidence of improper purpose should not overcome the decisionmakers’ qualified privilege. The absence of nonprivileged evidence of illicit motivation even may indicate a frivolous claim that should not be pursued at the expense of the interests underlying a privilege, particularly if the evidence subject to the qualified privilege is of low probative value. Therefore, when nonprivileged sources of evidence are unavailable, the degree of harm that the government likely will suffer should be balanced against the other factors favoring admissibility: the relevancy, probative value, and importance of the evidence to the plaintiff’s case.

The privilege, however, should not be overruled merely because the evidence cannot be obtained or presented through nonprivileged sources. Thus, when an informant was neither an eyewitness nor a participant, courts generally have upheld the government’s claim of privilege despite a lack of nonprivileged evidence. To the extent that the evidence subject to the qualified privilege is relevant, probative, and important to a party’s case, however, the absence of other nonprivileged evidence should encourage the court to admit the privileged evidence.

In weighing a litigant’s need for evidence, courts also should consider the

606. See, e.g., id. at 703 (special prosecutor demonstrated that presumptively privileged materials not available from any other source); United States v. Reynolds, 345 U.S. 1, 11 (1953) (aircraft accident report, though relevant, nevertheless privileged because discovering party could have obtained information elsewhere); United States v. Anderson, 627 F.2d 161, 164 (8th Cir. 1980); United States v. Leggett & Platt, Inc., 542 F.2d 653, 659 (6th Cir. 1976); Nixon v. Sirica, 487 F.2d 700, 717-18 (D.C. Cir. 1973) (ordered disclosure after finding disputed materials essential to pending grand jury investigation and only adequate source); United States v. DeStefano, 476 F.2d 324, 330-31 (7th Cir. 1973).


608. If there is no evidence of a particular fact, in circumstances suggesting that if the fact were true evidence of it probably would exist, the absence of evidence implies that the fact is not true.

609. One commentator has suggested that a close connection exists between relevance and necessity, and has concluded that evidence of low probative value usually is unnecessary. “Excluded evidence is rarely very probative of the issues on which it is inadmissible. When it does have probative value, if the hypothesis for which it is offered is true, there is almost always other available evidence that supports it better.” Lempert, "Modeling Relevance," 75 MICH. L. REV. 1021, 1031 n.35 (1977).

610. Proof of the purpose underlying a decisionmaking body’s action always will be critical in a motive case.


612. A plaintiff is likely to call unfriendly decisionmakers to the stand only when he greatly needs their testimony; an experienced trial attorney rarely will attempt to prove her case by cross-examining hostile witnesses if other evidence is available. Discovery, however, is another matter. Litigants routinely would seek discovery from decisionmakers if they could. Since nonparties are subject only to depositions and not interrogatories in most jurisdictions, however, the relatively high expense of taking depositions also will discourage many litigants from pursuing needless inquiries.
quantity and quality of evidence subject to a qualified privilege that already has been admitted. Whether evidence admitted is privileged or not, there may come a point when enough evidence has been presented that additional evidence would be only cumulative.\textsuperscript{613} The trial judge in such circumstances has broad discretion to exclude the additional evidence without resort to a privilege. The decisionmaker's privilege, however, to the extent that it applies, justifiably imposes a stricter standard than mere accumulation. Applying that stricter standard probably would exclude such evidence before it actually became cumulative.

Despite the logic of a balancing process that accounts for the availability of nonprivileged sources of evidence, the process cannot be applied mechanically because different modes of proof often are not fungible. Different sources of evidence will vary both in their logical implications and their persuasive appeal to different factfinders. Because these qualities can be measured only imprecisely, one source of evidence rarely makes another clearly unnecessary. This difficulty of substitution exists for the closest evidentiary equivalents such as credible admissions in a legislative record substituting for admissions made during cross-examination. When different modes of proof are more dissimilar but create the same ultimate inference, it is much harder to equate them. The foreseeable discriminatory impact of a government action, for example, implies the same improper purpose as admissions of illicit motivation made by individual decisionmakers—both tend to prove that improper purpose was among the factors that caused the body to take a challenged action. The two forms of evidence, however, may be of vastly different probative value or importance to the case, both quantitatively and qualitatively; the first tends to prove that improper purpose was among the factors that caused the action to be taken.\textsuperscript{614}

Nevertheless, nonprivileged alternate sources of evidence that will be equally or more probative often will exist; in those instances, the privilege should prevail.\textsuperscript{615} When an accurate record of legislative or administrative proceedings

\textsuperscript{613} See, e.g., FED. R. EVID. 403. Evidence ordinarily may be excluded as cumulative when "the fact finder has considered all of its relevant informational content in his weighing of other evidence." Lempert, supra note 609, at 1050.

\textsuperscript{614} See supra notes 551-54 and accompanying text.

\textsuperscript{615} See supra notes 548-49, 580-82 and accompanying text. On the other hand, if the decisionmaking body is relatively large compared with the number of individual admissions of illicit intent, evidence of the foreseeable impact may be more probative.

\textsuperscript{616} The principles discussed in the text refer to presenting evidence at trial, but apply more or less to discovery as well. A central factual question in every case involving motives of a decisionmaking body will be whether a challenged action was taken for an unconstitutional purpose. The ability to obtain through discovery facts relevant to that question is as important as the ability to present the facts at trial. In addition, the discovery process also may be less intrusive. See supra note 412. Because discovery is more often less predictable than presenting evidence at trial, however, and because at the discovery stage litigants may be unaware of available alternative sources of evidence, it may be more difficult for a judge to assess the equivalence of privileged and nonprivileged sources. Nevertheless, reasonable efforts can be taken that would protect the interests underlying the privilege when nonprivileged sources appear available. Litigants could be required to
is available, litigants should be precluded from proving the content of the debates through compelled testimony, despite possible tactical advantages of doing so.617 Similarly, when plaintiffs can find a decisionmaker who will testify voluntarily about the deliberative process, they should be foreclosed from compelling similar testimony from an unwilling decisionmaker.618 The decisionmakers' privilege also should restrict litigants' normal prerogative to select the evidence they deem most probative, when nonprivileged sources of evidence seem roughly equivalent. Thus, a plaintiff probably should be precluded from compelling a decisionmaker to testify about his personal intent in supporting a decision when there are credible extra-judicial admissions of his illicit intent.

On the other hand, when the privileged and nonprivileged sources of evidence tend to prove the same ultimate fact through different intermediate inferences, the privileged source should not be deemed unnecessary automatically. Assume that a plaintiff seeks to prove through two pieces of evidence that illicit intent played a part in the government's decision. The first is the information on which the body acted, which indicates a foreseeable discriminatory impact. The second is the decisionmaking body's failure to hold a required public hearing prior to its action. If the former evidence could be adduced only through compelled testimony, a court should not exclude it as unnecessary on the ground that the latter unprivileged evidence also suggests unconstitutional considerations. Furthermore, to the extent that privileged evidence is probative of a different matter, it should not be excluded merely because it overlaps with available nonprivileged evidence.619 The decision not to exclude potentially privileged evidence as unnecessary does not mean that the claim of privilege is inapplicable; the remaining factors favoring and opposing the privilege still must be balanced.

Evidence of illicit motivation will be more important to a plaintiff's case when it tends to establish that the motivation was a "but for" cause of the challenged action rather than an influence of unknown strength, because the question that the court ultimately must decide is whether the motivation was a "but for" cause of the action. Thus, when evidence is highly probative on that issue,620 it more readily should outweigh a claim of privilege. Even when evidence suggests that illicit purposes were a motivating factor of unknown strength, it still may be very important because it will be sufficient to shift the

617. When litigants reasonably could challenge the record as inaccurate, however, privilege should not preclude such a challenge.

618. See supra note 532. When the unwilling witness can testify about other matters for which there is no friendly witness, or when no amicable witness is available because the challenged action was unanimous, compelled testimony can be necessary and crucial.

619. Cf. Barnard v. Henderson, 514 F.2d 744, 745-46 (5th Cir. 1975) (Court erred in excluding evidence that overlapped with that of prior witness.).

620. See supra notes 552-54 and accompanying text.
burden to the government to establish that the illicit motivations were not a "but for" cause.

Given the infinite potential combinations of evidence with which to prove unconstitutional motivation and the need for an individualized balance of competing interests in each case, it is impossible to foresee accurately which items of evidence the plaintiff is most likely to need to introduce. Nevertheless, some useful general principles emerge. First, the need for various evidence will fluctuate with the court's standard of what unconstitutional purpose is and how it may be proved. Thus, depending on the court and the category of illicit motivation, different evidentiary sources will be of greater or lesser significance. Second, nonprivileged evidence of decisionmaker intent is more often available for administrative decisions than legislative enactments because an administrative body is more likely to reveal its purpose through a series of actions leading up to its decision than a legislature enacting a law on an isolated occasion. Decisionmakers engaging in a series of actions over time often establish a pattern that is difficult to explain, except by impermissible purposes. It can be more difficult, on the other hand, to discern the motives of legislators, both because there generally is less history from which to do so and because of the broader range of potential legitimate purposes.

621. Case law thus far has been an inconsistent guide of what unconstitutional purpose is and how it may be proved. Schnapper, supra note 449, at 36. For example, "[d]isparate impact, described as an 'important starting point' in Arlington Heights, was the keystone of the lower court opinions overturned in Feeney and City of Mobile. A history of 'a series of official actions taken for invidious purposes,' cited as a significant 'evidentiary source' in Arlington Heights, was dismissed in City of Mobile as 'of limited help.'" Id.

622. Commentators have noted that administrative intent generally is easier to ascertain that legislative intent. See, e.g., A. Bickel, supra note 7, at 217. Moreover, some have cited the different status of administrators in addition to the court's ability to determine administrative motive as justification for judicial inquiry into administrative motive. Id. Ironically, however, although there usually will be a greater need for qualified-privilege evidence to prove illicit legislative rather than administrative intent, the privilege protecting legislators probably is stronger than that for administrators. See supra notes 328-50 and accompanying text. Thus, in balancing these competing interests, the results, on average, may be more or less the same for both administrative and legislative decisionmakers.


624. See Simon, supra note 371. When the range of goals that a decisionmaking body legitimately can pursue is narrower, there will be fewer purposes with which the body can justify its actions. Thus, the purported objectives of a body with a limited range of discretion such as an administrative or lower legislative body, can be exposed more easily as a pretext.

Professor Simon discusses this observation at length and offers the following example: A police board passes a rule requiring police applicants to pass a test about opera or world history. The test disqualifies blacks at a significantly higher rate than whites. To avoid the inference of illicit motivation, the board claims that the test was designed either to encourage people to study opera or world history by rewarding knowledge with employment or to promote a better and more well-rounded police force. The first explanation is beyond the police board's limited authority; the second merely
Third, plaintiffs almost always will have a greater need for evidence subject to a qualified privilege when challenging the actions of most state legislatures and state and federal administrative bodies that maintain no detailed records of their proceedings.625 Last, as litigators and courts develop new methods of proving impermissible motivations through circumstantial evidence, decisionmakers will become more sophisticated in camouflaging their purposes.626 This facility to disguise illicit motivation has evolved rapidly in the last decade.627 Even now, when there is a public record of the deliberations of the decisionmaking body, decisionmakers have become “sophisticated” enough to conceal impermissible motivations from the court.628

7. The right of citizens to receive notice of and attend all meetings of public bodies is not an absolute right. Compelling decisionmakers to testify may increase the maintenance and publication of verbatim records of legislative and administrative deliberations, which often would render such testimony unnecessary.

628. There was no doubt, for example, about the motives of the Alabama legislature when it began placing a large black dot at the beginning and end of material not actually spoken on the floor. Ironically, however, no identifying dot will be placed next to inserted text if only a few lines are spoken on the floor. "Id.; Neuberger, The Congressional Record is not a Record, N.Y. Times, Apr. 20, 1958, § 6 (Magazine), at 14, reprinted in 104 CONG. REC. 6816-18 (1958)."

627. Legislators frequently stage a “planned colloquy” or predesigned debate to plant evidence which they would not otherwise want to have heard. "Id.; Neuberger, supra, at 142; For the Record, Less Distortion, New York Times, March 5, 1978, § 4, at 2, col. 6. In an attempt to end this editing, rephrasing, and polishing of remarks, the Record, starting about March 1, 1978, began placing a large black dot at the beginning and end of material not actually spoken on the floor."


625. Although all state legislatures maintain some journal of their proceedings, only a few keep full verbatim or even partial records of legislative debates. See Cushman, Availability of Records of Legislative Debates, 24 REC. A.B. CITY N.Y. 153 (March 1969). Even the Congressional Record is only a “substantially” verbatim journal of congressional deliberations. See 44 U.S.C. § 181 (1982). Several writers have noted that Congress permits members to insert statements in the Congressional Record that never were made in debate, and to revise those that were. See Cashman, supra, at 142; For the Record, Less Distortion, New York Times, March 5, 1978, § 4, at 2, col. 6. In an attempt to end this editing, rephrasing, and polishing of remarks, the Record, starting about March 1, 1978, began placing a large black dot at the beginning and end of material not actually spoken on the floor. Ironically, however, no identifying dot will be placed next to inserted text if only a few lines are spoken on the floor. "Id.; Neuberger, supra, at 142); For the Record, Less Distortion, New York Times, March 5, 1978, § 4, at 2, col. 6. In an attempt to end this editing, rephrasing, and polishing of remarks, the Record, starting about March 1, 1978, began placing a large black dot at the beginning and end of material not actually spoken on the floor."


623. Most administrative bodies also do not maintain detailed records of their proceedings and many conduct their deliberations primarily behind closed doors. See Cohen, supra, at 142; For the Record, Less Distortion, New York Times, March 5, 1978, § 4, at 2, col. 6. In an attempt to end this editing, rephrasing, and polishing of remarks, the Record, starting about March 1, 1978, began placing a large black dot at the beginning and end of material not actually spoken on the floor. Ironically, however, no identifying dot will be placed next to inserted text if only a few lines are spoken on the floor. "Id.; Neuberger, supra, at 142); For the Record, Less Distortion, New York Times, March 5, 1978, § 4, at 2, col. 6. In an attempt to end this editing, rephrasing, and polishing of remarks, the Record, starting about March 1, 1978, began placing a large black dot at the beginning and end of material not actually spoken on the floor."

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Thus, the need for the discovery and presentation of evidence of unconstitutional motivation, particularly direct evidence, undoubtedly will increase as decisionmakers better mask their purposes. As the availability of public sources of such evidence declines, the need for sources subject to a qualified privilege will grow. Courts should recognize that this heightened need favors the admissibility of evidence over the claims of legislative and administrative privilege.

IV. CONCLUSION

By requiring unconstitutional motivation before invalidating governmental actions, the Supreme Court complicated the task of litigants challenging those actions; at times, the only source of evidence probative of illicit purpose may be subject to a claim of privilege. The purpose of this evidentiary privilege is to protect the functional integrity of the legislative process rather than the interests of individual lawmakers. The integrity of the legislative process in turn will protect the people, whose elected representatives must be free from coercive influences threatening their independent judgment.

Judicial review of the constitutionality of legislative and administrative actions also protects the integrity of the decisionmaking process. To review challenged actions, the litigants and courts must have access to evidence critical for determining accurately the validity of a challenged decision. If the decisionmakers may claim a privilege prohibiting the discovery and introduction of evidence necessary for an effective review, there will be diminished protection against unconstitutional governmental decisions. Thus, the integrity of the decisionmaking process is simultaneously protected and endangered by permitting the questioning of decisionmakers about their motives for having taken an official action. The purpose of the privilege itself is undermined when the privilege defeats the courts' obligation and ability to review.630

When faced with privilege claims under the speech or debate clause, the Court previously distinguished between essential and nonessential legislative conduct. If the conduct was legislative, and therefore insulated from judicial review in actions against legislators, the Court prohibited any inquiry into legislative acts or motives because of the threat that such inquiry posed to legislative independence. When adjudicating the constitutionality of certain official acts, however, courts now must examine legislative motivation, despite the potential


630. Courts historically have narrowed the scope of evidentiary privileges, confining them to the purposes they were created to achieve, in order to interfere as little as possible with the search for truth. See, e.g., United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created not expansively construed, for they are in derogation of the search for truth."); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) ("Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.").
chill to legislative behavior. The simple and categorical distinction between legislative and nonlegislative activity no longer provides a viable framework for analyzing these claims.

Because the threat to legislative and administrative independence is subordinate to the courts' obligation to inquire into decisionmaker motivation, evidence essential to that inquiry should not be barred by the decisionmakers' inferior interest in absolute autonomy. Although the courts may intrude on legislative independence, that intrusion is warranted only to the extent necessary for a proper review. Decisionmakers should be privileged to refuse to testify, except when that evidence is critical or when the questioning will not be particularly intimidating; such evidence generally should be permitted when its helpfulness in fulfilling the courts' obligation outweighs the corresponding damage to the independence of the decisionmaking institutions. These interests best can be measured and compared with the methodology that this Article suggests.

Almost fifteen years before the Court's decision in Washington v. Davis,631 Professor Bickel suggested that courts should not inquire into the motives of legislators because "[t]he only possibility of a solution [to ascertaining legislative motivation]—itself far from certain—is cross-examination of each individual legislator," and that "is simply unthinkable."632 In Davis, however, the Court mandated inquiry into such motives. Having done so, the courts should not allow the evidentiary privileges protecting the integrity of legislative and administrative processes to make it impossible to prove the very facts that the Supreme Court has deemed critical. What once may have seemed unthinkable now has become imperative.

632. A. BICKEL, supra note 7, at 215.