STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 19-20

Expulsion of House Member for Conduct Pre-dating Election

Question

May the Tennessee House of Representatives expel a member for conduct that occurred more than twenty-five years before the member's initial election to the House and that was known to the member's constituents when they most recently re-elected him?

Opinion

Historical practice, sound policy considerations, and constitutional restraints counsel against, but do not absolutely prohibit, the exercise of the legislature's expulsion power to oust a member for conduct that occurred before he was elected and that was known to the member's constituents when they elected him. Given those considerations, the expulsion power is best exercised only in extreme circumstances and with extreme caution.

1. There is no historical precedent of expelling a member other than for conduct that occurred while the member was in office.

2. Sound policy considerations counsel that the power of expulsion should rarely if ever be exercised when the misconduct complained of occurred before the member's election and was generally known to the public at the time of the member's election. Because expulsion under those circumstances essentially negates the choice of the electorate, the House must weigh its interest in safeguarding the integrity of its legislative performance against the deference and respect owed to the choice of the electorate before it expels the member.

3. In any event, since even the broadest legislative power is subject to state and federal constitutional restraints, the expulsion power may be exercised only to the extent consistent with the voters' constitutional right to choose their representatives and with the member's state and federal constitutional rights, such as the right to due process and equal protection.

ANALYSIS

The "expulsion clause" of the Tennessee Constitution gives the Senate and the House of Representatives each authority to expel a member for "disorderly behavior."

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-

> thirds, expel a member, but not a second time for the same offence; and shall have all other powers necessary for a branch of the Legislature of a free State.

Tenn. Const. art. II, § 12. Although Tennessee's expulsion clause has remained unchanged since its inclusion in the original Tennessee Constitution of 1796,[1] Tennessee courts have yet to construe the meaning of "disorderly behavior" or the scope of the expulsion clause more generally.

The Tennessee Senate has never exercised its power to expel a member. The Tennessee House of Representatives has used its power to expel only three times, and in each instance the expulsion was for conduct that had occurred while the member was in office, not for conduct that had occurred before the member was elected. First, during the Extraordinary Session of 1866, the House expelled six members "for the contempt of the authority of this House." House Journal at pp. 52-54 (July 1866). Second, in 1980, the House expelled Representative Robert Fisher after he had been found guilty of accepting a bribe while in office. The House considered the expulsion to be "in the best interest" of Mr. Fisher's constituents because his conduct "reflects adversely upon [its] integrity and dignity . . . , places a cloud upon [its] actions . . . , and is inconsistent with the public trust and duty of a member of this Body." House Resolution No. 114. Third, in 2016, after conducting an investigation into certain allegations against Representative Jeremy Durham, the House expelled him for "disorderly conduct."

Like the Tennessee Constitution, the federal Constitution provides that "[e]ach House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. Like the Tennessee legislature, the United States Congress historically has exercised its power of expulsion sparingly and then only to expel members for conduct that occurred while they were in office. The House has expelled five members; the Senate has expelled 15. Seventeen of the 20 congressional expulsions occurred circa 1861 in the wake of the secession of the Confederate States. The remaining 3 expulsions took place in 3 different centuries. In 1797, the Senate expelled William Blount of Tennessee for having "concocted a scheme for Indians and frontiersmen to attack Spanish Florida and Louisiana in order to transfer those territories to Great Britain" for his own financial gain. *United States Senate: Election, Expulsion and Censure Cases 1793-1990*, S. Doc. No. 103-33, at 13 (1995). In 1980, the House expelled Representative Michael Myers following his indictment for bribery. In 2002, Representative James Traficant was expelled following his conviction on federal corruption charges and for misuse of campaign funds.

To date, Tennessee courts have provided no discussion *specifically* of Tennessee's expulsion clause. The Tennessee Court of Appeals has opined that, *generally* under article II, section 12, each chamber has the right to make its own rules and is the sole judge of its rules, but cautioned that even that broad power of the legislature is always limited "by the Constitution of the state and of the United States." *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001), *perm. app. den*. (2001) (citing *Bank of Commerce & Trust Co. v. Senter*, 260 S.W. 144 (Tenn. 1924); *see also Lynn v. Polk*, 76 Tenn. 121, 130 (1881) (explaining that the legislature, like the other two branches of government, derives its power and authority from the Constitution and must, therefore subordinate itself to the requirements of the Constitution).

[1] *See* art. I, § IX, Tenn. Const. of 1796; art. II, § XII, Tenn. Const. of 1834; and art. II, § 12, Tenn. Const. of 1870.

There are just a few cases from other jurisdictions that deal to any significant degree with the scope of legislative expulsion power. The paucity of judicial precedent on this issue is largely attributable to the political-question doctrine, under which courts treat purely "political questions" as non-justiciable and decline to review them. A case may be held to entail a "political question" if it involves

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

A political question is non-justiciable because a court that undertakes to pass on a matter that is constitutionally committed to the authority of another branch of government might violate the constitutionally mandated separation of powers. *Bredesen v. Tenn. Judicial Com'n*, 214 S.W.3d 419, 434 (Tenn. 2007) ("[If the issue presented [to a court] is a purely 'political question,' the separation of powers provisions of our constitution make it non-justiciable." (quoting *Mayhew v. Wilder*, 46 S.W.3d 760, 773 (Tenn. Ct. App. 2001)).

The few state courts that have been faced with challenges to a legislative expulsion have generally found the matter to be a political question and, therefore, non-justiciable. For example, in *French v. Senate of Cal.*, 146 Cal. 604, 80 P. 1031 (1905), several expelled state senators sought a writ of mandamus for their reinstatement. The California Constitution provided that the senate "shall determine the rule of its proceeding, and may, with the concurrence of two thirds of all the members elected, expel a member." The court declined to "interpose" itself in the matter, finding that the judicial department had no authority to revise actions of the legislative department taken pursuant to the expulsion power because the expulsion power was committed exclusively to the legislature by the state constitution. In *In re Speakership of House of Representatives*, 15 Colo. 520, 25 P. 707 (1890), the court declined to inquire into the motives or methods of the legislative body when it expels a member. The court left it to the legislature to "judge for itself in such matters" and viewed the legislature's "jurisdiction to so judge and decide [as] exclusive" since the matter was constitutionally "confided exclusively to each legislative branch of the government." Because the question was a political question, redress for a wrong or unwise legislative action was to be had at the ballot-box, not with the courts. *Id.* And in *In re Op. of Justices*, 254 Ala. 160, 47 So. 2d 586 (1950), the Alabama Supreme Court held that it did not have jurisdiction to answer questions submitted to it by the governor about the basis for an expulsion of a state senator and the

manner in which an expulsion could be accomplished because those issues fell within the legislature's exclusive province.

But in a more recent case, *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698 (1977), the Pennsylvania Supreme Court did review—and ultimately upheld—the expulsion of a member of the state house. The court debated at length whether the case involved a "political question." It was ultimately persuaded that the expulsion of a member had not been exclusively committed to the legislature by the Pennsylvania Constitution,[2] and that the question could and should be reviewed by the courts when there is an allegation that the expulsion violated a member's right to procedural due process. The court noted that the political question doctrine is disfavored when a claim is made that individual liberties have been infringed because, where civil liberties are concerned, the legislature is not equipped to interpret the constitution without judicial review nor does it have "unbridled authority" to determine the constitutionality of its own acts. In short, the expulsion clause of the Pennsylvania Constitution did not "bar judicial review of a claimed denial of due process."

Where the *Sweeney* court found no political question as to the expulsion power because of allegations of constitutional deprivation by the legislature, the *Mayhew* court in Tennessee found a non-justiciable political question as to the scope of the legislature's power to make its own rules, but then reviewed the exercise of that power because there were allegations of constitutional deprivation by the legislature. Although *Sweeney* and *Mayhew* take different analytical approaches, the lesson and the result are the same: when there are allegations of constitutional deprivation the court may review what might otherwise be a non-justiciable political question.

Mayhew dealt with article II, section 12, although not with the expulsion clause of that section. The court was asked to decide whether the legislature had the power to hold closed sessions. It found that question to be a non-justiciable political question because the part of article II, section 12, that authorizes the legislature to make its own rules and to exercise "all the powers necessary for a branch of the Legislature of a free State" constitutes a "textually demonstrable constitutional commitment" of the issue to the legislative branch. *Mayhew*, 46 S.W.3d 773-74. The court also found that the question was a purely political one because there were no "judicially discoverable and manageable standards" for deciding the issue. *Id.*

Although the *Mayhew* court found that there was political question that it could not adjudicate, it did nevertheless review the challenged action of the legislature because there were claims that closing the sessions violated various constitutional rights and, while the "legislature has unlimited power to act in its own sphere," its actions are always "*restrained by the Constitution of the state and of the United States*." *Id.* at 773-74 (emphasis added) (quoting *Bank of Commerce & Trust Co. v. Senter*, 260 S.W. 144, 146 (Tenn. 1924). Upon review of the constitutional claims,

[2]"Each House shall have power to determine rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause, and shall have all other powers necessary for the Legislature of a free State. A member expelled for corruption shall not thereafter be eligible to either House, and punishment for contempt or disorderly behavior shall not bar an indictment for the same offense.". Pa. Const. art. II, § 11.

the *Mayhew* court determined that the legislature had not violated the plaintiffs' rights of freedom of the press and due process by closing its sessions.

The political question doctrine has also generally led federal courts to decline review in the few cases in which a member of Congress has tried to challenge disciplinary proceedings under the federal expulsion clause. *See, e.g., U.S. v. Traficant*, 368 F.3d 646 (6th Cir. 2004) (pointing to Supreme Court precedent recognizing that the expulsion clause grants Congress exclusive authority to discipline its members); *Rangel v. Boehner*, 20 F.Supp.3d 148, 157, 168-69 (D.D.C. 2013) (finding a House censure under the expulsion clause to be non-justiciable because the decision of the House to discipline its member was "a classic example of a demonstrable textual commitment to another branch of government," i.e., a political question).

Thus, there is precedent from other jurisdictions to support an argument that the question posed here is purely a political question, that "the Constitution gives the Legislature the sole right to make that decision," *Mayhew* 46 S.W.3d 774, and any decision to expel a member should not be subject to judicial review. The argument would be that, as with the closed-session issue in *Mayhew*, (1) there is a "textually demonstrable constitutional commitment" of the expulsion issue to each house of the legislature, (2) there are no "judicially discoverable and manageable standards" for deciding when a member may be expelled, (3) the legislature has virtually unlimited power to act in its own sphere, (4) each chamber has the right to make its own rules and is the sole judge of its rules, (5) the expulsion clause is expansive in scope and subjecting the exercise of that broad power to judicial review would interfere with the legislature's "inherent power of self-protection" to prevent a member's behavior from "destroy[ing] public confidence in the body," *In re Chapman*, 166 U.S. at 688, and (6) when a political question is involved, courts are "the least co-equal" branch of the government and are expected "to lean over backward to avoid encroaching on the legislative branch's power," *Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit*, 579 S.W.2d 875, 877-78 (Tenn. 1978).

But the more recent precedent of *Sweeney*, coupled with the analysis in *Mayhew*, strongly suggests that, regardless of whether the expulsion question posed here is found to be a non-justiciable political question, a court will still review a challenged expulsion if the challenge includes claims of constitutional deprivation. While the expulsion clause of the Tennessee Constitution vests each house of the legislature with a broad and discretionary power to expel a member, that power is "restrained by the Constitution of the state and of the United States." *Mayhew*, 46 S.W.3d at 773-74; *see also* Op. Tenn. Att'y Gen. 05-163 (Oct. 24, 2005) (expulsion authority of the legislature is not totally unlimited; it must be exercised in accordance with the protections and rights guaranteed under the Tennessee and United States Constitutions); *accord U.S. v. Ballin*, 144 U.S. 1, 5 (1892) (while the U.S. House of Representatives has broad rulemaking power, it "may not by its rules ignore constitutional restraints or violate fundamental rights"). Thus, for example, the equal protection guarantees of Tennessee and U.S. Constitutions would prevent racially discriminatory expulsion decisions. And the due process guarantees of the Tennessee and U.S. Constitutions would prevent either chamber from expelling a member without proper notice and a meaningful opportunity to be heard. *See Monserrate v. New York State Senate*, 599 F.3d 148, 158-59 (2d Cir. 2010) (quoting *Spinelli v. City of N.Y.*, 579 F.3d 160, 172 (2d Cir 2009) ("The particularity with which alleged misconduct must be described varies with the facts and circumstances of the individual case, however due process notice contemplates specifications

of acts or patterns of conduct, not general, conclusory charges unsupported by specific factual allegations.").

Article II, section 3 of the Tennessee Constitution, which gives the people the right to choose their representatives[3], must also be considered as a key constraint on the legislature's expulsion power, and, if violated, could trigger judicial review and invalidation of the expulsion. The expulsion power is in tension with the people's constitutional right to choose their representatives because an expulsion in effect negates the electorate's choice. This tension may well rise to the level of outright constitutional conflict when the expulsion is for conduct of which the electorate was aware when it made its choice.

And, in fact, just such a conflict was pointed out when Congress considered expelling a member for behavior that had occurred before an election and that was known to the member's constituency when it elected him to office. As one Congressional House Report noted, if the House were to expel a member under such circumstances, it might "abuse its high prerogative, and [] might exceed the just limitations of its constitutional authority by seeking to substitute its standards and ideals for the standards and ideals of the constituency of the Member who had deliberately chosen him to be their Representative." H. R. Rep. 63-570, at 5 (1914). For that reason, a legislature's exercise of its power to expel a member for misconduct occurring before his or her election must,

> [a]s a matter of sound policy, . . . be exercised only in extreme cases and always with great caution and after due circumspection *and should be invoked with greatest caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election.*

H. R. Rep. No. 63-570, at 4-5 (1914) (emphasis added).

In sum, historical practice, sound policy considerations, and constitutional restraints counsel against, but do not absolutely prohibit, the exercise of the legislature's expulsion power to oust a member for conduct that occurred before he was elected and that was known to the member's constituents when they elected him. Given those considerations, the expulsion power is best exercised only in extreme circumstances and with great caution.

1. There is no federal or Tennessee historical precedent of expelling a member other than for conduct that occurred while the member was in office. Historically, the power of expulsion has been used very sparingly and then only to punish a member for "disorderly conduct" that occurred during the member's current term in office.

2. Sound policy considerations counsel that the power of expulsion should rarely if ever be exercised when the misconduct complained of occurred before the member's election and was generally known to the public at the time of the member's election. Because expulsion under those circumstances essentially negates the choice of the electorate, the House must

[3] Article II, section 3 provides that "[t]he Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, *both dependent on the people*." (Emphasis added.)

weigh its interests in safeguarding the public trust in its institutional integrity against the deference and respect owed to the choice of the electorate before it expels the member. That is, in light of the particular facts and circumstances of each case "the [House] must balance its interest in 'assur[ing] the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government,' with a respect for the electoral decisions of the voting public and deference traditionally paid to the popular will and choice of the people." *Expulsion of Members of Congress*, CRS Report 7-5700 at 13 (quoting *Powell v. McCormack,* 395 F.2d 577, 607 (D.C. Cir. 1968) (McGowan, J., concurring)).

3. In any event, since even the broadest legislative power is subject to state and federal constitutional restraints, the expulsion power may be exercised only to the extent consistent with the voters' constitutional right to choose their representatives and with the member's state and federal constitutional rights, such as the right to due process and equal protection.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General

Requested by:

The Honorable Cameron Sexton
Speaker of the House
425 5th Avenue North
Nashville, TN 37243