

# Research Department

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## Minnesota House of Representatives

Director  
Carole Pagonis

Associate Director  
Thomas M. Todd

Legal Services Coordinator  
Joel T. Michael

600 State Office Building, St. Paul, MN 55155  
(612) 296-6753

Alan R. Hopeman  
Stan Jacobson  
Laura D. Kadwell  
Kathryn Lamp  
Lisa F. Larson  
Marv Jane Lehnertz  
Steven B. Liss  
Deborah K. McKnight  
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Marsha Gronseth  
John Helland  
Stephen D. Hinze

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TO: Select Committee On the Staten Case

FROM: Deborah K. McKnight, Legislative Analyst *DKM*

RE: Legislator Expulsion and Discipline Cases and Experience

This memorandum will review recent case law and available experience of Congress and state legislatures in actions to consider the expulsion or discipline of a member. Two major aspects of the expulsion issue will be covered: procedure and the substantive basis for the inquiry. On the issue of discipline, the memorandum provides examples of conduct Congress has censured and touches briefly on available state legislative practice.

### I. EXPULSION PROCEDURE

Modern cases establish that a legislator subject to expulsion proceedings has a right to due process. There is no case law on the expulsion, as opposed to the exclusion, of a member of Congress. However, several cases in the past two decades have been brought by state legislators challenging an expulsion. Every case involved claims that the expulsion action had denied the member due process.

The majority of the cases indicate that while a legislative body need not operate like a court, it must provide the essentials of due process. The cases agree that these include: notice of the issues under review, counsel, a public hearing, the right to question committee witnesses, and the right to call the member's own witnesses. McCarley v. Sanders, 309 F. Supp. 8 (D. Ala. 1970); Gerald v. Louisiana State Senate, 408 So.2d 426 (La. App. 1981). Of five cases on due process in legislative expulsion, McCarley is the only one to suggest that one component of due process would be making a transcript of the committee proceedings available to any member of the body upon request. In McCarley an expulsion was declared void for failure to provide several essentials of due process. In Gerald the court ruled that due process was not violated when the senator expelled chose not to attend committee investigations to which he had been invited.

## II. SUBSTANTIVE BASIS FOR EXPULSION

### A. Background and Policy

The power to discipline and expel members is inherent in a legislative body. It originates with the English Parliament in the sixteenth century and was exercised by colonial legislatures prior to American independence. When the federal Constitution adopted a provision on Congressional punishment and expulsion, it was understood as an accepted policy. The only item debated was whether expulsion should require an extraordinary majority; two-thirds was specified. Expulsion has been used by Congress and legislatures to respond to official misconduct and to private misconduct "of a kind which arguably reflected upon a member's loyalty or integrity in general, and hence, tended to diminish public confidence in his capacities or in the functioning of government."<sup>1</sup>

As a matter of policy and experience, Congress' and legislatures' use of the power to expel has been limited by the importance placed on the right of the people to choose their own representatives.

### B. Minnesota Experience

The Minnesota Constitution contains an expulsion provision identical to that in the federal Constitution and in many other states. It reads:

Each house may...with the concurrence of two-thirds,  
expel a member. Art. IV. Sec. 7.

Nothing in the language of the state constitution or the debates on the federal Constitution indicates that any specific grounds are required for expulsion. That question appears left to the discretion of the body. There is no known instance of proceedings against a legislator in Minnesota under this section of the constitution. There is also no known instance of a seated member pleading or being convicted of a felony offense. In 1983 a state senator pleaded guilty to misdemeanor offenses of driving while intoxicated and having an open liquor bottle in his vehicle. No disciplinary action was taken by the Senate.

Under a separate constitutional provision making the Legislature the judge of its members' election returns and qualifications (Art. IV, Sec. 6), four members since 1957 have been removed from office because their elections were deemed invalidated by unlawful campaign practices.

<sup>1</sup>Bowman and Bowman, Article I, Section 5: Congress' Power to Expel, 29 SYRACUSE L. REV. 1071 (1978).

### C. Congressional Experience<sup>2</sup>

No one has been expelled from Congress since 1862. With one exception, the basis for successful expulsion has been treason or similar disloyalty (25 cases). The one exception was the first case: a Senator was expelled for writing a letter that stirred up distrust of the government among Indians. The action did not violate a law and was not done in the Senator's official capacity, but the body decided that it cast discredit on the Senate.

Other proceedings based on treason or bribery did not end in expulsion. They were cut off when the member resigned, lost an intervening election, was censured or when the expulsion resolution was withdrawn or defeated by the body.

Congressional proceedings to consider expulsion have usually involved a member convicted of a crime connected with official duties. Sources do not indicate that Congress has found it significant for expulsion purposes whether a conviction was for a felony or misdemeanor, but in practice investigations seem to have involved felonies. Similarly, Congress has not as a matter of policy distinguished between official misconduct and criminal activity not involving official duties, although in practice Congressional investigations have involved the former.

It is established by Congressional practice that criminal conduct is not required as the basis of an expulsion proceeding. Conversely, Congress does not believe it is required to expel or otherwise punish a member convicted of a criminal offense. The Supreme Court agrees that the decision whether to expel for conviction of a crime rests entirely with the body. Burton v. United States, 202 U.S. 344 (1906).

### D. Other States

The most reliable source of recent examples of legislative expulsion is case law and one attorney general opinion developed by members challenging such action. As noted in Part I of this memorandum, challenges have all been based on whether the member received due process. No member challenged the propriety of the substantive grounds for expulsion, so none of the cases discuss the reasons why particular conduct was the basis of expulsion. The cases are only useful as examples of what conduct other legislatures have deemed to merit expulsion.

In one case a member was expelled for demanding payment from someone who sought a hearing on a bill, although the member had not been charged with any crime for doing so. McCarley v. Sanders, 309 F. Supp. 8 (D. Ala. 1970).

Other recent legislator expulsions all resulted from convictions for apparent felonies:

<sup>2</sup>Bowman and Bowman, Note 1; McLaughlin, Congressional Self-Discipline: the Power to Expel, to Exclude and to Punish, 41 FORDHAM L. REV. 43 (1972).

- . attorney legislator embezzled client funds<sup>3</sup>
- . attorney legislator filed false insurance claims for clients<sup>4</sup>
- . filing false federal income tax returns<sup>5</sup>
- . extortion<sup>6</sup>
- . attempted extortion<sup>7</sup>

Unlike Congressional expulsion actions which have primarily involved conduct connected with official duties, these recent state cases involve several criminal offenses not arising out of legislative duties.

A National Conference of State Legislatures staff member by telephone February 13, 1986 described four legislator expulsions which occurred in Pennsylvania in the late 1970s. Three members were convicted of felonies arising out of their official duties (vote fraud, obstruction of justice for destroying evidence, attempting to use official position to make the state rent a building from the member). The fourth pleaded no contest to a felony of having a "ghost" on his legislative staff payroll.

The Secretary of the Illinois Senate in a letter dated January 31, 1986 indicated that two or three Illinois House members have been convicted of felonies and resigned so that expulsion did not become an issue. Normal procedure is said to be for a member to be subject to expulsion as of the time of sentencing.

Florida House rules indicate that a member who pleads no contest or guilty or who is convicted of a felony related to his or her responsibility as a public member will be suspended without pay from all membership privileges until the end of his or her term.

## II. PUNISHMENT FOR DISORDERLY BEHAVIOR

### A. Congress

The state constitution provides:

Each house may...punish its members for disorderly behavior... Art. IV. Sec. 7.

This provision was modeled on an identical part of the federal Constitution. Art. I, Sec. 5, cl. 2.

<sup>3</sup>Op. A.G. Mich. 1978, No. 5295, p. 415

<sup>4</sup>Sweeney v. Tucker, 375 A.2d 698 (Pa. 1977)

<sup>5</sup>Reaves v. Jones, 515 S.W.2d 201 (Ark. 1974)

<sup>6</sup>Gerald v. Louisiana State Senate, 408 So.2d 426 (La. App. 1981)

<sup>7</sup>Errichetti v. Merlino, 457 A.2d 476 (N.J. Super. 1982)

There is no case law defining "disorderly behavior" in either the state or federal provision. The best available information is Congressional practice on the subject.<sup>8</sup>

The Senate and House have developed ethics codes designed to give meaning to the phrase disorderly behavior. Examples of requirements in the House code include conducting oneself at all times in a manner that reflects creditably on the House, receiving no compensation for use of congressional influence, and keeping campaign and personal funds separate. The Senate code is more general, covering "improper conduct which may reflect upon the Senate, violations of law, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as members of the Senate."<sup>9</sup>

In Senate disciplinary actions disorderly behavior has generally been deemed conduct that is (1) not unlawful but reflects badly on the Senate or violates its rules and (2) takes place in the full Senate or in a committee. Examples of censured actions include putting a lobbyist on a committee staff, fighting on the floor, revealing confidential information, and using one's role as a senator to obtain personal funds through political campaigning.

In the House, disorderly behavior is generally deemed to be both illegal and office related, such as six cases involving bribery or the sale of military academy appointments. In all these cases a committee recommended expulsion but the full House voted for censure instead. This history suggests that Congress views censure and expulsion as points on a continuum of punishment, rather than each response being strictly limited to a specific type of conduct. The only clear distinction between these two proceedings in the Constitution is that censure can be voted by a simple majority, while expulsion requires a two-thirds vote.

Censure is the most common punishment either house of Congress has imposed on members. Suspension is the suggested practice under a House policy when a member is awaiting appeal of conviction of an offense punishable by two years or more imprisonment, regardless of whether the sentence actually imposed was greater or less than two years. A fine was imposed in one case for misuse of public funds. Deprivation of party seniority and of full House seniority has also been imposed in one case.

#### B. States

Information could not be found on examples of disciplinary actions short of expulsion against state legislators. The National Council of State Legislatures provided rules from the Florida House, the Kansas House, and the New Jersey Assembly indicating those bodies explicitly state that they may use censure to deal with misconduct by members. Such rules are not necessary, since the power to censure is implicit in the constitutional power to punish disorderly behavior. However, the rules are of some interest in that each one includes both

<sup>8</sup>McLaughlin, note 2, pp. 60-66

<sup>9</sup>Ibid., p. 64

censure and expulsion as disciplinary options (attached). This suggests that legislatures, like Congress, may view censure and expulsion as points on a continuum for responding to member misconduct.

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## APPENDIX - SAMPLE RULES ON CENSURE AND EXPULSION

### FLORIDA

#### House Rule 5.14 PENALTIES FOR VIOLATIONS

Separately from any prosecutions or penalties otherwise provided by law, any member of the House determined to have violated the foregoing requirements of this rule shall be censured, reprimanded, placed on probation or expelled. Such determination and disciplinary action shall be taken by a two-thirds vote of the House, upon recommendation of the committee so designated under Rule 5.12 (see below). This committee, before making said recommendation, shall conduct a hearing, after notifying the House member alleged to have violated this rule and granting said member an opportunity to appear at the hearing. The member who is under investigation shall have a right to testify on his own behalf, cross examine the witnesses against him, compel the attendance and testimony of witnesses on his own behalf before the committee shall make a recommendation to the House.

### KANSAS

#### House Rule 87. CENSURE OR EXPULSION

Whenever any member of the House of Representatives desires to lodge a complaint against any other member of the House of Representatives requesting that the member be censured or expelled for any misconduct, the complaining member shall file a written statement of such complaint with the chief clerk, and such complaint shall bear the signature of the complaining member. Whenever any complaint has been filed under this rule, the Speaker shall appoint a select committee for consideration thereof. The select committee may dismiss the complaint after the inquiry or may set the matter for hearing. Reasonable notice and an opportunity to appear shall be afforded the member complained of at any hearing held hereunder. Any select committee meeting under authority of this section shall be authorized to meet and exercise compulsory process without any further authorization of any kind, subject however to limitations and conditions prescribed in article 10 of chapter 46 of Kansas Statutes Annotated. Upon completing its hearing the deliberations thereon the select committee may dismiss the complaint or may make recommendations to the full House of Representatives for censure or expulsion, and upon receiving any such report the House of Representatives may without further hearing or investigation censure or expel the member complained of. Censure or expulsion of a member shall require a two-thirds majority vote of those members elected (or appointed) and qualified of the House of Representatives.

