



Expelling Moore would put Senate in uncharted territory

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Republican lawmakers' push to expel Roy Moore if he wins Alabama's Senate race next month could soon move the Senate into uncharted territory.

The Constitution gives the Senate the authority to expel a member with a two-thirds majority, but that power hasn't been used in more than 150 years.

The last senators removed from office were expelled for supporting the Confederacy during the Civil War. And no senator has seen the expulsion process through to the end since Americans began directly electing their senators, with lawmakers facing expulsion choosing to resign before they could be forced out.

Legal experts doubt that Moore would have an opening to argue that the Senate is denying the will of his state's voters if they vote to kick him out. But it's clear that any attempt to oust Moore would set up a brutal, high-profile fight for the Senate GOP.

Washington Republicans started to abandon Moore's campaign over the past week after a story in *The Washington Post* quoted a woman who said a 32-year-old Moore touched her sexually while she was 14 years old. While Moore has denied the allegations, the rush away from him continued on Monday after a different woman claimed Moore sexually assaulted her while she was a teenager.

Shortly after the latest allegation surfaced, Sen. Cory Gardner (R-Colo.), the head of the National Republican Senatorial Committee, declared in a statement that "the Senate should vote to expel [Moore] because he does not meet the ethical and moral requirements of the United States Senate" if he wins.

Gardner's statement shows the tough choices the GOP faces as the December election approaches, since it's too late for the party to remove his name from the ballot.

Alabama's state GOP could withdraw official support from Moore, which would render him ineligible to serve even if he wins the vote. But both Moore and the Alabama Republican Party are standing firm, meaning he's likely to remain an official candidate.

Moore is by no means a shoo-in to win the Dec. 12 special election against Democrat Doug Jones. Recent polls have shown Jones gaining ground since the allegations surfaced.

But if Moore does win, the Senate can't block him from taking his seat.

That's because of a 1969

Supreme Court ruling that bars Congress from blocking a "duly elected" member — someone who meets the minimum Constitutional requirements to be a senator and was elected fairly — from taking office.

The case centered on Rep. Adam Clayton Powell Jr. (D-N.Y.), who successfully ran for reelection after being removed from office amid accusations of financial impropriety. In the interim, the House passed a resolution that barred Powell specifically from taking his seat, but the Supreme Court ruled that unconstitutional.

Once Moore is seated, though, his new colleagues could try to oust him.

"The Constitution gives the complete authority to each house to expel without any conditions put on it," said Heritage Foundation legal expert Hans von Spakovsky. "Senators can basically do what they want."

If the Senate decided to move forward with expulsion, the Ethics Committee would oversee the hearings. In order to satisfy "basic standards of fairness and due process," von Spakovsky said the committee would need to conduct "almost a mini-trial to give Moore the ability to defend himself."

Robert Walker, the former chief counsel and staff director of the Senate Ethics Committee, told The Hill that the Senate would likely have to call witnesses and hold hearings before expelling Moore.

"It would be more like a court case, I think, with a panel of six people, the six members of the committee, acting as the judges. The committee staff, the committee counsel would effectively be the prosecutors and witnesses would be called to provide testimony and evidence," said Walker, who now works at the law firm Wiley Rein.

"But the standard of proof is different. It's not proof beyond a reasonable doubt, it's proof by clear and convincing evidence," he added — a lower standard than the evidence standard for criminal proceedings.

Walker said public hearings would be the "default," but that it's possible that both sides could agree to private sessions. An open setting would be unique for the Senate, since recent expulsion investigations have largely remained behind closed doors.

The Senate hasn't successfully expelled a sitting lawmaker since the Civil War, when senators kicked out 14 members for siding with the Confederacy. Before that, a Tennessee senator was removed after being implicated in a conspiracy with Great Britain.

More recently, senators facing possible or probable expulsion have decided to resign ahead of a formal removal from office. That was the case in 1995, when the Senate Ethics Committee recommended that Sen. Bob Packwood (R-Ore.) should be expelled for sexual misconduct and abuse of power. That recommendation came after Packwood waived his right to a hearing, although he later requested a hearing and was denied.

In 2011, Sen. John Ensign (R-Nev.) resigned while the Ethics Committee investigated him for accusations related to a cover-up of an alleged affair.

It's likely that Moore, a former state Supreme Court justice who has stayed in the race despite criticism from top GOP leaders, would look for any avenue to challenge the expulsion. Packwood slowed down his own expulsion by refusing to turn over his personal diary, ultimately triggering an ill-fated floor battle over a Senate subpoena for the diary.

One possible option for Moore would be arguing that the Senate shouldn't be allowed to expel him for alleged conduct that took place before he took office. Another potential argument floated by experts involves Moore arguing that an expulsion overturns the will of Alabama voters, who knew about the sexual misconduct allegations before the election.

But legal experts who spoke to The Hill agreed that, as long as Moore was given his due process rights, the Alabama Republican wouldn't have much legal recourse thanks to the broad latitude the Constitution gives the Senate to police its own members. They predicted that courts would dismiss any case, barring any major oversight by the committee, out of reluctance to weigh in on political matters.

"I'm fairly confident, however, that no court will want to get involved, as this is the ultimate 'political question,'" Cato Institute senior fellow Ilya Shapiro told The Hill.

While an expulsion would trigger a second special election, Moore would still be eligible to run again, which conceivably could keep controversy brewing. And even if Moore's legal recourse is limited, lawmakers would certainly face political pressure about effectively invalidating the special election with information that began to come out before most votes had been cast.

"You can't make light of the charges, but at the same time do you really want to add to the anger at Washington by telling people who they should elect or that you won't seat their senators if they elect them?" said Barry Bennett, a former campaign adviser to President Trump. "That's called a coup."