

9th Circuit hears ousted lawmaker's appeal

By: Howard Fischer, Capitol Media Services June 2, 2020

Attorneys for the state and a former House speaker told a federal court Tuesday that the legislature is free to remove members for any reason at all — including political affiliation and race — as long as they can muster a two-thirds vote.

Steve Tully said there was nothing wrong with the procedures used by J.D. Mesnard, who was speaker in 2018, to investigate then-Rep. Don Shooter and eventually have a vote that resulted in his ouster.

Tully, himself a former lawmaker, did not specifically dispute Shooter's claim that Mesnard ignored decades of precedent which normally allow an accused lawmaker a formal hearing before the Ethics Committee where evidence can be presented and witnesses can be questioned. Nor did he address Shooter allegations that he was being charged with violating a sexual harassment policy that did not yet exist or that Mesnard removed certain information from an investigative report that was given to his fellow lawmakers.

Instead, he told the three-judge panel that lawmakers were free to vote to eject Shooter anyway. "The right to expel members is granted to the House by the Arizona Constitution," Tully said, with the only requirement being able to get at least 40 of the 60 members to go along. That claim drew a skeptical response from Judge Marsha Berzon, a President Clinton appointee. She asked whether if the Democrats controlled most of the seats they could simply decide to remove all Republicans.

"My answer is, yes," Tully responded. "If they're at 90 percent (of the House) and they filed a motion to expel a member for being what they thought was disruptive, and they got the votes." Berzon said that opens the door to the majority deciding that the minority is being disruptive "because they get up and are making speeches" about why the majority is wrong. But Tully stuck to his position. And, more to the point in this case, he told the judges that members of the House — including his client — cannot be sued for damages by the expelled member.

It wasn't just Tully making that argument.

Jeremy Horn, representing the state, said the House can discipline anyone who violates its rules, "whatever the House decides its rules are." Berzon questioned that logic.

"If you just let the body expel whoever it wants, with absolutely no oversight by anybody, you could completely undermine democracy?" she asked.

Horn said there is no way for courts to intercede and decide what is proper. That drew questions from Judge Lawrence VanDyke, a President Trump appointee, about whether lawmakers could decide to remove all black legislators simply because they didn't want them there.

“It very well may be,” Horn conceded.

What the appellate court ultimately rules will affect more than whether Shooter’s rights were violated and he is entitled to some damages, as reinstatement is not an option. It could set a federal court precedent that gives legislators carte blanche to oust members for whatever reason they want if they can get that two-thirds vote.

The House voted 56-3 in early 2018 to oust Shooter after an investigative report found there was “credible evidence” that he had sexually harassed other lawmakers, lobbyists and others. Since that time, Shooter has been trying to get courts to conclude that his rights were violated and that Mesnard and Kirk Adams, at the time an aide to Gov. Doug Ducey, had defamed him. Shooter won a small victory last week in Maricopa County Superior Court as Judge Theodore Campagnolo ruled that Shooter is entitled to sue Mesnard over alleged defamatory comments. The judge acknowledged that elected officials generally have absolute immunity for comments they make during formal sessions.

But Campagnolo said the issues in this case involve claims that Mesnard altered a report about Shooter’s conduct prepared by an outside law firm before it was given to House members and the public. And Shooter also contends that the press release Mesnard issued contained untrue and defamatory statements that went beyond merely stating the facts. That, Campagnolo said, requires him to reject a bid by Mesnard to simply throw out the case. The new ruling, however, is not a total victory for Shooter — and not only because all this does is give him a chance to try to make his case.

The judge threw out separate defamation claims made against Adams. Campagnolo said there is nothing in Shooter’s legal briefs containing any specific allegations that Adams had defamed him.

He also said Shooter, as a public figure, had no right to claim invasion of his privacy. And Campagnolo reaffirmed an earlier decision that the Yuma Republican cannot claim in state courts that he was denied due process in the way he was removed from the House in early 2018. The judge said courts cannot second-guess the procedures used to oust Shooter. But that claim lives on at the 9th Circuit which led to Tuesday’s hearing. Philip Byler, Shooter’s attorney, told a three-judge panel of the court that the normal procedure used in the House to discipline or oust a lawmaker involves a hearing before the Ethics Committee. That provides an opportunity for the legislator to not only present evidence but also to question witnesses.

On top of that, Byler said Shooter’s rights were violated because he was charged with violating a “zero tolerance” standard for sexual harassment, a policy that did not exist at the time. And he charged that Mesnard had the independent investigators he hired “omit material and exculpatory testimony and evidence,” including allegations against then-Rep. Michelle Ugenti-Rita, R-Scottsdale, who was one of the women who complained about his conduct. The appellate judges did not indicate when they will rule.