

Government Censorship of Elected Officials and the 1st Amendment

By James P. Hughes, J.D.

The Supreme Court and lower federal courts have seldom discussed the issue of suppressing the speech of government officials by their governing body. The issue of whether this is in violation of the official's First Amendment rights is still contested. One Supreme Court case that tackled this hotly debated and sensitive issue was the liberal leaning Warren Court of the 1960's. The court discussed the issue in the case of Bond v Floyd in 1966. The court ruled that there should be wide discretion and latitude on the right to discuss issues of public importance. At face value, the issue of whether censoring an official is a violation might seem easy to solve. It is the right of the government representative both as an individual protected by the Constitution and as a duly elected voice of the people to have the right to speak on public matters. However, the government's ability to regulate its representatives to maintain a stable domestic and international policy is also significant.

When elected representatives of a country of over 370 million people make inflammatory statements or comments about hot-button or sensitive domestic or international issues, world stability can be dramatically affected. Tenuous political, social, or financial relations between nations can be irreparably damaged. This is a significant issue when publicly elected officials cannot be fired for expressing inflammatory political or social views. Officials can be removed through impeachment, but a passing comment or statement, despite seeming incendiary, may not rise to that level. Even though the public may have the luxury of making comments on a whim without affecting the nation, publicly elected officials do not have such a luxury. They are fiduciaries of the Constitution and duty bound to put the public interest above their own bias or opinions.

It is understandable why the Supreme Court has not placed many cases regarding the censorship of elected officials by the government on the docket. The issue, while important, is controversial. The basis for contentions is often motivated by opposition to an official's political or social affiliations, opinions, or biases. The Court has been reluctant to take on such politically charged contentions, and for good reason. The Court's job is not to make statements based on political arguments, but in law. Rarely has the court decided specific First Amendment issues regarding the censorship of a publicly elected official by the government. However, the Supreme Court, in the case of Bond v Floyd, did touch on the issue. The court stated that the debate on public issues should be robust and uninhibited. Just as erroneous statements should have breathing space to survive, statements that criticize public policy and the implementation of such policy should be similarly protected.

The Fifth Circuit in the case of Houston Community College System v Wilson cites Bond. It uses the same argument as the Warren Court. While the two cases share similarities and the argument made by the court is cohesive and backed by some precedent, it is important to note the difference. Since the Bond case, the court and the law have changed. The standards, particularly those concerning elected public employees, are ambiguous. The argument the court uses in Houston Community College System is antiquated and subject to scrutiny. Since the Bond case in 1966, the court has established standards when it comes to First Amendment challenges, terminations, and censorships for public employees.

A few years after the decision in Bond, the decision in Pickering v. Board of Education in 1968 outlined a balancing test when it comes to protected government employee speech. The court stated that when government employee speech is protected, which means the speech does relate to a matter of public concern and is not engaged in as part of the employee's official duties, the court will balance the employee's interest in expression against the school's interest in the effective and efficient operation of the

government workplace. The court determined that the employer's apparent adverse employment action against the employee violates the First Amendment. The court evaluated further expressing that the state interest prong of the test focuses on the effective functioning of the public employer's enterprise. There is a strong state interest in assuring the actions of the employee do not interfere with work, employee relationships, or the specific speaker's job performance. This test, while a new factor to consider, is flawed pursuant to its use in evaluating cases of elected government officials. The Pickering test focused on a public-school teacher who is a government employee but not an elected voice of constituents. The teacher may be acknowledged as a natural extension of the school when speaking on matters of public concern. However, the representation by government officials rises to a higher standard, as they are duly elected by voters as the official voice of their constituents.

In the present case of Houston Community College System, there is a strong argument that the elected official interfered with the school's enterprise, employee relations, or the performance of the speaker himself. At present the case has also been granted cert. and is awaiting a Supreme Court discussion. In addition, the current divisive political climate could be an additional reason the Court decided to take this case. The new standards, as defined by the court, attempt to balance the interests of both parties as well as whether the matters were of public or internal concern.

As the recent case of Snyder v Phelps has shown, matters of public concern can be broadly defined. The globalization of the world and proliferation of social media have allowed both private citizens and government officials to both inspire and enrage, often with compelling consequences. In some cases, this speech has been beneficial to the country, bringing awareness to systematic racism, poverty, homelessness, drug addiction, or the necessity for public health initiatives. In other cases, rhetoric of elected officials has

incited violence against police, ethnic or marginalized groups, and government institutions as well as rejection of scientific and medical facts. The impact of such rhetoric cannot be overstated, even if such statements are defined as matters of public concern.

Government employees can be fired for cause while elected officials cannot. This distinction is significant. Even though an elected representative may use speech that influences others to cause harm, it may not raise to the level of impeachment. Decades ago, the Supreme Court addressed this issue in Connick v Myers by stating the government does have a significant interest in directing policymakers to make beneficial decisions of consequence. Even in the recent case of Garcetti v Ceballos, the court focused on the role of the speaker and if the speech contains information acquired by virtue of the speaker's public employment. In that case, the court ruled that speech acquired by virtue of employment is not per se categorized as speech spoken as an employee. As the decades have passed since Bond, the Court's view has evolved when addressing the rights of public officials to speak on matters of public concern.

The current case at bar, Houston Community College System v Wilson, addresses the actions of an elected board member named Wilson. The individual was censored by the school and the trustee board members. Wilson had voiced his disagreement regarding both the decisions of the board and the methods in which they were made. Specifically, he disagreed with the board's decision to fund a campus in Qatar. He also voiced concerns that a board member did not reside in the district to which they had been elected. Wilson created a series of provocative robocalls to district residents regarding the board's recent actions. Additionally, he made disparaging remarks on a radio show, mentioning the board members by name. Regarding the board member's disputed residency, he hired a private investigator to follow the member. It is not surprising that the board allegedly excluded the plaintiff from an executive session. Subsequently, the plaintiff filed two lawsuits against the

board and school stating that his exclusion was unlawful. Consequently, the board voted during a regularly scheduled meeting to publicly censure the plaintiff, as he could not be removed from the elected office. The board's reasoning was the plaintiff was not acting in a manner that was consistent with the best interests of the school or the board. He needed to immediately cease and desist from all inappropriate conduct. Furthermore, the board stated that any repeat of the alleged improper conduct by Wilson would constitute grounds for further disciplinary action. This is a contradictory statement, as the board had stated in the same paragraph that censuring was the highest level of sanction available. Therefore, any further disciplinary matters by the board could only be legal action. The board does not elaborate on what exactly the inappropriate conduct had been, whether it was the private investigator, Wilson's repeated public criticisms, robocalls, radio interviews, or multiple lawsuits. It is speculated that the tipping point for the censure was the lawsuits brought by Wilson. While the Fifth Circuit does not focus on the reasons for Wilson's censure, the reasoning for censure is and should be critical to the analysis and the question of Wilson's First Amendment rights.

The Fifth Circuit breaks from the Pickering test which had been precedent of previous related cases. They put forth that, instead of a balancing test, an issue involving the censure of an elected employee of the state should be analyzed under strict scrutiny. While the Fifth Circuit does comment about earlier similar cases and how those cases were correctly decided, the court only decides that Wilson has a claim for damages, which reversed the lower court decision. By specifically citing decisions in similar cases, even though the law was not applied there, the court implies that through strict scrutiny, the state's interest in suppressing the speech of an elected official is weak. Even had the school argued the order was a good faith effort to pursue the public interest, it would fail the test. I believe the Fifth Circuit's overall decision that there is standing for Wilson was the correct

one. I do not believe that strict scrutiny should be the standard for this situation. As in the Texas case Scott v Flowers, I believe that a Pickering balancing standard should be considered instead.

Even though the Fifth Circuit's concern whether Wilson can argue recovery and standing, the court intimates that if strict scrutiny were used on the case at bar, Wilson would most likely win. However, considering the current political climate, the rapid growth of technology and methods of wide-scale communication, the board's actions here (while not argued very well by the board) were justified. Wilson should be allowed his right as a citizen and as a member of the board to voice his concerns regarding board decisions and how they are made. However, Wilson exceeded the proper and usual channels to voice his concerns. His actions are detrimental to the functioning of the institution and appear capricious and vindictive.

Wilson argues that because his First Amendment rights were violated, due to his opposition, he experienced significant mental anguish. He should be compensated, despite disrupting the formal process and causing mental anguish to the board. Wilson could argue that the board attempted to silence him through censor due to his legitimate complaints of malfeasance. However, it appears the board was more alarmed by Wilson's vindictive responses than to his complaints. The board and the school argued that his behavior was inappropriate and disruptive. Wilson's individual rights are important, but if his actions significantly affect the board and school's ability to conduct operations, thousands of innocent individuals could be adversely impacted. This, by definition, is contradictory to Wilson's oath of office.

The Fifth Circuit championed Wilson's case by supporting the allegations that the board was violating its bylaws. Wilson also claimed municipal corruption by the board. Consequently, his speech was a matter of public concern which required strict scrutiny to

validate the censor. Although well intentioned, the court's sentiment is overzealous. The rights of citizens and elected government officials to call out potential corruption is significant. However, if that call for justice includes harassment or violence, they are contrary to the public good, especially if those arguments are exaggerated or questionable. For example, one of Wilson's contentions is the board violated a bylaw by permitting a member to vote via videoconference. In 2017, Wilson could have argued that such actions defiled the integrity of the vote, but considering the events surrounding the global pandemic, his argument seems unreasonable.

Individuals must have the right to identify and report potential violations. However, it is unethical to overload the system with petty, unfounded, or personally motivated vendettas. With the Pickering test, this standard allows for courts to weigh the potential outcomes. Considering this higher standard for dismissal, the power of elected officials to influence or impede the democratic process is significant.

Government censure of elected officials when they speak on matters of public concern is a slippery slope. In the Houston Community College Systems case, the official in question can be seen as disruptive to the proper and efficient functioning of the institution. Conversely, the governing body may be perceived as suppressing his First Amendment right because they disagree with his legitimate objections. While the lower courts have begun to take a more restrictive view on the issue of government official's speech, it is likely the Supreme Court is not yet ready to make such a leap.

The case at bar, Houston Community College System v Wilson, has just recently been granted certiorari. It is on the docket for the court to debate in the coming months. The case will likely not be a difficult decision for the court. In light of Bond v Floyd, the court has precedent to rule Wilson's First Amendment rights were violated because he was speaking on a matter of public concern. A significant aspect of a duly elected representative is to

question policy. The court would be reluctant to establish new precedent allowing government entities to find loopholes to censor officials for speaking on legitimate issues of public concern.

However, the crux of the issue may not be censoring but the few options government bodies have when dealing with officials that are detrimental to the office or their constituents. The time-honored trust most Americans have is the individual chosen by the people is best qualified for the job. In the rare occasion the official is corrupt, there is an official process for impeachment. As the nation has witnessed during the Trump Administration, this is a difficult, time-consuming process, even when the actions of the government official result in violence and chaos. While the notion of suppression of speech is difficult for many Americans to accept, the divisive and inflammatory rhetoric of a growing number of elected officials has become detrimental to the public interest. Many are now intentionally deceiving the public to gain or retain power. This speech is now so prevalent, it is becoming accepted as a legitimate political strategy. Despite the Court's reluctance to address this growing concern, without intervention, it will continue to threaten our democracy and the rule of law.