
LEGAL UPDATE

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UNITED STATES SUPREME COURT DECISION — COMMUNITY COLLEGE BOARD'S CENSURE OF BOARD MEMBER

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Houston Community College System v. Wilson

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Factual and Procedural Background. The Houston Community College System (HCC) is a public entity that operates community colleges in Texas. HCC's Board of Trustees (board) consists of nine members. David Wilson was elected to HCC's board in 2013.

Mr. Wilson disagreed with other board members about HCC's direction and brought several lawsuits challenging the board's actions. In 2016, the board responded to Mr. Wilson's actions by reprimanding Mr. Wilson publicly. Subsequently, Mr. Wilson accused the board of violating its bylaws and ethical rules in various media outlets, arranged robocalls to the constituents of certain board members to publicize his views, hired a private investigator to surveil a board member, and filed two additional lawsuits against the board in state court.

During a 2018 meeting, the board adopted a public resolution censuring Mr. Wilson. The resolution stated that Mr. Wilson's conduct was "not consistent with the best interests of the [HCC]" and "not only inappropriate, but reprehensible." The board also imposed penalties on Mr. Wilson, including making him ineligible for election to board officer positions in 2018 and for reimbursement for HCC-related travel. In addition, the board penalized Mr. Wilson by requiring board approval for him to access moneys in his board account.

In response, Mr. Wilson amended the pleadings in one of his state court lawsuits against the board to include claims that the censure violated the First Amendment. Mr. Wilson sought injunctive and declaratory relief as well as damages and attorney's fees. HCC and the board removed the lawsuit to federal court. HCC then moved to dismiss the lawsuit. The District Court granted HCC's motion to dismiss, finding that Mr. Wilson lacked standing. Mr. Wilson appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the District Court's decision, finding that Mr. Wilson had standing and had stated a viable First Amendment claim. HCC filed a petition for certiorari with the United States Supreme Court (Court) in which it asked the Court to review the Fifth Circuit's judgment that Mr. Wilson possessed an actionable First Amendment claim arising from the board's purely verbal censure.

Issue. Whether Mr. Wilson had an actionable First Amendment claim arising from the board's purely verbal censure.

Holding. The Court held unanimously that Mr. Wilson did not have an actionable First Amendment claim arising from the board's purely verbal censure.

Analysis. The Court began its analysis by acknowledging that an implication of the First Amendment's prohibition on laws that abridge the freedom of speech is that government officials cannot subject an individual to retaliatory actions after that individual has engaged in protected speech. Mr. Wilson argued that the board's censure was such a retaliatory action.

The Court rejected Mr. Wilson's argument for two reasons. First, as early as colonial times, elected bodies in this country have had the power to censure their members, which indicates that the Court should interpret the First Amendment to allow for such censures. Second, under the Court's more recent cases, Mr. Wilson cannot show that he has a viable First Amendment retaliation claim.

Beginning with the Court's discussion of the history of the use of censure by elected bodies, the Court noted that when it is faced with an issue related to the Constitution's meaning, "[l]ong settled and established practice is a consideration of great weight." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). Neither party to this case cited any evidence that a purely verbal censure has ever been considered to violate the First Amendment. The Court cited numerous examples of censures by different types of elected bodies that were analogous to the case presented here. The Court concluded there was "no evidence suggesting prior generations thought an elected representative's speech might be 'abridge[d]' by [a purely verbal censure] from his colleagues."

Mr. Wilson argued that a prior Court case, *Bond v. Floyd*, 385 U.S. 116 (1966), indicates there is precedent for the Court to find that a government body's action against a member of the body may violate the First Amendment. In *Bond*, a state legislature refused to seat a duly elected representative because, the legislature argued, the representative's comments criticizing the Vietnam War were incompatible with the state's required loyalty oath. The Court in *Bond* held that the legislature's actions violated the First Amendment. Mr. Wilson argued the Court should reach a similar result in this case. The Court rejected Mr. Wilson's argument, pointing out that the legislature's action in *Bond* implicated not only the speech of an elected official but also the franchise of that elected official's constituents by excluding the elected official from office. As the Court explained in a later case, *Powell v. McCormack*, 395 U.S. 486, 550 (1969), the power to exclude an elected official from office and the power to issue other, lesser forms of discipline are not mutually interchangeable under the Constitution.

In terms of the Court's analysis of more recent cases, the Court indicated that a plaintiff pursuing a First Amendment retaliation claim must show, among other things, that the government took a material adverse action in response to speech that would not have been taken absent the retaliatory motive. The Court stated that an assessment of the materiality of the board's conduct must account for the fact that Mr. Wilson was an elected official. The Court noted that it is expected that elected officials shoulder criticism about their public service from both their constituents and their peers. The Court also stated that a fair assessment of the materiality of the board's conduct must acknowledge that the only adverse action at issue is itself a form of speech that concerns the conduct of public office. The Court explained that, just as the First Amendment allows an elected official like Mr. Wilson to speak freely on matters of public policy, it cannot be used as a weapon to silence other public officials seeking to do the same.

The Court then explained the limits of its holding in this case. The Court stated it did "not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim." The Court left open the possibility of First Amendment retaliation claims when government officials reprimand or censure students, employees, licensees, private individuals, or other government officials who are members of a different government body. The Court also left open the possibility of First Amendment retaliation claims when reprimands or censures are accompanied by punishments.

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