

BOND

HIGHER EDUCATION INFORMATION MEMO

APRIL 4, 2022

Is a Censure a Form of Censorship Under the First Amendment?

In *Houston Community College System v. Wilson*, the Supreme Court of the United States recently addressed the scope of impermissible retaliation under the First Amendment in the context of a dispute between the members of the governing board of an institution of higher education. In a unanimous decision authored by Justice Gorsuch, the Court held that verbal censure by one's fellow board members alone does not give rise to an actionable First Amendment retaliation claim.

The case arose from heated disagreements between Houston Community College (HCC) Trustee David Wilson and his fellow elected board members. These disagreements went well beyond the sort of verbal derision, procedural jousting and sharply divided votes that can be common on some (even well-functioning) governing boards. Wilson set up robocalls to the constituents of his colleagues, disparaged them personally in the media, filed three lawsuits (costing HCC hundreds of thousands of dollars for legal defense) and at one point even hired a private investigator to surveil another trustee.

In response to Wilson's behavior, the HCC board first reprimanded him publicly in 2016. This only seemed to incite the renegade trustee further and, following continued defiance (and litigation), the board adopted a resolution censuring Wilson and imposing penalties limiting his ability to serve in leadership positions and expend HCC funds. The language of the censure specifically rebuked Wilson for acting in a manner "not consistent with the best interests of the College," violating the board's code of conduct, and warned him that repeating such conduct "will constitute grounds for further disciplinary action."

Within weeks, Wilson brought a legal challenge to the resolution. Due to the procedural posture of the case, the only part of Wilson's lawsuit that made it before the Court was his First Amendment challenge to the censure itself.

The Court tethered its opinion to two intersecting analyses. First, the Court examined the historical understanding and context of the First Amendment and concluded that public governing bodies in the United States have long been understood as having the power to censure their members (Congress itself first censured a member in 1811 and last did so in 2021).

Second, the Court engaged in an "adverse action" analysis to determine if the censure resolution truly punished or "chilled" Wilson's speech. In this context, the Court looked to the reasonable expectations of elected officials, which dovetail with the aforementioned historical practices of deliberative bodies in the United States. After pointing out that officials are free to use their positions as platforms for projecting their own views, the Court concluded that such officials should also expect "to shoulder a degree of criticism about their public service from their constituents *and their peers*" [emphasis added].

The Court went on to characterize a governing body's power of censure itself as a "form of speech." In this regard, such a censure is merely speech that counterbalances the speech of the censored member. Fair is fair and both sides get their say.

Key to this analysis is that the censure must be without material consequence (making the procedural posture of the case convenient since the Court did not have to consider the concomitant limitations that the board placed on Wilson's leadership and spending ability). The Court also noted that the language of the censure was not alleged to have been defamatory, which could have removed it from the shelter afforded to most pure speech. (Note that even bitter or injurious criticism of a public official would not give rise to damages for defamation without proof that the expression was motivated by "actual malice"—i.e., known falsehood of allegations or reckless disregard for the truth.)

The most salient limitation of the holding for governing boards is that the dispute was between coequal members of the same body. The Court states forthrightly that "government officials who reprimand or censure students, employees, or licensees may in some circumstances materially impair First Amendment freedoms." In other words, internecine squabbles are one thing, but boards using their powers—including censure—to punish or deter the speech of a student, faculty member or (presumably) administrator, may be quite another matter and much more likely to run afoul of First Amendment protections.

Though ultimately worthy of attention, the limited central holding of *Houston Community College System v. Wilson* is unlikely to affect the practices of any college or university board. If anything, an issue not raised by the case—but nonetheless mentioned twice in the Court's opinion—may be the most significant takeaway: "When the government interacts with private individuals as sovereign, employer, educator, or licensor, its threat of a censure could raise First Amendment questions." Legal scholars call this type of statement *dicta*, but wise boards might receive it as a warning.

If you have any questions about the information presented in this memo, please contact [Seth Gilbertson](#), any attorney in Bond's [Higher Education practice](#) or the Bond attorney with whom you are regularly in contact.

