



# Board Governance: U.S. Supreme Court Upholds Power of Elected Boards to Censure Their Own Members

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After years of recriminations and acrimony between members of the Board of Trustees for the Houston Community College System (“System”), the Board censured one of its members for “reprehensible” conduct—including speech—“not in the best interests” of the college. The board member, David Wilson, sued the System for violation of his First Amendment rights of free speech. In a unanimous decision, the Court held that the Board violated no First Amendment rights when it adopted a purely verbal censure of Mr. Wilson. (*Houston Community College Sys. v. Wilson* (2022) – U.S. –.)

The Court held that the censure by the Board was not a materially-adverse action sufficient to trigger First Amendment protections. Mr. Wilson, as an elected official, was expected to “shoulder a degree of criticism” about his public service and exercise his right to respond. Equally important, the only adverse action was itself a form of speech exercised by the other Board members. The Court thus concluded there was no actionable First Amendment claim. At the same time, the Court was careful to limit its holding to reprimands issued by an elected body to one of its members. The outcome might be different, the Court explained, for government reprimands issued to a government employee or a private citizen. Similarly, censures accompanied by other punitive action, such as expulsion or exclusion, might be subject to a different result.

The System Board of Trustees is a nine-member public body that oversees the administration of various community colleges in Texas. Mr. Wilson was first elected to the Board in 2013 and his tenure there was “a stormy one.” (*Wilson, supra*, Slip Opinion at p. 1.) He often disagreed with the direction of the Board and made his opinions well known. He charged the Board with violations of its own bylaws and ethics rules; he arranged robocalls to constituents to air these views; and he hired a private investigator to surveil a fellow trustee whom he asserted did not live in the district to which she had been elected. He also brought a

number of lawsuits against the Board, alleging a wide variety of Board misconduct.

In one of the lawsuits, Mr. Wilson alleged that the Board violated its own bylaws when permitting a trustee to vote by videoconference. When his colleagues did not permit him to attend a meeting to discuss the litigation, Mr. Wilson filed a second suit alleging that the Board and System had “prohibited him from performing his core functions as a Trustee.” (*Id.* at p. 2.) These lawsuits, and others brought by Mr. Wilson, resulted in the System incurring more than \$270,000 in legal fees. In 2018, the Board passed a resolution “censuring” Mr. Wilson and stating that his conduct was “not consistent with the best interests of the College” and “not only inappropriate, but reprehensible.” (*Id.*) The Board also “imposed certain penalties. It provided that Mr. Wilson was ‘ineligible for election to Board officer positions for the 2018 calendar year,’ that he was ‘ineligible for reimbursement for any College-related travel,’ and that his future request to ‘access ... funds in his Board account for community affairs’ would require Board approval. *Ibid.* The Board further recommended that Mr. Wilson ‘complete additional training relating to governance and ethics.’” (*Id.*)

Mr. Wilson promptly amended one of his petitions against the System to include a First Amendment claim. The federal district court dismissed the First Amendment claim based on the censure resolution, but the Fifth Circuit reversed. The Supreme Court granted *certiorari* to consider whether the Board’s censure violated the First Amendment.<sup>[1]</sup> (*Id.* at p. 4.)

The Court began its analysis with a look into the historical practice of censure. Often, the Court explained, “a regular course of practice” can illuminate or “liquidate” the “terms and phrases” of the Constitution. (*Id.* at p. 5, citing *inter alia* 8 Writings of James Madison 450 (G. Hunt ed. 1908) [Letter from J. Madison to S. Roane (September 2, 1819)].) Reciting examples from colonial assemblies, the United States Congress, and state and local elected bodies, the Court found a long and settled historical practice of elected bodies censuring their members for both conduct and speech thought detrimental. And the Court found “no evidence” suggesting that “prior generations” thought that a representative’s speech might be “abridged” by countervailing speech from the representative’s colleagues. Thus, “history suggests ... a[n] understanding of the First Amendment ... permitting free speech on both sides and for every faction on any side.” (*Id.* at p. 7, citing *Thomas v. Collins* (1945) 323 U.S. 516, 547 [internal quotations omitted].)

The Court then analyzed the claim under “contemporary” First Amendment doctrine. To prevail, a claimant must demonstrate an “adverse action” taken in response to protected speech. Detrimental adverse actions can take many forms – arrest, license denial, or dismissal from government employment – which are easy to identify. Less harsh actions may also qualify, depending on their severity or their adverse effect on the claimant’s speech. In the present case, the Court explained, the effect was immaterial for at least two reasons. First, “[i]n this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers – and to continue exercising their free speech rights when the criticism comes.” (*Id.* at p. 8.) Whatever the First Amendment might mean under differing interpretations, the Court explained, there is practically universal agreement that it was adopted “to protect the free discussion of governmental affairs.” (*Ibid.*, quoting *Mills v. Alabama* (1966) 384 U.S. 214, 218.) Second, the only adverse governmental action unleashed on Wilson was also a form of speech itself. It concerned the public conduct of a member of the same deliberative body issuing the censure. It did not prevent him from doing the job he was elected to perform, nor did it deny him any privilege of his office. And it did not materially deter him from exercising his own right to speak. The First Amendment cannot, the Court held, be used as a weapon to silence fellow representatives from speaking freely on questions of governmental policy. Given these infirmities in the plaintiff’s claim, the Court concluded that the Board’s

censure could not qualify as a “materially adverse action” under First Amendment caselaw. (*Id.* at p. 9.)

The Court concluded by articulating limits to its holding. “Our case is a narrow one[] ... concerning “a censure of one member of an elected body by other members of the same body.” (*Id.* at p. 13.) “We do not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim.” (*Id.* at p. 10.) For example, government reprimands of students, employees, or licensees might “in some circumstances” materially impair First Amendment protections. (*Id.*) Similarly, censures accompanied by additional punishments, those issued by government bodies against officials who do not serve on the body, and those criticizing private citizens, might raise First Amendment questions. (*Id.* at pp. 10-11.) But *Wilson* is none of those cases the Court concluded in dismissing Wilson’s claims against the Board of Trustees.

Public censure plays an important role in the governance policies and practices of many public pension boards. Under these policies, a public censure is often the means that a board may invoke to hold a member accountable for a policy or rules violation. The Court’s decision in *Wilson* upholds the rights of boards to impose this penalty on its own elected members.

But *Wilson* also leaves several related questions unanswered. May a board impose the same sanction on an appointed representative as it may on an elected one? In its historical survey, the Court focused its review on elected bodies, such as Congress and state legislatures. At the same time, much of the Court’s analysis would seem to apply to a censure of an appointed member, particularly where the member is deemed under state law to hold a position on the public pension board as a public official and other members of the board are elected. But the holding does not expressly cover these types of members. Similarly, the Court did not address other forms of punishments, such as “expulsion, exclusion, or any other form of punishment.” Any censure resolution that included punishment which, in fact, prevented a Board member from performing his or her “core functions” on the Board would almost certainly be subject to a more exacting review.

[<sup>1</sup>] With respect to the additional penalties, the Supreme Court expressly declined to review these actions because the lower appellate court had upheld their legality and Wilson failed to file a cross-appeal. (*Id.* at pp. 3-4.)