

**SCHOOL BOARD MEMBERS
AND THE FIRST AMENDMENT**

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THE RIGHT TO FREE SPEECH

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

U.S. Const. Amend. I.

THE RIGHT TO FREE SPEECH

“No right is absolute.”

McDonald v. City of Chicago, Ill., 561 U.S. 742, 879 (2010) (Stevens, J., dissenting).

“RIGHTS” AND LIMITATIONS

DO ELECTED OFFICIALS HAVE A RIGHT TO POLITICAL VIEWS?

- Yes.
 - While the State has an interest in requiring its legislators to swear to a belief in the constitutional processes of government, it cannot limit its legislators’ capacity to discuss their views of local or national policy.
 - Officials have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office.

Bond v. Floyd, 385 U.S. 116 (1966).

NO NEW TAXES!

- After a community member tried to remove an elected official who spoke out against the taxes that supported the governmental entity to which he’d been elected, the official said, “my opinion is my right!”
- The court said:
 - No evidence the board member *did anything*.
 - He took no official action, made no official motion.
 - When a motion was made to set the tax rate, he said: “I’d vote for zero.”
 - No evidence “he was trying to influence the other board members” in texts, so no unlawful “deliberations” among a quorum.
 - There is a difference between an elected official speaking his or her mind about the public entity of which they are a member, and actually taking official action.

Harper v. Best, 2016 WL 1613546 (Tex. Ct. App. 2016).

ELECTED OFFICIALS CANNOT USE THE "TRAPPINGS" OF OFFICE TO PROMOTE A PERSONAL MESSAGE

- While communication between an official and his or her constituents cannot be "shut down," an elected official cannot "use the trappings" of his or her public office to promote a personal message.
- As "political actors," elected officials must "take it outside" those "trappings" of office.

Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007).

NEW MEXICO ATTORNEY GENERAL ON PUBLIC OFFICE AND POLITICAL ACTIVITY

- "People who take jobs in government do not give up all their rights to participate as citizens in our democracy. They can vote, donate to candidates, and work on their own time for candidates and political parties and causes. Those elected to office or appointed by elected officials are entitled, and expected, to use public resources at their disposal to fulfill their public commitments made during their political campaigns, consistently with their other duties of office."
- "At the same time, election to office does not entitle officials to use publicly funded resources to finance their political campaigns."
- "...the challenge is how to respect the civil rights of individuals and the legitimate political expectations of office-holders, while protecting the public against political misuse of their resources."

THIS IS NOT UNLIKE PROHIBITIONS ON ELECTIONEERING AND POLITICAL ADVOCACY WITH PUBLIC RESOURCES

- A public officer is prevented from "directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose." NMSA 1978, § 10-16-3.1(A) (2011).
- "Any public officer making any profit out of public money or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office." N.M. Const. art. VIII, § 4.
- "Any person diverting or expending any public school money contrary to the approved budget is, in addition to being subject to any other civil or criminal action, liable along with his sureties to the state for the amount diverted or expended." NMSA 1978, § 22-8-42(B) (1988).
- "Any person falsifying any record, account or report required to be kept or filed pursuant to the Public School Finance Act or knowingly using any money budgeted or appropriated for public school use or for any other purposes than that provided in the appropriation or budget is guilty of a petty misdemeanor and shall, in addition to all other civil or criminal penalties, forfeit his office or employment." NMSA 1978, § 22-8-42(D) (1988).

DOES AN ELECTED OFFICIAL HAVE A "RIGHT" TO VOTE?

- Not necessarily.
 - An elected city official said he did not have to recuse himself from voting on a matter where he had conflict of interest...he had a First Amendment "right" to vote.
 - The court said: Voting is an act of governance. The legislative power is not personal to the legislator but belongs to the people; the legislator has no personal right to it.

Nevada Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011).

NO RIGHT TO PRAY AT MEETINGS WHEN ACTING IN OFFICIAL CAPACITY

- An elected official's religious expression in the performance of his or her official duties is "government speech" and not private speech protected by the First Amendment.

Turner v. City Council of City of Fredericksburg, VA, 534 F.3d 352 (4th Cir. 2008).

ELECTED OFFICIALS' PRIVATE DELIBERATIONS ABOUT PUBLIC BUSINESS ARE NOT PROTECTED BY THE FIRST AMENDMENT

- There is no First Amendment right to privately discuss public policy and public business among a quorum because "...the First Amendment does not protect the right of government officials to deliberate in private, given that [the open meetings law] sometimes requires them to open their proceedings to the public."
- Open meetings law and penalties are content-neutral time, place, or manner restrictions, and are not an unconstitutional criminalization of political speech based on content.

Asgeirsson v. Abbott, 696 F.3d 454 (5th Cir. 2012).

CAUTION

***Exercising Free Speech Rights
Can Result In
Political Consequences!***

The “Give-and-Take of the Political Process” Does Not Violate an Official’s Constitutional Rights

- A school board’s removal of a board member from his officer position did not violate his free speech rights because it did not prevent him from continuing to speak out, vote his conscience, and serve his constituents as a member of the Board.
- It was simply a “minor indignity” for the board member to be properly removed from an honorary position by the board member peers who had “elected him to the position in the first place.”

Blair v. Bethel Sch. Dist., 608 F.3d 540 (9th Cir. 2010).

A BOARD CENSURE IS NOT FREE SPEECH VIOLATION

- A Board’s vote to censure another member for his “demeaning, insulting, abusive...discriminatory, and inappropriate” comments and actions towards the Administration was not unlawful retaliation.
- “[P]ublic officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.”

Dillaplain v. Xenia Cmty. Schs. Bd. of Educ., 2013 WL 5724512 (S.D. Ohio Oct. 21, 2013).

COMMUNITY COLLEGE BOARD COULD CENSURE MEMBER FOR VIOLATING ETHICS POLICY

- Board adopted its own ethics policy which included a provision that all members would “abide by and uphold the final majority decision of the Board.”
- After the Board voted in favor of presenting a project and tax assessment to the public, one Board member bought a newspaper ad encouraging the public to vote against the measure.
- After the Board censured her for violating its ethics policy, she claimed her free speech rights had been violated.
- The court said the Board merely expressed its own opinion, which did not prevent the dissenting member “from performing her official duties or restrict her opportunities to speak, such as her right to vote as a Board member, her ability to speak before the Board, or her ability to speak to the public.”

Phelan v. Laramie County Community College Bd. of Trustees, 235 F.3d 1243 (10th Cir. 2000).

POLITICAL BACKLASH DOES NOT EQUAL VIOLATION OF THE FIRST AMENDMENT

- An official on a Board of Supervisors said his colleagues violated his free speech rights when they insulted and threatened him, directed obscene gestures at him, and changed the locks on the township garage.
- The court disagreed and said the First Amendment does not “guard against every form of political backlash that might arise out of the everyday squabbles of hardball politics.”

Willson v. Yerke, 604 F. App'x 149 (3rd Cir. 2015).

MANAGING A MEMBER'S DISRUPTIVE OR UNRULY BEHAVIOR DOES NOT VIOLATE HIS/HER FREE SPEECH RIGHTS

- A governmental body has significant discretion to regulate its own meetings in the manner it sees fit.
- Therefore, the Board could keep a sitting member from speaking during the time reserved for citizen comment.
 - “...federal courts are not the forum for redressing political injuries.”

Shields v. Charter Twp of Comstock, 617 F. Supp. 2d 606 (W.D. Mich. 2009).

THE BOARD CAN EXCLUDE FROM CLOSED SESSION LITIGATION DISCUSSIONS THE BOARD MEMBER WHO IS SUING IT

- City councilor who was suing the city said she had a “unique First Amendment right” of access to closed session deliberations, different from those of a citizen.
- Court said that officials do have wide “latitude to express their views on issues of policy,” but it was still not a Constitutional violation to exclude the city councilor from closed session deliberations regarding her pending litigation against the city.

DeGrassi v. City of Glendora, 207 F.3d 636, 646 (9th Cir. 2000).

SOCIAL MEDIA?

- Remember that such comments may be considered public, and could be subject to open records and open meetings laws, depending on the forum, the audience, and the topics under discussion
- As with other board member conduct, freedom of speech does not equate to freedom from political consequences for online conduct. For example:
 - A board member can be censured or removed from honorary positions (e.g. *officer*) for online conduct or speech.
 - Community reaction can equal disruption to the Board/District, recall efforts, or demands for resignation.

EXAMPLES



- Calls and petitions for resignation as an elected official.
- Terminated from his private sector job.
 - "In my opinion, I was fired for a freedom of speech issue."
 - "It was wrong that they fired me. They said it was pretty much because of this. I didn't do anything on their time. I was never on the clock."

EXAMPLES

- ❑ After ignoring calls to resign, she was publicly censured by the school board.
- ❑ Resigned two years later, saying she had been "bullied" by the Superintendent and accusing the rest of the Board of kowtowing to him.

QUESTIONS?

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