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Speech of Government Employees

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of the statute making it a crime to threaten the life of the president. After a public rally against the Vietnam War, a demonstrator was convicted of making such a "threat" when he said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J . . . . They are not going to make me kill my black brothers." The Supreme Court reversed Watts' conviction, holding that his only offense was a "kind of very crude offensive method of stating a political opposition to the President."

A different type of case is presented where a defendant truly "threatens" another person with violence. In such cases, the state is attempting to protect victims from the fear of violence and to forestall threatened violence. In *Virginia v. Black*, the Court upheld the constitutionality of a Virginia statute banning cross burning undertaken with "an intent to intimidate a person or group of persons." The decades-long history of violence preceded by Klan-inspired cross-burning supported the determination that burning a cross as a mechanism of intimidation is a particularly virulent threat to one's safety.

Although the Court's current direction in addressing the relationship between speech and violence is more speech protective than the approach followed before the 1960s, a better test of that proposition will come when speech that "threatens" violence to widely held, core social values comes to the Court. The Smith Act prosecutions occurred during an era of deep mistrust of Communism. Perhaps tomorrow's "threat" will arise from vitriolic speakers who stoke the fire of disenchanted groups. The central question remains: to what extent is the society willing to tolerate speech that has the potential of provoking violence?

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Whitney v. California, 274 U.S. 357 (1927)
Yates v. United States, 354 U.S. 298 (1957)

See also **Abortion Protest Cases; Anti-Anarchy and Anti-Syndicalism Acts; Bad Tendency Test; Balancing Approach to Free Speech; Brandenburg Incitement Test; *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Captive Audiences and Free Speech; *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Clear and Present Danger Test; Communism and the Cold War; Communist Party; Content-Based Regulation of Speech; Content-Neutral Regulation of Speech; *Cox v. Louisiana*, 379 U.S. 559 (1965); Cross-Burning, Extremist Groups and Civil Liberties; Fighting Words and Free Speech; Freedom of Access to Clinic Entrances (FACE) Act, 108 Stat. 694 (1994); Freedom of Speech: Modern Period (1917–Present); *Gitlow v. New York*, 268 U.S. 652 (1925); *Hague v. C.I.O.*, 307 U.S. 496 (1939); Hate Speech; Heckler's Veto Problem in Free Speech; *Hess v. Indiana*, 414 U.S. 105 (1973); Holmes; Oliver Wendell, Jr.; Ku Klux Klan; National Security and Freedom of Speech; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); Red Scare of the Early 1920s; *Scales v. United States*, 367 U.S. 203 (1961); *Schenck v. United States*, 249 U.S. 47 (1919); Smith Act; Speech versus Conduct Distinction; Terrorism and Civil Liberties; Threats and Free Speech; Time, Place, and Manner Rule; Traditional Public Forums; Vinson Court; Vinson Fred Moore; *Virginia v. Black*, 538 U.S. 343 (2003); *Watts v. United States*, 394 U.S. 705 (1969); *Whitney v. California*, 274 U.S. 357 (1927); World War I, Civil Liberties in; *Yates v. United States*, 354 U.S. 343 (2003)**

SPEECH OF GOVERNMENT EMPLOYEES

For many years, government employment was considered a privilege rather than a right, and, as a result, the government could place restrictions on employee speech that would be unconstitutional if applied to

citizens. An oft-quoted description of this rule is that offered by Justice Holmes in *McAuliffe v. Mayor of New Bedford*: "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." This doctrine began to erode in the 1950s and by 1967, the Court in *Keyishian v. Board of Regents* could firmly state that the doctrine allowing public employers to condition employment on waiver of constitutional rights had been rejected. Accordingly, public employees retain their First Amendment rights.

Nevertheless, the government as an employer has an interest in regulating employee speech that is greater than its interest in regulating citizen speech. The government must be able to control employee speech to ensure effective and efficient delivery of government services. Thus the task becomes determining which governmental restrictions on employee speech are permissible to serve the governmental purposes. The Supreme Court has attempted, with mixed success, to provide the government with traditional employer rights without unduly restricting employee First Amendment rights.

Protected Speech

To warrant First Amendment protection, employee speech must relate to a matter of public concern. Determining what is a matter of public concern has proven to be a difficult task for the courts. The speech must relate to issues of concern to the community and not to personal grievances of the employee or matters of internal office policy. To determine whether speech is protected courts must look to the content, form, and context of the speech. The speech need not relate to the employee's job duties or the functioning of the government to be protected, although the Supreme Court has noted that government employees may be in a position to contribute importantly to public debate by virtue of the knowledge and information they possess.

Government Regulation Burdening Employee Speech

When government regulation broadly burdens the speech of government employees, the government must show that the interests of potential audiences for government employee speech and the free speech interests of the employees are outweighed by the impact of the speech on the operation of the government. Applying this test, the Supreme Court struck down a federal statute that barred federal employees from accepting honoraria for speeches or articles in *U.S. v. National Treasury Employees Union*. The Court rejected the government's argument that the ban was necessary for government efficiency, finding it too broad to constitute a reasonable response to a legitimate concern about misuse of power. The court noted particularly that the ban applied even where the speech was unrelated to the employee's service.

Employee Discipline Based on Speech

When the issue involves discipline of an individual employee for speech, the government's burden of justification is less onerous. The Court in *Pickering v. Board of Education* held that the employee's free speech rights must be balanced against the employer's interest in "promoting the efficiency of the public services its performs" to determine whether an employer's discipline of an employee for speech violates the constitution. The Court noted the importance of allowing government employees who have informed opinions on matters of public concern to speak without fear of employer retaliation. Employees can even make public statements critical of their superiors so long as they are not knowingly false or recklessly made and do not interfere substantially with the employee's job performance or the employer's operations. Because the test is generally applied after employee discipline for speech, the court will assess the level of disruption or threat of disruption caused by the employee's speech, that is, did it interfere with his or her job performance or that of others, hamper employee discipline, or damage personal relationships in the workplace necessary to efficient functioning of the operation. If the damage or potential damage is sufficiently severe, discipline will be upheld despite the protected nature of the speech.

When the government claims that the employee discipline was based on reasons other than speech, the employee must show that the protected speech was a motivating factor in the employer's decision to discipline, *Mt. Healthy City School District Board of Education v. Doyle*. If the employee proves that the speech motivated the employer, the employer can avoid liability by showing that it would have disciplined the employee for legitimate reasons even if the employee had not engaged in the protected speech.

Independent Contractors

These principles for determining the legality of government retaliation for employee speech have been applied to termination of independent contractors as well, *Board of County Comm'rs v. Umbehr*.

Government Employees and Political Activity

Although political speech has a high value under the First Amendment, restrictions on the political participation of government employees have been found constitutionally permissible. The federal Hatch Act, which in its earlier iterations barred virtually all federal employees from engaging in political management or political campaigns, survived constitutional challenge in *United States Civil Service Commission v. National Association of Letter Carriers*. Accordingly, similar restrictions by state and local governments are also constitutional. The Hatch Act does not bar employees from expressing opinions on political subjects and candidates, however. In addition, in 1993, the Hatch Act was revised to permit most federal employees to participate in political campaigns, with specified exceptions. However, with very limited exceptions, federal employees are still barred from running for partisan political office, campaigning while on duty, and soliciting political contributions.

Government employees are free to join political parties and cannot be discriminated against on the basis of their political affiliation unless they serve in high-level positions where party affiliation is a legitimate job qualification, *Rutan v. Republican Party of Illinois*. Elected politicians should be able to appoint high-level advisers and officials that agree with their policy agendas, but employees without such responsibilities are free to choose their party affiliation without fear of retribution from their employer.

In addition, government employees cannot be forced to subsidize political speech with which they disagree, either through union dues, *Abood v. Detroit Board of Education*, or direct political contributions, *Acevedo-Delgado v. Rivera*.

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SPEECH VERSUS CONDUCT DISTINCTION

Perhaps one of the most controversial issues is whether the part of the First Amendment that protects free speech should ever protect conduct. In other words, can conduct be a form of speech for First Amendment purposes? A typical model of free speech protection unfolds this way: I stand on my soapbox in the park and share with the world my opinion on a contentious topic of the day. A police officer walking by might like to poke me with his nightstick and encourage me to move on. But the First Amendment can be interpreted as preventing a public authority from interfering with my reasonable use of public space to air my views.

Now consider my using the same soapbox but to stand on while I light and then burn an American flag. One way of distinguishing this case from the previous one is to point out that far more people may be offended by my burning the flag than would be by my views on any given subject, even if shouted at the top of my lungs. Or maybe the key should be the difference between speech and conduct—in the first instance it was "only" speech in which I was engaged, whereas in the second, I was not speaking at all but, instead, doing something physical and engaging in a form of conduct highly repugnant to many citizens