HARSH REALITY: THE PRIOR RESTRAINT DOCTRINE AND THE FREE SPEECH RIGHTS OF EMPLOYEES OF PUBLIC COLLEGES AND UNIVERSITIES

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INTRODUCTION

Our nation's public colleges and universities are no strangers to First Amendment issues.[1] While continuing to emphasize the importance of free speech rights in academic settings,[2] United States courts have used two different standards for assessing free speech claims at public colleges and universities; one standard applies to students while a different standard applies to faculty.[3] The courts accord public college and university students the same First Amendment free speech rights as those of any other public citizen.[4] With respect to alleged violations of the free speech rights of public college and university faculty, however, the courts have applied the same standard that is applied to other government employees.[5]

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1. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (holding that a professor had a cause of action against his college for the non-renewal of his contract when there was a question of fact as to whether the professor's right to free speech was violated); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (holding that New York statutory provisions making treasonable or seditious words or acts grounds for removal from state employment were in violation of the First Amendment); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (holding state Attorney General's questioning of a college professor pursuant to authorization of state Legislature concerning the content of professor's lectures and the subsequent contempt conviction of the professor for refusal to answer was an invasion of the professor's liberties in the areas of academic freedom and political expression).

2. "The First Amendment itself, of course, makes no mention of academic freedom. But in *Keyishian*, the Supreme Court not only characterized academic freedom as 'a special concern of the First Amendment;' it also implied that it is one of the 'constitutional freedom[s].'" Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 35–36 (2002) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

3. *See, e.g.*, Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004). *See infra* Parts I, III.

4. *See* Healy v. James, 408 U.S. 169, 187–88 (1972) (holding a public college or university, acting as instrumentality of the state, "may not restrict speech or association simply because it finds the views expressed by any [student] group to be abhorrent"); Crue v. Aiken, 137 F. Supp. 2d 1076 (C.D. Ill. 2001).

5. *See* Scallet v. Rosenblum, 911 F. Supp. 999 (W.D. Va. 1996) (holding that the balancing test derived from *Pickering v. Board of Education* applied to a public university professor's in-class speech); Crue v. Aiken, 370 F.3d 668 (7th Cir. 2004) (holding that the balancing test derived from *NTEU* applied to prior restraint on speech of public university

Depending on the nature of the action taken by a public college or university against a faculty member for troublesome speech, one of two balancing tests will apply. If the action is retaliatory in nature and aimed at a specific instance of speech, the courts will apply the classic balancing test set forth in *Pickering v. Board of Education*[6] and *Connick v. Myers*.[7] When, however, the action taken by the college or university creates a prior restraint on the free speech rights of college and university employees, the courts will apply the more demanding balancing test set forth in *United States v. National Treasury Employees Union* (*NTEU*).[8]

This note will examine the two different standards that can apply in a case of an alleged free speech violation of a public college or university employee in the context of the Seventh Circuit case of *Crue v. Aiken.*[9] Part I of this note will examine, in relative detail, the facts underlying *Crue*. Part II will set forth the two standards applied to free speech restrictions imposed by the government on its employees. Subsection A will focus on the traditional standard balancing test applied by the courts to cases in which an alleged free speech violation has occurred in the context of government employment. The primary focus of this part will be a brief examination of the facts underlying the two seminal cases that define the balancing test. Subsection B will be devoted to an examination of the modified balancing test that courts have recently applied in cases in which an alleged prior restraint of free speech has occurred in the context of government employment. In so doing, this subsection will briefly set forth the origins of the prior restraint doctrine and then show how that doctrine supplements the *Pickering*/*Connick* test in the *NTEU* case and its progeny to create a modified balancing test applicable in circumstances not originally contemplated by *Pickering*. Part III will then revisit the facts of *Crue* illustrating the contrast in the

professors). At least one author has argued that "[t]he general public employee speech rules provide no methodical way to incorporate academic freedom analysis, professors are not employees of the university in the traditional sense . . . and the 'public concern' requirement produces questionable results when applied to teaching choices and the intramural speech of professors." Alisa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search For a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915, 965 (2001).

6. 391 U.S. 563 (1968) (holding that in a case of an alleged violation of government employee speech, the court should "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.") See *infra* Part II.A, for a discussion of *Pickering*.

7. 461 U.S. 138 (1983) (elaborating on the test in *Pickering* holding that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."). *See infra* Part II.A, for a discussion of *Connick*.

8. 513 U.S. 454, 468 (1995) (holding that when the government's action constitutes a prior restraint on the free speech of public employees such that it "chills potential speech before it happens," the government's burden is greater than in the case of a *post hoc* disciplinary action as in *Pickering*. In the case of a prior restraint on speech in the context of government employment, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."). *Id. (*citing *Pickering*, 391 U.S. 571). *See infra* Part II.B.

9. 370 F.3d 668 (7th Cir. 2004).

two approaches. Finally, Part IV will conclude by emphasizing the potential harshness of the *NTEU* standard in the context of public college and university employment in which employees have many opportunities to engage in constitutionally protected free speech. This part will serve to put public colleges and universities on notice of the high bar they face when attempting to restrain or even deter the speech of employees prior to such speech taking place.

I. *CRUE V. AIKEN*

The plaintiffs in *Crue v. Aiken* were students and faculty members at the University of Illinois who publicly opposed the use of "Chief Illiniwek" as the mascot for the University.[10] According to the plaintiffs, the use of the mascot created a "hostile environment for Native American students, promote[d] the acceptance of inaccurate information in an educational setting, increase[d] the difficulty of recruiting Native American students, and contribute[d] to the development of cultural biases and stereotypes."[11] The plaintiffs had employed various tactics in an effort to express their opposition to the use of the mascot.[12] Included among these efforts were: "public speaking in various forums, writing letters, meeting with student groups, submitting newspaper articles for publication, and attending protests."[13] The University of Illinois made no attempt to interfere with such efforts by the plaintiffs.[14] However, the plaintiffs then sought to directly contact prospective student athletes "to make them aware that the University and its athletic program utilize a symbol that [was], in their opinion, degrading to the Native American race."[15]

The University foresaw a distinct problem with the plaintiffs contacting prospective student athletes. The National Collegiate Athletics Association (NCAA) strictly regulates the "timing, nature and frequency of contacts between any University employee and prospective athletes."[16] On March 2, 2001, Chancellor Michael Aiken, sent an e-mail message to all faculty, staff, and students, briefly explaining the NCAA regulations and declaring, "No contacts are permitted with prospective student athletes, including high school and junior college students, by University students, employees or others associated with the University without express authorization of the Director of Athletics."[17] Aiken then explained that "[t]he University faces potentially serious sanctions for violation of NCAA . . . rules."[18] The policy requiring the authorization of the Director of Athletics was referred to in the record as the "Preclearance

10. Crue v. Aiken, 137 F. Supp. 2d 1076, 1078 (C.D. Ill. 2001).
11. *Id.*
12. *Id.* at 1079.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

Directive."[19]

After being contacted by a faculty member who wanted to make contact with prospective student athletes, the Assistant Athletic Director, Vince Ille, asked the NCAA in writing for guidance as to exactly what circumstances invoke NCAA regulations.[20] The NCAA replied saying:

> [I]f an institution either identifies and contacts a group of prospective students based on their athletics ability or contacts prospective students to discuss their athletics participation those contacts are subject to NCAA regulations. Therefore . . . if an institutional staff member makes a telephone contact, an in-person off-campus contact or sends written correspondence to a prospective student to discuss his or her athletics ability or possible participation in intercollegiate athletics such contacts would be considered recruiting contacts and would be subject to NCAA regulations. . . . [I]f an institutional staff member makes a telephone contact or sends written correspondence to prospective students who have been identified based on their athletics ability such contacts would be considered recruiting contacts regardless of the content of the message and thus would also be subject to NCAA regulations.[21]

Chancellor Aiken later addressed the faculty senate regarding inquiries he had received regarding First Amendment free speech matters.[22] The Chancellor explained, "The University values and defends the principles of free speech and academic freedom for members of the University community. The University does not seek to interfere with the expression of views regarding matters of public concern."[23] The Chancellor went on to explain the reasons for the Preclearance Directive:

> [T]here are numerous and detailed NCAA rules regarding contacts by faculty and other University representatives with prospective student-athletes. The NCAA Division I Manual itself is 480 pages long. That is why my e-mail advised that any such contacts should occur only with the express authorization of the Director of Athletics or his designee, who have experience in these issues.[24]

Finally, Chancellor Aiken noted the alternative avenues available for the faculty and students to use in order to express their viewpoints on the University's use of

19. *Id.*

20. Crue v. Aiken, 370 F.3d 668, 675 (7th Cir. 2004).

21. *Id*. at 675–76. Mr. Ille informed the faculty member that the NCAA rules, and therefore the Preclearance Directive:

> [A]pply in four situations: [I]f the prospective students contacted are identified for contact based upon their participation in athletics, if the contact is made for the purpose of addressing any issue related to athletics, if the contact is made for the purpose of addressing the prospective student's possible participation in intercollegiate athletics, or if the contact is made at the request of a Division of Intercollegiate Athletics staff member." Crue v. Aiken, 137 F. Supp. 2d 1076, 1079–80 (C.D. Ill. 2001).

22. *Crue,* 137 F. Supp. 2d. at 1080.

23. *Id.*

24. *Id*.

the mascot. "Numerous such opportunities abound, including letters to the editor, press releases, radio/TV interviews[,] leafleting, and public speeches."[25]

The plaintiffs initially filed a Motion for a Temporary Restraining Order (TRO) in the United States District Court for the Central District of Illinois.[26] The plaintiffs sought to enjoin the University from "requiring preclearance of communications with prospective student athletes [by the plaintiffs]."[27] The District Court granted the plaintiffs' motion and issued the TRO, enjoining the defendant from enforcing the portion of the Preclearance Directive that required the preclearance of communications to student athletes "by University faculty who do not represent the athletic interests of the University and who do not intend [sic] and will not recruit prospective student athletes."[28]

Then on June 5, 2001—days after entry of the Temporary Restraining Order—Chancellor Aiken sent another e-mail to all faculty, staff, and students at the University.[29] The e-mail referred to the prior correspondence which was the basis for the plaintiffs seeking the TRO and then went on to say, "in light of [the] order . . . and more recent testimony by representatives of the National Collegiate Athletic Association (NCAA), I have concluded that express authorization of the Director of Athletics or his designee should not be required."[30] As a result the TRO was dissolved as moot.[31] In response to a later inquiry, the NCAA informed the plaintiffs that they could send letters informing prospective athletic recruits about the Chief Illiniwek controversy and that the NCAA would not impose sanctions on the University as a result of such contacts.[32]

The District Court then, in a new proceeding, took up the issue of the plaintiffs' request for declaratory judgment "that the Preclearance Directive violated their First Amendment rights."[33] The University argued that the *Pickering/Connick* standard applied to the Preclearance Directive.[34] Determining that the

25. *Id*.

26. *Id.* at 1076.

27. *Id*. at 1078.

28. *Id*. at 1091.

29. Crue v. Aiken, 370 F.3d 668, 677 (7th Cir. 2004).

30. *Id*.

31. *Id*. Although the e-mail was retracted and thus the requests for injunctive relief became moot, the Seventh Circuit noted that, "the requests for declaratory relief and for damages remain. When a claim for injunctive relief is barred but a claim for damages remains, a declaratory judgment as a predicate to a damages award can survive." *Id.* (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

32. *Id.* at 680. The majority opinion from the Seventh Circuit is quick to point out that, "were we faced with a situation in which the university would in some way be sanctioned based on the plaintiffs' activities, it does not necessarily follow that the university's interest in preventing a sanction would outweigh a legitimate interest in protesting allegedly racially offensive behavior." *Id*.

33. Crue v. Aiken, 204 F. Supp. 2d 1130, 1137 (C.D. Ill. 2002).

34. *Id*. at 1142. "Under *Pickering/Connick*, the proper analysis requires 'a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" Crue v. Aiken, 370 F.3d 668, 685 (7th Cir. 2004) (Manion, J., dissenting) (quoting Connick v. Myers, 461 U.S. 138, 140 (1983)). *See infra* Part II.A.

Preclearance Directive constituted a "content-based prior restraint" on speech, the District Court instead applied the higher standard set forth in *NTEU*.[35] The District Court ruled in favor of the plaintiffs on their motion for summary judgment holding that "the University . . . failed to sufficiently justify its conduct under the standard set forth in *NTEU*."[36]

The University appealed the District Court's decision to the United States Circuit Court of Appeals for the Seventh Circuit.[37] A three judge panel on the Court of Appeals affirmed the District Court's ruling.[38] Judge Manion dissented, arguing that the majority applied the incorrect standard to the action in question.[39] He argued that instead of the higher standard *NTEU* test, the more relaxed standard of *Pickering/Connick* should have applied.[40]

II. THE TWO STANDARDS APPLIED TO FREE SPEECH RESTRICTIONS IMPOSED BY THE GOVERNMENT ON ITS EMPLOYEES: *PICKERING/CONNICK* AND *NTEU*

This part of the Note will be devoted to a more in-depth analysis of the *Pickering/Connick* and *NTEU* tests and their progeny. While the Seventh Circuit in *Crue* ultimately applied the *NTEU* test,[41] a brief exploration of the *Pickering/Connick* line of cases will serve a number of useful purposes. First, understanding the *Pickering/Connick* approach will enable public college and university officials to avoid the potentially harsh ramifications of the application of the *NTEU* test. Second, both the *Pickering/Connick* and the *NTEU* tests require as a prerequisite that the speech in question involve a matter of public concern.[42] The cases that follow *Pickering*, namely *Connick v. Myers*[43] and the recently decided

35. *Crue*, 204 F. Supp. 2d at 1143. The standard set forth in *United States v. National Treasury Employees Union* states that where a ban "chills potential speech before it happens . . . [t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of government." United States v NTEU, 513 U.S. 454, 468 (1995). *See infra* Part II.B. The University argued that the Preclearance Directive was a "content neutral time, place, and manner restriction" to which the less stringent standard in *Pickering* should apply. *Crue*, 204 F. Supp. 2d at 1142–43.

36. *Crue*, 204 F. Supp. 2d at 1146.

37. *Crue*, 370 F.3d 668.

38. *Id*. at 680. Judge Evans wrote for the majority in the two to one decision. At the beginning of his recitation of the facts of the case, he engaged in a very entertaining survey of nicknames for college mascots across the country. The University of Notre Dame Fighting Irish, Purdue University Boilermakers, and University of Wisconsin Badgers are some nicknames that the Judge considered "pretty cool." *Id.* at 671. He then pointed out a number of common nicknames for college mascots including: Tigers, Bulldogs, Wildcats, Lions, and Cougars. He further noted other colleges and universities, such as Marquette University and Stanford University, which have changed their mascots from Warriors and Indians to Golden Eagles and Cardinal respectively. *Id.*

39. *Id*. at 681.

40. *Id*. at 685 (Manion, J., dissenting).

41. *Id*. at 679.

42. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); United States v. NTEU, 513 U.S. 454, 466 (1995).

43. 461 U.S. 138 (1983).

Garcetti v. Ceballos[44], clarify what constitutes speech on a matter of public concern. Whether the speech constituted a matter of public concern was not an issue in *Crue v. Aiken*.[45] It will, however, be useful for public college and university officials to be keenly aware of the limits the Supreme Court has placed on what speech constitutes a matter of public concern for purposes of the First Amendment.

A. The *Pickering/Connick* Test

The United States Supreme Court dealt with the issue of restriction of free speech rights in the context of government employment in the seminal case of *Pickering v. Board of Education* in 1968.[46] Marvin Pickering was a high school teacher in Will County, Illinois.[47] He had written a letter to a local newspaper regarding a proposed tax increase in which he was critical of the way the county Board of Education and the superintendent of schools had handled past proposals to raise revenue for the school system.[48] As a result of the letter, Pickering was dismissed from his teaching position by the county Board of Education.[49] Articles attributed to a local teachers' organization and a letter from the superintendent appeared in the local paper urging the passage of the tax increase and arguing that a failure to pass the increase "would result in a decline in the quality of education."[50] In response to those letters, Pickering submitted his letter to the editor of the local paper.[51] The substance of his letter attacked the School Board's handling of a bond issue proposal and its allocation of financial resources between the schools' educational and athletics programs.[52] It further accused the superintendent of attempting to prevent teachers "from opposing or criticizing the proposed bond issue."[53] The School Board then held a hearing pursuant to Illinois law which resulted in Pickering's dismissal.[54] The Board determined that "the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence under the relevant Illinois statute, . . . 'interests of the school require[d] [his dismissal].'"[55] The Illinois courts rejected Pickering's claims that he could not constitutionally be dismissed from his teaching position as a result of writing the letter.[56] Pickering then petitioned for writ of certiorari to the Supreme Court of the United States which

44. 126 S. Ct. 1951 (2006).
45. 370 F.3d 668, 678 (7th Cir. 2004).
46. 391 U.S. 563 (1968).
47. *Id*. at 564.
48. *Id*.
49. *Id*.
50. *Id*. at 566.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id.*
55. *Id*. at 564–65 (citing 122 ILL. COMP. STAT. 10–22.4 (1963)).
56. *Id*. at 567–68.

granted his petition.[57]

The Court began its discussion by stating the general principle that, "[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[58] The Court went on to point out, however, that the state does have interests "as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[59] In light of these two competing principles, the Court in *Pickering* arrived at a balancing test which served to "balance . . . the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[60]

The Supreme Court wisely declined the opportunity to define any bright line standard for judging claims of First Amendment violations in the context of government employment.[61] The Court added, "However, . . . in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run."[62] Importantly, the Supreme Court found that "the question whether a school system requires additional funds [was] a matter of legitimate public concern."[63] The Court then emphasized the importance of the role of "free and open debate" in the informed decision-making process by the public.[64] In the context of *Pickering*, the Court noted that "[t]eachers are, as a class, the members of a community most likely to have informed and definite

57. *Id*. at 566.

58. *Id*. at 568 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).

59. *Id*.

60. *Id*. *See* Matthew M. Killen, Note, *Intolerable Cruelties: Retaliatory Actions in First Amendment Public Employment Cases*, 81 NOTRE DAME L. REV. 1629, 1630 (2006) (discussing what constitutes adverse employment action under *Pickerin /Connick*, noting that "[s]ome courts choose to limit adjudicative relief to those claims involving major employment decisions, like hiring, firing, promotion, and wage increases . . . [while] [o]ther courts, . . . are open to any adverse action that chills speech").

61. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569 (1968). The Court stated:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Id.

62. *Id*.

63. *Id*. at 571.

64. *Id*. at 571–72. Later in the opinion the Court stated:

> The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity.

Id. at 573 (citations omitted).

opinions as to how funds allotted to the operation of the schools should be spent."[65] The Court pointed out that the threat of dismissal, while having a different impact on the exercise of the right of free speech from criminal sanctions or damages, could still pose a "potent means of inhibiting speech."[66] The Court concluded that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment," absent proof of false statements knowingly or recklessly made by the teacher.[67] This was because "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public."[68]

Fifteen years after the Supreme Court decided *Pickering v. Board of Education*, the Court had occasion to further develop the law with respect to alleged free speech restrictions placed on government employees by their employer. The case of *Connick v. Myers* involved an Assistant District Attorney in New Orleans who was informed by her superior that she would be transferred to prosecute cases in a different section of the criminal court.[69] Sheila Myers, who had worked for the District Attorney's Office for five and a half years, "was strongly opposed to the transfer and expressed her view to several of her supervisors."[70] In response to the proposed transfer, Myers prepared a questionnaire addressed to fellow staff members "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[71] Myers met with Harry Connick, her supervisor, who urged her to accept the proposed transfer.[72] At the time of the meeting; however, Connick was unaware of the questionnaire that Myers had distributed earlier.[73] After learning of the questionnaire, Connick contacted Myers and told her "that she was being terminated because of her refusal to accept the transfer . . . [and] [s]he was told that her distribution of the questionnaire was considered an act of insubordination."[74] Myers sued alleging that she was wrongfully terminated "because she had exercised her constitutionally protected right of free speech."[75] The District Court ordered that Myers be reinstated, finding that Myers was not terminated as a result of failing to accept the transfer,

65. *Id*. at 572.
66. *Id*. at 574.
67. *Id*.
68. *Id*. at 573.
69. 461 U.S. 138, 140 (1983).
70. *Id*. (citation omitted).
71. *Id*. at 141 (citation omitted).
72. *Id*.
73. *Id*.
74. *Id*. "Connick particularly objected to the question which inquired whether employees 'had confidence in and would rely on the word' of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press." *Id*.
75. *Id*.

but rather that the questionnaire itself was the reason for her termination.[76] The District Court's ruling was affirmed on appeal by the Fifth Circuit Court of Appeals.[77]

The United States Supreme Court reversed the Fifth Circuit's ruling.[78] After restating the *Pickering* test replacing the word "teacher" with "employee,"[79] the Court said that the District Court erred in its finding that the issues presented in Myers' questionnaire were "matters of public importance and concern."[80] The Court concluded, based on "*Pickering*, its antecedents, and its progeny,"[81] that Myers' questionnaire could not be characterized as constituting speech on a matter of public concern.[82] The Court continued, "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[83] According to the Court, when a public employee speaks as an employee on matters of personal interest—as opposed to public interest—a federal court is typically not the "appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[84]

As in *Pickering*, the *Myers* Court declared that the inquiry as to whether a government employee's speech is protected by the First Amendment should be a

76. *Id*. at 142 (citation omitted).

77. *Id*.

78. *Id*. at 154.

79. *Id*. at 142. "Our task, as we defined it in *Pickering*, is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id*. Thus, the Supreme Court made it clear that the *Pickering* test applies to all levels of government employees, not simply to the facts specific to *Pickering*.

80. *Id*. at 143 (quoting Myers v. Connick, 507 F. Supp. 752, 758 (E.D.L.A. 1981)).

81. *Id*. at 146. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (stating that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values.") (quoting Carey v. Brown, 447 U.S. 455 (1980)); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (stating that "speech concerning public affairs is more than self-expression; it is the essence of self-government."); Roth v. United States, 354 U.S. 476, 484 (1957) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). *See also* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (holding that a teacher's statements concerning the school's allegedly racial discriminatory policies involved a matter of public concern even though she communicated privately with her employer rather than expressing her views publicly); Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) (holding that a public school teacher's speech relaying to a radio station a memorandum regarding teacher dress and appearance that had been circulated by the school principle, constituted speech as a matter of public concern); Perry v. Sindermann, 408 U.S. 593 (1972) (holding that a state college teacher who had testified before committees of the state legislature and was involved in public disagreement over whether the college should be elevated to four year status, was protected by the First Amendment as her speech constituted a matter of public concern).

82. Connick v. Myers, 461 U.S. 138, 146 (1983).

83. *Id*.

84. *Id*. at 147.

fact specific inquiry: "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[85] The Court in *Connick* viewed Myers' questions regarding trust in various supervisors, office morale, and the need for a grievance committee as "mere extensions of Myers' dispute over her transfer," not falling under the rubric of matters of public concern.[86] The Court further remarked that, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[87]

The Court did, however, find that the question in Myers' questionnaire dealing with whether employees felt pressured to work in political campaigns of specific candidates involved a matter of public concern.[88] The Court then moved on to the next element of the *Pickering* analysis—determining whether Connick was justified in terminating Myers.[89] Noting that "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public,"[90] the Court concluded that "[t]he limited First Amendment interest involved . . . [did] not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[91]

The recent Supreme Court case of *Garcetti v. Ceballos* further clarified the *Pickering/Connick* test, specifically adding clarity to what speech may or may not be characterized as speech as a matter of public concern.[92] Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office.[93] A defense attorney contacted Ceballos regarding a pending case in February 2000.[94] The defense attorney claimed there were inaccuracies in an affidavit used to obtain a search warrant in the case.[95] Ceballos examined the affidavit and visited the

85. *Id*. at 147–48 (citation omitted). *See also* Waters v. Churchill, 511 U.S. 661 (1994) (plurality opinion) (ruling that a public employer did not violate the First Amendment when it fired an employee for what the employer reasonably believed was speech on a matter of private concern, even when the belief turned out to have been mistaken); Rankin v. McPherson, 483 U.S. 378 (1987) (holding that a clerical employee in a county constable's office could not be discharged for remarking "[i]f they go for him again, I hope they get him," in reference to the attempted assassination of President Reagan, because the speech in question constituted speech on a matter of public concern and that the firing violated the First Amendment).

86. *Connick*, 461 U.S. at 148–49.

87. *Id*. at 149. The Court further added that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id*.

88. *Id*.

89. *Id*.

90. *Id*. at 150.

91. *Id*. at 154.

92. 126 S. Ct. 1951 (2006).

93. *Id*. at 1955.

94. *Id*.

95. *Id*.

location it described.[96] Ceballos came to the conclusion that the affidavit did, in fact, contain "serious misrepresentations."[97] After relaying his findings to his supervisors, Ceballos subsequently prepared a "disposition memorandum" which explained his concerns and recommended dismissal of the case.[98] Despite Ceballos' recommendation, his supervisor, Frank Sundstedt, decided to proceed with the prosecution of the case.[99] Ceballos was called as a witness at a hearing on the defendant's motion to traverse the warrant in the case.[100] The trial court rejected the challenge to the warrant.[101] Ceballos claimed that in the aftermath of these events he was "subjected to a series of retaliatory employment actions,"[102] including "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."[103] Ceballos initiated an employment grievance that was subsequently denied based on a finding that he had suffered no retaliation.[104]

Ceballos filed suit against the District Attorney's office in the United States District Court for the Central District of California claiming his employer violated the First and Fourteenth Amendments by retaliating against him based on the disposition memorandum.[105] The District Attorney's office subsequently filed a motion for summary judgment claiming that no retaliatory action was taken and that all the actions of which Ceballos complained could be legitimately explained.[106] The District Court granted the motion for summary judgment against Ceballos.[107] Ceballos then appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the District Court's grant of summary judgment, holding "Ceballos'[] allegations of wrongdoing in the memorandum constitute[d] protected speech under the First Amendment."[108] The District Attorney's office petitioned for writ of certiorari to the United States Supreme Court, which granted the petition.[109]

The Supreme Court began its analysis by summarizing the inquiry under *Pickering*.[110] "*Pickering* . . . identif[ied] two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public

96. *Id*.
97. *Id*.
98. *Id*. at 1955–56.
99. *Id*. at 1956.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. *Id*.
108. Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004).
109. Garcetti v. Ceballos, 126 S. Ct. 1951, 1957 (2006).
110. *Id*. at 1958.

concern."[111] The Court stated that the employee has no First Amendment cause of action if this first inquiry is answered in the negative.[112] If, however, the answer to the first inquiry is yes, the question then "becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[113] The Court summarized the *Pickering/Connick* balancing test by stating, "The Court's decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions."[114]

The fact that "Ceballos expressed his views inside his office, rather than publicly, [was] not dispositive" for the Court.[115] The Court also noted that the fact that "the memo concerned the subject matter of Ceballos' employment . . . [was] nondispositive."[116] The Court found the fact that Ceballos' expressions "were made *pursuant to his duties* as a . . . deputy [district attorney]" to be the controlling factor.[117] "[T]he fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishe[d] Ceballos' case from those in which the First Amendment provides protection against discipline."[118] The Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[119] According to the Court, Ceballos "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[120] The Court noted, "[t]he fact that [Ceballos'] duties sometimes required him to speak or write [did] not mean his supervisors were prohibited from evaluating his performance."[121] Summarizing the *Pickering/Connick* test in light of the Court's present interpretation the Court stated:

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.

111. *Id*. (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

112. *Id*.

113. *Id*.

114. *Id*. at 1959 (citing Rankin v. McPherson, 483 U.S. 378, 384 (1987)).

115. Garcetti v. Ceballos, 126 S. Ct. 1951, 1959 (2006) ("Employees in some cases may receive First Amendment protection for expressions made at work."). *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979).

116. *Garcetti*, 126 S. Ct. at 1959 ("The First Amendment protects some expressions related to the speaker's job."). *See, e.g.*, *Givhan*, 439 U.S. at 414; Pickering v. Bd. of Educ. 391 U.S. 563 (1968).

117. *Garcetti*, 126 S. Ct. at 1959–60 (emphasis added).

118. *Id*. at 1960.

119. *Id*.

120. *Id*.

121. *Id*.

> When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.[122]

In summary, the *Pickering/Connick* test seeks to balance the interests of the government employee in commenting on matters of public concern against the interests of the state as an employer "in promoting the efficiency of the public services it performs through its employees."[123] Further, as the Court stated in *Connick*, "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[124] In situations such as in *Connick*, where the employee's First Amendment interest is "limited," such interest will be outweighed by a strong interest on the part of the state.[125] Finally, when a government employee speaks "pursuant to his duties" as a government employee, he or she does not speak on a matter of public concern for purposes of First Amendment protection.[126]

B. *United States v. National Treasury Employees Union* and its Progeny

Both the District Court and the Seventh Circuit in *Crue*[127] applied the high scrutiny standard set forth in *United States v. National Treasury Employees Union* (*NTEU*).[128] Because *NTEU* involved a prior restraint on the free speech rights of government employees,[129] it will be useful here to briefly introduce the doctrine of prior restraints which was originally articulated by the Supreme Court in the case of *Near v. Minnesota*.[130]

Near involved a Minnesota state statute enacted in 1925 that called for any person who produced "an obscene, lewd and lascivious newspaper, magazine, or other periodical, or a malicious, scandalous and defamatory newspaper, magazine

122. *Id*. at 1961. In his dissent, Justice Souter warned of the potential ramifications of the Court's holding on the constitutional value of academic freedom. *Id*. at 1969–70 (Souter, J., dissenting) (warning that the Court's holding "is spacious enough to include even the teaching of a public university professor"). Souter declared, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" *Id*. at 1969 (citing Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

123. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

124. Connick v. Myers, 461 U.S.138, 147–48 (1983).

125. *Id*. at 154.

126. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006). Once again, the question remains how the Court's holding in *Garcetti* will be squared with the constitutional value of academic freedom as pointed out by Justice Souter in his dissent. *Id*. at 1969–70 (Souter, J., dissenting). One can fairly anticipate this issue to be debated in the scholarly literature and perhaps in the courts very soon.

127. Crue v. Aiken, 370 F.3d 668, 679 (7th Cir. 2004). *See also* Crue v. Aiken, 204 F. Supp. 2d 1130, 1142 (C.D. Ill. 2002).

128. 513 U.S. 454 (1995).

129. *Id*. at 466–68.

130. 283 U.S. 697 (1931).

or other periodical," to be guilty of a nuisance and to be enjoined from such action.[131] J.M. Near, who was at that time a publisher of a Minneapolis periodical known as the Saturday Press, published and circulated editions of the periodical that were "largely devoted to malicious, scandalous and defamatory articles"[132] that in substance charged "that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[133] Minnesota prosecuted Near under the statute in question, and the trial court enjoined Near from "producing, editing, publishing, circulating, having in . . . possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper."[134] Near appealed to the Supreme Court of Minnesota where the decision of the lower court was affirmed.[135] Near appealed the matter to the United States Supreme Court.[136] In holding the Minnesota state statute unconstitutional, the Court declared that, "it has been generally, if not universally, considered that it is the chief purpose of the [free speech] guaranty to prevent previous restraints upon publication."[137] Since *Near*, the prior restraint doctrine has been a hurdle over which it has been nearly impossible for a proponent of a law or regulation to clear.[138]

United States v. National Treasury Employees Union involved an alleged prior restraint of free speech in the context of federal government employment.[139] A federal statute enacted by Congress in 1989[140] "broadly prohibit[ed] federal employees from accepting any compensation for making speeches or writing

131. *Id*. at 702 (quoting MINN. STAT §§ 10121–1 to 10123–3 (Mason 1927)).

132. *Id*. at 703.

133. *Id*. at 704.

134. *Id.* at 706.

135. *Id*.

136. *Id.* at 707.

137. *Id*. at 713. The Court quoted William Blackstone on the matter: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." *Id*. at 713.

138. *See, e.g.*, Se. Promotions v. Conrad, 420 U.S. 546, 558 (1975) ("Labeling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional *per se*. . . . Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963))). *See also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

139. United States v. NTEU, 513 U.S. 454 (1995).

140. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 4 § 501(b) (2000)). The text of the provision read, "An individual may not receive any honorarium while that individual is a Member, officer or employee" of the federal government. "Section 505 of the Ethics Reform Act defined 'officer or employee' to 'include nearly all employees of the Federal Government' and 'Member' to include any Representative, Delegate, or Resident Commissioner to Congress." *NTEU*, 513 U.S. at 459 (quoting Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 4 § 505(1)–(2) (2000)). Further, the statute defined "honorarium" as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee." Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at U.S.C. app. 4 § 505(3) (2000)).

articles."[141] Subsequently, "[t]wo unions and several career civil servants employed full time by various Executive departments and agencies filed suit in the United States District Court for the District of Columbia to challenge the constitutionality of the honoraria ban."[142] The District Court granted the plaintiff's motion for summary judgment, holding the statute unconstitutional "insofar as it applies to Executive Branch employees of the United States government," and enjoined the government from enforcing the statute against such persons.[143] Importantly, the District Court characterized the restriction in the statute as a "content-neutral restriction on the speech of 'government employees.'"[144] The Court of Appeals subsequently affirmed the District Court's ruling.[145] The Supreme Court of the United States granted certiorari.[146]

The Supreme Court noted that "[w]ith few exceptions, the content of respondents' messages ha[d] nothing to do with their jobs and d[id] not even arguably have any adverse impact on the efficiency of the offices in which they work[ed]."[147] The Court discussed *Pickering*, noting, "[W]e have applied *Pickering*'s balancing test only when the employee spoke '*as a citizen* on matters of public concern' rather than '*as an employee* upon matters only of personal interest.'"[148] The Court easily determined, as did the majority in *Crue*,[149] that the conduct in question involved a matter of public concern.[150] The Court further pointed out that when "the speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action."[151]

Unlike Pickering and its progeny, however, "this case [did] not involve a *post hoc* analysis of one employee's speech and its impact on that employee's public responsibilities."[152] Thus, the Court distinguished the facts in *NTEU* from those to

141. *NTEU*, 513 U.S. at 457.

142. *Id*. at 461.

143. *Id*. at 462 (quoting United States v. Nat'l Treasury Employees Union, 788 F. Supp. 4, 13–14 (D.D.C. 1992)).

144. *NTEU*, 788 F. Supp. at 10.

145. NTEU v. United States, 990 F.2d 1271 (D.C. Cir. 1993).

146. United States v. NTEU, 513 U.S. 454, 464 (1995).

147. *Id.* at 465. Each of the respondents alleged that he or she had in the past received honorarium for speaking or writing on various topics in full compliance with ethics regulations. Examples of the respondents' work include: a postal employee in Arlington, Virginia had given lectures on the Quaker religion for which he had received small payments; a government aerospace engineer that had lectured on black history for $100 per lecture; a microbiologist at the FDA who had made nearly $3,000 per year writing articles and making radio and TV appearances reviewing dance performances; and a tax examiner for the IRS who had received comparable pay for articles about the environment. *Id*. at 461–62.

148. *Id.* at 465 (quoting Connick v. Myers, 461 U.S. 138 (1983)).

149. "There is no doubt that the speech involved here concerns a matter of public concern." Crue v. Aiken, 370 F.3d 668, 678 (7th Cir. 2004).

150. "Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace." *NTEU*, 513 U.S. at 466.

151. *Id.* at 466 (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

152. *Id*. at 466–67.

which the *Pickering* analysis would be applied.[153] Rather than a *post hoc* analysis of an employee's speech, the law in question in *NTEU* served as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers."[154] The Court further emphasized the distinction by adding, "[U]nlike an adverse action taken in response to actual speech, this ban chill[ed] potential speech before it happen[ed]."[155] The Court said that in cases such as *NTEU*, "the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action."[156] The Court then declared a new standard to be applied in such cases; "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[157] Of great significance to the Court's analysis was the fact that the statutory prohibition in *NTEU* was broad in reach, potentially stifling the free speech rights of a "massive number of potential speakers."[158] According to the Court, the "large-scale disincentive to Government employees' expression" imposed by the honoraria ban constituted "the kind of burden that abridges speech under the First Amendment."[159] Regarding the government's burden, the Court stated,

> [W]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[160]

In a footnote, the Court added, "We have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large."[161] The Supreme Court held that the honoraria ban violated the First Amendment.[162]

The Seventh Circuit applied the *NTEU* test in the case of *Milwaukee Police*

153. *Id*. The Court also noted that in the past it had applied the *Pickering* balancing test in a case involving a statutory restriction on employee speech. The fact that *NTEU* involved a statutory restriction did not cause the Court to depart from *Pickering* to establish a different standard. *Id*. at 467 (citing United States Civil Serv. Comm'n v. Nat'l. Ass'n. of Letter Carriers, 413 U.S. 548, 564 (1973)).

154. *Id*. at 467.

155. *Id*. at 468.

156. *Id*.

157. *Id*. (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968)).

158. *Id.* at 467.

159. *Id*. at 470.

160. *Id*. at 475 (quoting Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622 (1994)).

161. *Id*. at 475, n.21 (citing Waters v. Churchill. 511 U.S. 661 (1994)).

162. *Id*. at 480.

Ass'n v. Jones.[163] In *Jones*, the Milwaukee Chief of Police issued a directive to officers of the Milwaukee Police department regarding the procedure for making a verbal or written complaint against another police officer.[164] The directive provided:

> If a Department employee makes a verbal or written complaint against another member, they are to be immediately informed that the complaint is [confidential] and considered an internal investigation. They are to be ordered not to discuss the matter with *anyone* (including their Labor Union). Their reports are [not] to be duplicated, and the only statements they can make are to duly authorized Department members.[165]

The Milwaukee Police Association—a union representing non-supervisory police officers of the Milwaukee Police Department—brought suit in state court against the Chief of Police under 42 U.S.C. § 1983, alleging "that the directives infringed its members' rights of free speech and association."[166] The Police Chief removed the action to federal district court.[167] The District Court denied the Association's request for preliminary injunction, and the Association appealed.[168] The Court of Appeals noted that it "must determine the proper test that the district court should apply in analyzing the constitutional challenge."[169] In discussing whether to apply the *Pickering/Connick* test or the *NTEU* test, the court noted that "[t]he *Pickering* test, . . . was crafted to balance the interests of the government as employer and the employee as citizen in the context of speech *that has already occurred*."[170] The court further explained:

> In addressing such a situation of *post hoc* discipline, the government action is more closely contained to the individual or individuals involved, and a court can readily ascertain the effect of the speech on the workplace. The *Pickering* test on its face cannot be easily applied to a situation of a preemptive ban on certain speech.[171]

The court then noted that "*NTEU* entailed a ban on a broad category of expression by a large number of potential speakers . . . as opposed to a *post hoc*

163. 192 F.3d 742 (7th Cir. 1999). Both the majority and the dissent in the Seventh Circuit's opinion in *Crue v. Aiken* rely on *Jones* as precedent. Crue v. Aiken, 370 F.3d 668, 679, 682–83 (7th Cir. 2004). Of further note, Justice Bauer and Justice Evans, the two judges in the majority in the Seventh Circuit's opinion in *Crue*, also joined the majority opinion in *Jones*.

164. *Jones*, 192 F.3d at 744.

165. *Id*. (emphasis added). Following the issuance of the directive, questions arose regarding the directive's scope. Since Chief Jones was on vacation at the time, his subordinates issued further clarification regarding the directive. The clarification stated, "[c]omplaining members are instructed that they cannot talk to *anybody* regarding the matter under investigation; this includes their lawyer and/or union representative." *Id*. at 745.

166. *Id*. at 745.

167. *Id.*

168. *Id.*

169. *Id*. at 749.

170. *Id*. (emphasis added).

171. *Id*.

disciplinary decision."[172] The court in *Jones* also pointed out that "[w]ith a prior restraint, the impact is more widespread than any single supervisory decision would be, and the action chills potential speech instead of merely punishing actual speech already communicated."[173] Finally, the court noted that when dealing with a prior restraint on expression, the government's burden is greater than it would have been in a situation in which isolated disciplinary action is involved.[174]

In determining that the *NTEU* test was the proper standard for the case, the court pointed out that "[s]imilar to *NTEU*, the directives that [were] challenged ban[ned] speech generally and thus [the court] [was] not presented with an isolated disciplinary response to speech that ha[d] already occurred."[175] The court went on to explain that it did not "have the opportunity to consider the actual nature of the speech that was communicated and the impact it had on the workplace; instead [the court was] presented with a general prohibition against speech rather than an isolated communication that already occurred."[176]

The District Court in *Crue* cited as persuasive authority, the Second Circuit case of *Harman v. City of New York*.[177] At issue in *Harman* were executive orders issued by the City of New York, which governed contacts between the media and employees of the City's social service agencies.[178] The Executive Order in question provided, "*All* media inquiries and requests for interviews must be referred to the HRA [Human Resources Administration] Media Relations Office."[179] The order went on to state, "It is *not* appropriate to indicate willingness to speak with a reporter until the conversation is cleared through Media Relations."[180] Shortly after the executive order was promulgated, the ABC news program, World News Tonight, contacted the plaintiff, Rosalie Harman.[181] At the time, Harman was a supervisor at one of the City's social service agencies.[182] ABC was interested in speaking with Harman regarding the death of a six-year-old child, about whom the social service agency had received numerous reports prior to the child's death.[183] Harmon agreed to the interview request and was subsequently interviewed during her lunch hour at a location away from her employer's premises.[184] The ABC television news program later broadcast its

172. *Id*. at 749–50.

173. *Id*. at 750 (citing United States v. NTEU, 513 U.S. 454 (1995)).

174. *Id*.

175. *Id*.

176. *Id*.

177. Crue v. Aiken, 204 F. Supp. 2d 1130, 1144 (C.D. Ill. 2002). The District Court also cited *Harman v. City of New York* in its ruling on the motion for a Temporary Restraining Order. Crue v. Aiken, 137 F. Supp. 2d 1076, 1086 (C.D. Ill. 2001) (citing Harman v. City of New York, 140 F.3d 111, 115 (2d Cir. 1998)).

178. *Harman*, 140 F.3d at 115.

179. *Id*. at 116 n.2 (emphasis added).

180. *Id*.

181. *Id*. at 116.

182. *Id*.

183. *Id*.

184. *Id.*

report and included footage of the interview with Harman.[185] Although the program did not identify Harman by name, the program showed Harman making the statement: "The workers who are considered the best workers are the ones who seem to be able to move cases out quickly . . . . There are lots of fatalities the press doesn't know anything about."[186] Harman was subsequently suspended based on violation of the executive order.[187] Harman brought suit in the Federal District Court for the Southern District of New York, alleging, *inter alia*, that the city had retaliated against her for constitutionally protected speech on a matter of public concern.[188] The District Court held the executive orders unconstitutional insofar as they required agency employees to obtain approval prior to speaking to the press.[189] The City subsequently appealed.[190]

As an initial matter, the appellate court in *Harman* concluded that the speech dealt with a matter of public concern.[191] The court pointed out that "[t]he Supreme Court has noted that '[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.'"[192] The Second Circuit went on to note that "there is an ongoing public debate about the effectiveness of the City's child welfare agency. Experienced case-management supervisors such as Harman . . . can contribute valuable insights to the discussion . . . . The public has a significant interest in hearing [her] comments."[193]

In applying the *NTEU* standard, the Second Circuit concluded that the policies involved in *Harman* were even broader than the honoraria ban which was struck down in *NTEU*.[194] "Whereas that regulation placed a burden on employee speech by denying compensation, the press policies here directly regulate[d] speech."[195] The court also found persuasive the notion that "a preclearance requirement may have a broad inhibiting effect on all employees, even those who might ultimately receive permission to speak."[196] "Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question."[197] Finding that the executive order could have the potential for censorship, the court point[ed] out that "[i]n the context of the *Pickering/NTEU* balance, courts have found that the

185. *Id*.

186. *Id*.

187. *Id*.

188. *Id.*

189. Harman v. City of New York, 945 F. Supp. 750, 767–68 (S.D.N.Y. 1996).

190. Harman v. City of New York, 140 F.3d 111, 117 (2d Cir. 1998).

191. *Id*. at 118. "This speech, concerning the priorities and effectiveness of the [agency], is obviously of interest to the public whom the agency serves." *Id*.

192. *Id*. at 119 (quoting Waters v. Churchill, 511 U.S. 661, 674 (1994) (plurality opinion)).

193. *Id*. at 119.

194. *Id.*

195. *Id.*

196. *Id.* at 120 (citing Weaver v. United States Info. Agency, 87 F.3d 1429, 1444 (D.C. Cir. 1996) (Wald, J., dissenting)).

197. *Id.* There may be disagreement regarding the application of this principle to tenured faculty members at public colleges and universities.

potential for censorship in a regulation 'justifies an additional thumb on the employees' side of [the] scales.'"[198] The court concluded that the press policies in question allowed for suppression of speech before it took place, and the administrators may have prevented speech that would not actually have had a disruptive effect.[199]

The Second Circuit noted that the Supreme Court had upheld a prepublication review in the past.[200] The case cited by the court, however, involved materials that were "essential to the security of the United States and, in a sense, the free world."[201] The court found that, while the City's interest in keeping information the agencies dealt with confidential was significant, that interest did not present as compelling a justification for the suppression of important First Amendment interests as in a case involving national security.[202] The Second Circuit also added that "the City [had] not demonstrated that the asserted harms [were] real, rather than conjectural."[203] Additionally, the court pointed out that "the City [had] not shown that the executive orders [were] designed to address the asserted harm in a 'direct and material way.'"[204] As a final note, the court found that the City's asserted interest in the need to promote the efficient and effective operation of the agencies did not justify the requirement of prior approval of employee speech.[205] The Second Circuit affirmed the District Court's ruling that the executive orders were unconstitutional infringements on the rights of city employees.[206]

The decision in *Harman* can be contrasted with the D.C. Circuit case of *Weaver v. United States Information Agency*.[207] In *Weaver*, the appellate court applied the *NTEU* test and ruled in favor of the government agency that was alleged to have violated an employees First Amendment right of free speech.[208] According to an internal regulation, employees of the State Department, the United States Information Agency (USIA), and the Agency for International Development (AID) were required to submit all speaking, writing, and teaching materials on matters of "official concern" to their employers "for review prior to publication."[209] Under

198. *Id*. (quoting Sanjour v. EPA, 56 F.3d 85, 97 (D.C. Cir. 1995)).

199. *Id*. at 120–21.

200. *Id.* at 122.

201. *Id*. (citing Snepp v. United States, 444 U.S. 507 (1980) (per curiam)). In *Snepp* the Court upheld the CIA's right to review employee writing material which related to intelligence activities regardless of whether the materials contained classified information. *Snepp*, 444 U.S. 507 (1980).

202. *Harman*, 140 F.3d at 123.

203. *Id*.

204. *Id*.

205. *Id*. at 124.

206. *Id.*

207. 87 F.3d 1429 (D.C. Cir. 1996).

208. *Id.*

209. *Id*. at 1431 (citing 3 Foreign Affairs Manual ("FAM") § 628.2). The relevant provision of the prepublication review scheme reads in subsection (a), "All speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities . . . of any employees agency or to current U.S. foreign policies, . . . are of official concern and shall be submitted . . . for clearance by the employee's agency." The next subsection reads, "(b) No

the policy, the term "official concern" was broadly construed to include "any material related to the employee's agency or U.S. foreign policy, as well as any material that 'reasonably may be expected to affect the foreign relations of the United States.'"[210] At that time, Carolyn Weaver was a part-time employee of the Voice of America, a unit of USIA.[211] She published an article in the *Columbia Journalism Review* without submitting it to her employer for prepublication review.[212] The article was entitled: "When the Voice of America ignores its charter—An insider reports on a pattern of abuses."[213] In substance, the article attacked the Voice of America on a number of issues, "from allegations that it communicated 'coded signals' to Solidarity activists . . . to more conventional assertions of politicization."[214] The appellant conceded that the article constituted material of "official concern" within the meaning of the USIA policy.[215] Even prior to receiving admonishment for publishing the article, Weaver filed suit challenging the review procedure, alleging violation of the First Amendment and seeking declaratory and injunctive relief.[216] The District Court found that the review requirement did not violate the First Amendment.[217]

In applying the recently decided *NTEU* test to the regulation,[218] the D.C. Circuit found that all the regulation required was that employees submit to a process of prepublication review.[219] "No speech [was] forbidden."[220] According to the court, the regulation in question "clearly pass[ed] muster."[221] The court found that, "[t]he primary burden on employees from the regulation [was] simply the delay associated with submitting to the review process prior to publication."[222] The court further stated that "the delay and discouragement effects . . . seem[ed] a considerably milder deterrent to speech than *NTEU*'s ban on honoraria . . . ."[223] The D.C. Circuit pointed out that "[t]here is certainly no logical reason to think that the existence of some element of prior restraint should remove a restriction on employee speech from the usual *Pickering* approach."[224] Crucial for the court was the fact that employees to whom the regulation applied, while lacking direct access to confidential information, could inadvertently come into contact with

employee shall publish any material of official concern under paragraph (a) until it has been cleared." 3 FAM § 628.2.

210. *Weaver*, 87 F.3d at 1431–32 (quoting 3 FAM § 628.2).

211. *Id*. at 1432.

212. *Id*.

213. *Id*.

214. *Id*.

215. *Id*.

216. *Id*.

217. *Id*.

218. *Id*. The District of Columbia Circuit in this case referred to what this Note calls the *NTEU* test, as "the test of *Pickering* and *NTEU*." *Id*.

219. *Id*. at 1440.

220. *Id*.

221. *Id*.

222. *Id*. at 1441.

223. *Id*.

224. *Id*. at 1440.

confidential information.[225]

Finally, in addressing whether the restraint was reasonably necessary to protect the efficiency of the government's services, the court found that "the advance nature of the review [was] at a minimum 'reasonably necessary' to protect the government's interests."[226] In the court's view, with respect to classified information, "advance review is plainly essential to preventing dissemination of the information."[227] With respect to other "sensitive material," the court noted, "review before publication enables the government to take preemptive rather than merely reactive steps in response."[228] The District of Columbia Circuit ruled that the prepublication review was not a violation of Weaver's First Amendment free speech rights.[229]

While at first blush it would seem that the D.C. Circuit's opinion in *Weaver* is inconsistent with *Jones* and *Harman*, its facts are unique and can be distinguished from those cases. In *Harman*, the Second Circuit was dealing with a restrictive executive order in the context of a city social service agency. In sharp contrast, the regulation in question in *Weaver* dealt with sensitive material that was "reasonably . . . expected to affect the foreign relations of the United States."[230] While the information that could potentially be released to the media in an interview by an agency employee in *Harman* could arguably be very sensitive, it did not rise to the same level of importance as the information in *Weaver*. The information that was the subject of the television interview in *Harman*, while highly important and sensitive to the city agency, could hardly be said to rise to the same level as the confidential information about which the court in *Weaver* was concerned.

Jones involved facts much more closely related to those in *Weaver*. While *Harman* involved restricted speech in the context of a city social service agency, *Jones* involved restricted speech in the context of law enforcement. The subject matter of the restricted information in *Jones*, however, did not involve any confidential or potentially confidential information such as was found to be the case in *Weaver*. One could certainly make an argument that the inner-workings of a city police department, including complaints issued by police officers against fellow officers, is sensitive material. Such material, however, did not rise to the same level of sensitivity as the material in *Weaver*.

In sum, the *NTEU* test requires that "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."[231] Based on the cases discussed above, it appears that the

225. *Id.* at 1441.

226. *Id*. at 1442 (citing United States v. NTEU, 513 U.S. 454, 474 (1995)).

227. *Id*.

228. *Id*. It almost seems as though the District Court is missing the point here. There could be a strong argument according to the aforementioned case law that the restraint is a violation of the First Amendment because it takes "preemptive" steps to curb government employee speech.

229. *Id*. at 1443.

230. *Id.* at 1431–32.

231. *Id.* at 468.

government has significant leeway when the information being restrained is of such a nature as to be at least potentially confidential. According to the D.C. Circuit in *Weaver*, the significantly more government-friendly *Pickering*/*Connick* test will apply to such cases.[232] If, however, the government is found to have restrained speech that did involve a matter of public concern yet did not involve potentially confidential information, the higher scrutiny *NTEU* test will apply.[233] *Weaver* appears to be somewhat of an outlier. Absent the exception illustrated by *Weaver*, it seems that the government faces a nearly impossibly high hurdle to overcome when attempting to impose a prior restraint on the speech of its employees.

III. *CRUE V. AIKEN* REVISITED

As an initial matter, for either *Pickering*/*Connick* or *NTEU* to apply, the speech in question has to be speech on a matter of public concern. The distinction between public and private concern is one that ought to be familiar to any government employer. To be challenged as unconstitutional, action taken by a public college or university with respect to employee speech—whether in the form a retaliatory action such as that in *Pickering* and *Connick* or in the form of a prior restraint as in *NTEU*, *Jones*, and *Harman*—has to involve speech as a matter of public as opposed to private concern.[234] Neither party in *Crue* disputed that the speech dealt with a matter of public concern, and the Seventh Circuit quickly dismissed it as a non-relevant issue.[235]

The initial legal question decided by the Seventh Circuit in *Crue* was whether to apply the *Pickering*/*Connick* test to the action taken by the University or to apply the higher standard set forth in *NTEU*.[236] The court's determination that the *NTEU* test applied effectively put the nail in the coffin of the University and Chancellor Aiken in the case. With the higher standard of *NTEU* on their side, the balance tipped easily in favor of the plaintiffs. Had the court decided to apply *Pickering*/*Connick*, the outcome may have been a much closer call. The court's analysis of the issue of which standard ought to apply was admittedly "oversimplif[ied]."[237] Oversimplified or not, the court's majority opinion made clear that any time a prior restraint on speech is involved, regardless of the degree and surrounding circumstances, *NTEU* would apply.[238]

232. Weaver v. United States Info. Agency, 87 F.3d 1429, 1443 (D.C. Cir. 1996).

233. *Id.*

234. *See* Garcetti v. Ceballos, 126 S.Ct 1951, 1960 (2006) (discussing what constitutes speech as a matter of public concern and stating that speech of a public employee "pursuant to his duties" does not constitute speech as a matter of public concern).

235. Crue v. Aiken, 370 F.3d 668, 678 (7th Cir. 2004). "There is no doubt that the speech involved here concerns a matter of public concern." *Id*. Even Judge Manion in his dissent stated, "the speech clearly involves a matter of public concern . . . ." *Id*. at 684.

236. *Id.* at 678.

237. *Id*.

238. The majority did not cite the exception carved out for the government in situations involving matters of national security or the foreign relations of the United States as applied by the D.C. Circuit in *Weaver*. Thus, for the majority, the determination that a prior restraint was

The Preclearance Directive in *Crue* arguably differed greatly from the actions taken by the government against the public employees in *NTEU*, *Jones*, and *Harman*. *NTEU* involved a federal statute that the Supreme Court found to be a "large-scale disincentive" to free speech rights of government employees.[239] Further, the Court in *NTEU* noted that nearly two million employees could be potentially affected by the ban.[240] In contrast, the preclearance directive in *Crue* "did not purport to limit the plaintiffs' right to give speeches concerning the Chief controversy, to write letters to the editor, participate in demonstrations, etc."[241] In fact, as the dissent in *Crue* noted, "[t]he [preclearance directive] left open a wide variety of unfettered speech opportunities for the plaintiffs, which the plaintiffs frequently used."[242]

The directive involved in *Jones* constituted a total ban on speech insofar as police officers were required to keep any complaints against other employees confidential.[243] Employees in *Jones* were not even permitted to reveal the contents of a complaint to the representatives of their labor union.[244] Unlike the plaintiffs in *Crue*, the police officers in *Jones* did not have alternate avenues available in which they could voice their complaints.

The city's executive order in *Harman* did not constitute a total ban on speech such as that in *Jones*. In *Harman*, the prior restraint of speech was in the form of a deterrent to employee free speech by requiring the city agency employees to clear all media interview requests with the public relations office prior to accepting the interview.[245] The underlying facts of *Harman* are much more akin to those of *Crue* insofar as the prior restraint in *Harman* did not completely ban speech. Further, like the employees in *Crue*, the city agency employees in *Harman* were not precluded from speaking publicly about the city agency's policies or from writing letters to a local newspaper. The employees in *Harman* were not even completely banned from giving media interviews, but, rather, were simply required to refer interview requests to the agency media relations office. Similarly, the employees in *Crue* were not completely prohibited from writing letters to prospective athletic recruits but were simply required to submit such requests to the athletic director's office for prior approval.[246] Despite the fact, however, that the plaintiffs in both cases had alternate avenues available in which to freely express their views and the fact that the plaintiffs in each case were not completely banned from engaging in the speech in question, the circuit courts in each case

involved was a threshold question. Judge Manion in the dissent cites *Weaver*, noting that, "'courts have uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints.'" *Id.* at 682 (Manion, J., dissenting) (quoting Weaver v. United States Info. Agency, 87 F.3d 1429, 1443 (D.C. Cir. 1996)).

239. United States v. NTEU, 513 U.S. 454, 472 (1995).

240. *Id.* at 481–82 (O'Connor, J., concurring).

241. Crue v. Aiken, 370 F.3d 668, 684 (7th Cir. 2004) (Manion, J., dissenting).

242. *Id.*

243. Milwaukee Police Ass'n v. Jones, 192 F.3d 742, 744 (7th Cir. 1999).

244. *Id.*

245. Harman v. City of New York, 140 F.3d 111, 117 (2d Cir. 1998).

246. *Crue*, 370 F.3d at 676–77.

found the question of whether a prior restrain was involved to be one of threshold importance. In each case, once it was determined that a prior restraint was involved, the courts found little difficulty applying the *NTEU* test as opposed to the more government friendly *Pickering*/*Connick* test.

While the speech of the employees in *Crue* was not completely banned, the restraint in *Crue* differed for the action taken by the government in *Pickering*, *Connick*, and *Garcetti* in one crucial respect. In *Pickering*, the action taken by the government occurred subsequent to the plaintiff's writing a letter to the local newspaper criticizing school officials.[247] In contrast, the plaintiffs in *Crue* had merely expressed their interest in contacting prospective student athletes when the University issued the preclearance directive.[248] The action taken by the University in *Crue*, therefore, was not in response to action already taken by the plaintiff-employees. Despite the fact that the restriction on employee speech under the preclearance directive was arguably much less harsh than the action taken by the government in *Pickering*, the fact that the directive in *Crue* constituted a prior restraint of speech caused the higher scrutiny *NTEU* test to apply.[249]

The action taken by the government in *Connick* and *Garcetti* similarly differed from the University's action in *Crue*. In *Connick* and *Garcetti*, the government's action was taken in response to the speech of the plaintiff-employee, as opposed to action taken preemptively, such as that in *Crue*. Because the University in *Crue* took action preemptively, restraining (or deterring) speech before it occurred, its action was bound to be subject to the higher scrutiny *NTEU* standard.

IV. CONCLUSION: PUBLIC COLLEGES AND UNIVERSITIES PAY HEED

The Seventh Circuit's opinion in *Crue v. Aiken* can serve as notice to the nation's public colleges and universities. If a public college or university takes action that restrains or even deters speech prior to the speech occurring, the school's action will be subject to the standard set forth in *NTEU*—the college or university must demonstrate that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expressions' necessary impact on the actual operation of the [college or university]."[250] According to the Seventh Circuit in *Crue*, the unique situation faced by public colleges and universities—that employees have a multitude of avenues in which to express freely their views and in which such values are further supported by the constitutional value of academic freedom—does not exempt them from the high standard applied to prior restraints

247. Pickering v. Bd. of Educ., 319 U.S. 563, 564 (1968).

248. *Crue*, 370 F.3d at 674.

249. The plaintiff in *Pickering* was dismissed from his teaching position as a result of the government's responsive action to his writing of the letter to the local paper. In contrast, the restriction in *Crue* merely deterred one avenue of potential free speech of the plaintiffs. The government in *Pickering*, however, received the benefit of the lower scrutiny standard because the action was in response to speech as opposed to restraining—or chilling—speech before it occurred. Despite the benefit of the more relaxed standard, the government in *Pickering* was still found to have violated the free speech rights of the plaintiff. *Pickering*, 319 U.S. at 574.

250. *Crue*, 370 F.3d at 678.

of speech of government employees set forth in *NTEU*. The nation's public colleges and universities can expect an uphill—or nearly vertical—climb when imposing any form of prior restraint on the free speech rights of their employees. Further, the Seventh Circuit's opinion in *Crue* illustrates that the high scrutiny *NTEU* standard will apply even when the school's action constitutes merely a deterrent to employee speech, as opposed to a total ban on such speech. Given the nature of the academy with its contrasting viewpoints and often contentious debates, one can expect a situation similar to *Crue* to arise again in the near future. A public college or university that restrains the speech of its employees in a way similar to that in *Crue* will find itself subject to a standard under which it is nearly impossible to prevail.[251]

251. *See, e.g.*, Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 5 (1989) (stating that "prior restraints are so strongly disfavored that labeling a law as a prior restraint on speech is tantamount to a declaration that the law is unconstitutional.").