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PRIOR RESTRAINT AND CENSORSHIP: ACKNOWLEDGED OCCUPATIONAL HAZARDS FOR GOVERNMENT SCIENTISTS

TODD STEDEFORD*

INTRODUCTION

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

—U.S. CONST. AMEND. I

The Founders designed the First Amendment to the United States Constitution as retaliation against the requirement of prepublication clearance by the government.¹ Although the government may still impose a level of restriction on speech, the courts determine the level of scrutiny to be imparted on those restrictions.² Based on the communicative content, content-based restrictions imposed by the government may remove speech from the purview of the First Amendment, or may trigger various degrees of protection for the speech depending on the message conveyed to listeners or the possible consequences that may stem from the message.³ For instance, restrictions on the following types of speech are permissible: false statements of fact, obscenity, child pornography, offensive speech, threats, and speech owned by others.⁴ The presumption remains that if a restriction is placed on speech outside the exceptions, the restriction is invalid.⁵

* The author, an employee of the U.S. Environmental Protection Agency (“EPA”), developed the research described herein on his own time. It was conducted independent of EPA employment and has not been subjected to the Agency’s peer and administrative review. The conclusions and opinions drawn are solely those of the author and are not necessarily the views of the Agency.

¹ EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 1 (2d ed. 2005).

² *Id.*

³ *Id.*

⁴ *Id.* at 3, 59, 114, 131, 147, 171, and 185.

⁵ *Id.* at 224.

However, these types of restricted speech do not define the boundaries of free speech among individuals, including scientists, within the government. Cases of prior restraint and outright censorship of science are increasingly being identified.⁶ Regrettably, restrictions on freedom of scientific speech infect not only regulatory agencies such as the Environmental Protection Agency ("EPA"), where a taunt leash may be held by the governing administration, but also purely research-based branches of government like the National Institutes of Health and the National Aeronautics and Space Administration.⁷

With regard to political or commercial speech, a restriction may be subject to either strict scrutiny or diminished protection, respectively, by the reviewing court.⁸ Under strict scrutiny review, a restriction will only be upheld if it is "narrowly tailored" to a "compelling state interest."⁹ This level of scrutiny has been routinely applied to political speech.¹⁰ Similarly, a restriction will be upheld under diminished protection review if: 1) "the restriction is justified by a *substantial* government interest;" 2) "it *directly advances* this interest;" and 3) "it is *not more extensive than is necessary* to serve that interest."¹¹ This level of review is applied to commercial speech.¹² Finally, restrictions on the "time, place, or manner of speech are permissible if they . . . [a]re justified without reference to the content of the regulated speech (*i.e.*, are *content-neutral*), . . . [s]erve a *substantial government interest*, . . . [and a]re *narrowly tailored* to serve this interest."¹³

Scientific speech has remained somewhat of an enigma as to the level of protection it should be afforded from government-imposed restrictions. Behind this critical inquiry is the lawfulness of speech restrictions by the government as a sovereign or as an employer of government scientists. This latter category is particularly problematic when restrictions are imposed to censor not only the official speech of government scientists, but also private speech.

⁶ Colin Macilwain & Geoff Brumfiel, *US Scientists Fight Political Meddling*, 439 NATURE 896, 896-97 (2006).

⁷ *NASA Press Office Blasted for Overstepping the Mark*, 439 NATURE 643, 643 (2006).

⁸ VOLOKH, *supra* note 1, at 2.

⁹ *Id.* at 224.

¹⁰ *See id.*

¹¹ *Id.* at 195.

¹² *Id.* at 194.

¹³ *Id.* at 314. The "narrowly tailored" requirement for time, place, and manner restrictions is considerably weaker than that used in strict scrutiny review. *Id.*

This Essay will explore these issues starting with the level of protection that scientific speech warrants, followed by an analysis of how the First Amendment rights of government scientists have been severely limited and, in some cases, potentially violated. The Essay will then present an example of a prior restraint policy that is enforced by the EPA's National Center for Environmental Assessment. This Essay will conclude with recommendations on how the risks of censorship may be reduced in order to allow government scientists to contribute their socially valuable speech, as private citizens, with minimal interference to or from the government.

I. SCIENTIFIC SPEECH AS HIGHLY PROTECTED SPEECH

A. *Background*

Few would argue that original scientific data or a “weight-of-the-evidence” evaluation of data demonstrating potential human carcinogenicity of a chemical used extensively in household products, for example, would not be an issue of public concern. Such findings enable citizens to make informed decisions with regard to their personal, as well as their political, views. Although the publication of such information may initially take place in the peer-reviewed scientific literature, the findings will inevitably flow through all major forms of media, ultimately reaching the general population. Hence, censorship of information to the scientific community may result in censorship to the public as a whole.

Despite the seemingly obvious connections between scientific speech and public concern, the legal system has not, for the most part, defined the level of First Amendment protection that should be allocated to scientific speech. In general, the case law that emerged over the course of the twentieth century that touches upon the First Amendment and scientific writings involves prior restraint in publishing and national security violations under the Atomic Energy Act (“AEA”) of 1954.¹⁴ Interestingly, the first real challenge to the Government’s censorship of scientific speech came by way of a journalist, not a scientist.¹⁵

¹⁴ Atomic Energy Act of 1954, Pub. L. No. 83-703, § 1, 68 Stat. 919, 958 (1954) (codified as amended at 42 U.S.C. § 2274 (2007)) (prohibiting anyone from communicating, transmitting, or disclosing any restricted data to any person with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation).

¹⁵ See *United States v. The Progressive, Inc.*, 467 F.Supp. 990, 990 (W.D. Wis. 1979).

B. United States v. The Progressive, Inc.

In 1979, Howard Morland gathered information available in the public domain and drafted a manuscript entitled *The H-Bomb Secret: How We Got It, Why We're Telling It*.¹⁶ In the manuscript, Morland described the essential design and operation of thermonuclear weapons.¹⁷ In response to the Government's request, Federal District Judge Robert W. Warren issued a temporary restraining order barring publication of the manuscript in *The Progressive* on the grounds that the material was classified, and that The Progressive, Inc., would be threatening national security and violating the AEA by publishing the material.¹⁸ Morland argued that the manuscript was compiled to make the basic point that "[s]ecrecy itself, especially the power of a few designated 'experts' to declare some topics off limits, contributes to a political climate in which the nuclear establishment can conduct business as usual, protecting and perpetuating the production of these horror weapons."¹⁹ Essentially, the article was intended to inform the public of the "false illusion of security created by the government's futile efforts at secrecy."²⁰ Morland believed the publication would provide the American public with the "needed information to make informed decisions on an urgent issue of public concern."²¹

The District Court for the Western District of Wisconsin noted that although the manuscript was probably not a "do-it yourself guide for the hydrogen bomb," it could provide sufficient information for a country to move faster with the development of a hydrogen weapon.²² Based on the restrictions stated in Section 2274 of the AEA and the possible "grave, direct, immediate and irreparable harm to the United States," the court concluded, reluctantly, that the issuance of a preliminary injunction against the publisher was warranted.²³ The case was eventually dropped and, ironically, the government's attempt at censorship "resulted in the disclosure of far more technical information than is contained in [the manuscript]."²⁴

¹⁶ *Id.* at 990.

¹⁷ *Id.* at 993.

¹⁸ *Id.* at 990. See also Erwin Knoll, *The 'Secret' Revealed*, PROGRESSIVE, Nov. 1979, at 1.

¹⁹ Howard Morland, *The H-bomb Secret: To Know How is to Ask Why*, PROGRESSIVE, Nov. 1979, at 3.

²⁰ *The Progressive*, 467 F.Supp. at 994.

²¹ *Id.*

²² *Id.* at 993 ("[A] *sine qua non* to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians. One does not build a hydrogen bomb in the basement.").

²³ *Id.* at 996.

²⁴ Knoll, *supra* note 18, at 1.

This case not only highlighted the exaggerated stance the government might take in acting as a sovereign over private citizens but also the censorship that may be imposed on scientific writing. Unfortunately, scientists' fear of penalties under the AEA effectively suppressed the findings that radioactive fallout from above ground nuclear testing was widespread, rather than localized as the Government claimed, prolonging the Government's failure to warn the public in the 1950s and 1960s.²⁵

It is noteworthy to contemplate the outcome if Morland had been a government employee expressing public concern over a scientific issue such as the H-bomb. Scientific speech from a private citizen, regardless of employer, should be afforded the same level of protection as political speech since government restrictions may stifle the growth of science in the professional community and ultimately deprive not only the scientific community, but also the general public of adequate information necessary to make informed decisions.

II. GOVERNMENT EMPLOYEES AND THE FIRST AMENDMENT

It is generally accepted that the government, when acting as an employer, may exert greater control over the expressions of its employees.²⁶ This level of restriction may be higher than instances where the government is acting as a sovereign over private citizens. A government employee may be penalized for speech made as a private citizen on matters of public concern.²⁷ A government employee may also be penalized for speech on a matter of public concern that is expressed while performing in his or her official capacity.²⁸ In both instances, the government aims to restrict speech it views as contrary to the government's perceived stance. For the better part of the 20th century, the unchallenged dogma was that a public employee had no right to object to conditions placed on employment, including those conditions that limit constitutional rights.²⁹

²⁵ See generally *Allen v. United States*, 588 F.Supp. 247 (D. Utah 1984).

²⁶ See *VOLOKH*, *supra* note 1, at 359.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Connick v. Myers*, 461 U.S. 138, 144 (1983) (quoting *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220 (1892)).

A. *Pickering v. Board of Education of Township High School*

The Supreme Court clarified the rights of government employees speaking as private citizens in 1968.³⁰ In *Pickering v. Board of Education*, the Court developed a two-part test for determining whether the Government as an employer may infringe on the First Amendment rights of its employees.³¹ Marvin Pickering, a teacher at the Township High School District, was fired for writing and submitting a letter to the editor of a newspaper.³² The letter was construed as an attack on the "School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs."³³ The letter also charged the superintendent of schools with "attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue."³⁴

As a result, Pickering, a government employee, was dismissed from his position.³⁵ The School Board claimed that the letter contained numerous false statements, damaged the reputations of the Board and the school administration, and would "tend to foment 'controversy, conflict, and dissension' among teachers, administrators, the Board of Education, and the residents of the district."³⁶ Pickering argued that his statements were protected by the First Amendment.³⁷ This argument was rejected, however, "on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.'"³⁸

Despite numerous U.S. Supreme Court decisions to the contrary, the Illinois Supreme Court rejected Pickering's claim that "he could not constitutionally be dismissed from his teaching position" for speaking on a matter of public interest, namely, the operation of public schools.³⁹ On

³⁰ *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563 (1968).

³¹ *See id.*

³² *Id.* at 564.

³³ *Id.* at 566.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 567.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See, e.g., Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (finding that a statute making treasonable or seditious words or acts grounds for removal from state employment was unconstitutional); *Shelton v. Tucker*, 364 U.S. 479 (1960)

review, the Supreme Court of the United States reversed.⁴⁰ The Court recognized that a balancing must take place between “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees.”⁴¹

The *Pickering* decision extends First Amendment protection to communications made by government employees speaking as private citizens on matters of public concern, provided that the damage the speech causes to the government’s operation is not outweighed by the value of the speech to the employee and the public. Therefore, if a government employee speaks as a private citizen on a matter of private concern or if the damage caused to the government’s operation exceeds the value of the speech, the government has *carte blanche* authority to do as it pleases.⁴²

As a corollary, the categorization of scientific speech as a matter of public concern is crucial for conveyances by government scientists to be afforded protection by the First Amendment. Scientific information that may first be accessible or understandable by only specialized audiences, such as toxicologists or epidemiologists, may nevertheless be a matter of public concern precisely because the scientific information’s applications may have real consequences for the public health and safety of the national community, which requires informed citizenry to make appropriate social choices.

B. Connick v. Myers

Although the Supreme Court has not had occasion to determine the social value of scientific speech, the Court addressed what constitutes a matter of public concern in *Connick v. Myers*.⁴³ In October of 1980,

(finding that a statute requiring school teachers to submit an annual affidavit, listing organizations with which they were involved, was unconstitutional); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (finding that a statute requiring government employees to take an oath of loyalty stating they had not associated with communist organizations was unconstitutional).

⁴⁰ *Pickering*, 391 U.S. at 574.

⁴¹ *Id.* at 568.

⁴² *See id.* at 573. *But see* *N.Y. Times Co. v. United States*, 403 U.S. 713, 723 (1971) (Douglas, J., concurring) (acknowledging that embarrassment to the government was not dispositive for overcoming the First Amendment).

⁴³ *Connick v. Myers*, 461 U.S. 138 (1983). *But see* Robert R. Kuehn, *Suppression of Environmental Science*, 30 AM. J.L. & MED. 333, 360-63 (2004); Diane Leenheer Zimmerman, *Scientific Speech in the 1990s*, 2 N.Y.U. ENVTL. L.J. 254, 260-75 (1993).

Sheila Myers, an Assistant District Attorney in New Orleans, Louisiana, was notified by Harry Connick, her supervisor, that she was being transferred to another section.⁴⁴ Myers was adamantly opposed to the transfer, and in response, she prepared a questionnaire on her own time soliciting the views of her colleagues on a variety of issues, including the "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."⁴⁵ The questionnaire was distributed to her colleagues primarily during her lunch hour the following day.⁴⁶ Another supervisor informed Connick that Myers had created a "mini-insurrection" in the office.⁴⁷ Thereafter, Connick terminated Myers because of her refusal to accept the transfer.⁴⁸ In addition, she was told that the distribution of the questionnaire was "an act of insubordination."⁴⁹

Myers filed suit arguing that the real reason for her termination was the questionnaire, which was protected speech under the First Amendment.⁵⁰ The trial court agreed with Myers and ordered that she be reinstated with "backpay, damages, and attorney's fees."⁵¹ Connick appealed, and the appellate court affirmed on the basis of the trial court's findings.⁵²

On review, the Supreme Court reversed the lower courts' decision, stating 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, as revealed by the whole record."⁵³ With the exception of the comment on "political campaigns," the Court found that the questionnaire did not "fall under the rubric of matters of public concern," and refused to constitutionalize an employee grievance.⁵⁴

Despite the Court's ruling in *Connick*, the *Pickering* decision provides protection to speech on matters of public concern contributed by government employees in their capacity as private citizens.⁵⁵ After all, government employees are the members of the community who are most

⁴⁴ *Id.* at 140.

⁴⁵ *Id.* at 140-41.

⁴⁶ *Id.* at 141.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 142.

⁵² *Id.*

⁵³ *Id.* at 147-48.

⁵⁴ *Id.* at 148-49, 154.

⁵⁵ *See supra* Section II.A.

likely to have informed and definite opinions about the inner workings of the government. However, as discussed below, government employees may not be afforded First Amendment protection for speech on matters of public concern that is made while working in their official capacity.

C. *Garcetti v. Ceballos*

In February of 2000, Richard Ceballos, a Deputy District Attorney with the Los Angeles County District Attorney's Office, was asked by a defense attorney to review "inaccuracies in an affidavit used to obtain a critical search warrant."⁵⁶ The defense attorney had filed a motion to challenge the warrant, but requested Ceballos' review.⁵⁷ "Ceballos determined the affidavit contained serious misrepresentations," and followed up by contacting a Deputy Sheriff at the Los Angeles County Sheriff's Department.⁵⁸ Unsatisfied with the Deputy Sheriff's explanation for the perceived inaccuracies, Ceballos notified his supervisors, Carol Najera and Frank Sundstedt, and drafted a disposition memorandum on March 2, 2000.⁵⁹ The memorandum expressed his concerns and recommended dismissal of the case.⁶⁰

Subsequently, a meeting was held between members of the sheriff's department and Ceballos, Najera, and Sundstedt, which erupted into a heated exchange.⁶¹ Despite Ceballos' concerns, Sundstedt opted to proceed with the prosecution, pending an outcome to the challenged warrant.⁶² At a hearing on the motion to quash the warrant, Ceballos was called by the defense to recount his observations about the affidavit, but the trial court rejected the challenge.⁶³ Soon thereafter, Ceballos claimed that he was the victim of retaliatory employment actions, including a "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."⁶⁴

After being denied an employee grievance, Ceballos brought suit, asserting that he was retaliated against in violation of his First and

⁵⁶ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1955 (2006).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1955-56.

⁶⁰ *Id.*

⁶¹ *Id.* at 1956.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Fourteenth Amendment rights because of the March 2 memorandum.⁶⁵ The trial court disagreed, noting that Ceballos drafted the memo pursuant to his official duties, and therefore, was not afforded First Amendment protection for its contents.⁶⁶

On appeal, the Court of Appeals for the Ninth Circuit relied upon the balancing test set forth in *Pickering*, and whether the "expressions in question were made by [Ceballos] as a citizen upon matters of public concern," as determined by *Connick*.⁶⁷ The court concluded that Ceballos' memorandum was "inherently a matter of public concern."⁶⁸ However, the issue of whether Ceballos' speech was made as a private citizen was not addressed.⁶⁹ Instead, the court relied on Ninth Circuit precedent that rejected the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility."⁷⁰ It should be noted that one judge specially concurred, stating that "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right."⁷¹

On review, the Supreme Court recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public service."⁷² Relying on *Pickering* and *Connick*, the 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."⁷³

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1956.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (quoting *Ceballos v. Garcetti*, 361 F.3d 1168, 1174-75 (2004)). The Ninth Circuit precedent relied upon by the Court of Appeals included, among other cases, *Roth v. Veteran's Admin. of Govt. of U. S.*, 856 F.2d 1401 (9th Cir. 1988). *Id.*

⁷¹ *Id.* at 1957.

⁷² *Id.* at 1958.

⁷³ *Id.* at 1960.

III. GOVERNMENT SCIENTISTS AND PEER-REVIEWED SCIENTIFIC SPEECH

Within the scientific realm, peer review serves as a measure for the accuracy and consistency of scientific speech. Peer review entails the critical review of a work product that is conducted by a limited number of individuals who possess equivalent technical expertise to those who drafted the original work.⁷⁴ Historically, peer review has been the *sine qua non* of the scientific literature and was incorporated in many of the offices within federal agencies upon their creation. For instance, EPA's Office of Research and Development has utilized peer review since 1970, and has had a formal peer review policy in place since 1982.⁷⁵ However, peer review has not been prominent or uniform across the different offices within EPA.⁷⁶ The existence of such inconsistency has led to repeated accusations that many of EPA's regulatory decisions possess a poor scientific basis.⁷⁷ Moreover, the 1992 report entitled *Safeguarding the Future: Credible Science, Credible Decisions* found that a perception existed that "EPA lacked adequate safeguards to prevent the unacceptable practice of adjusting science to fit policy."⁷⁸ In response to recommendations in the 1992 report, the EPA Administrator issued a Peer Review Policy in 1993, which included a strengthened and expanded peer-review process for Agency activities.⁷⁹ Subsequently, the EPA's Peer Review Handbook was issued in 1998, with the second and third editions being issued in 2000 and 2006, respectively.⁸⁰

The third edition of the EPA's *Peer Review Handbook* provides guidance for EPA scientists that wish to submit a work product to a peer-reviewed scientific journal.⁸¹ It should be noted that use of the term "work product" connotes an article developed in a scientist's official capacity as

⁷⁴ U.S. ENVTL. PROT. AGENCY, PEER REVIEW HANDBOOK 12 (3d ed. 2006) [hereinafter PEER REVIEW HANDBOOK] ("Peer review is usually characterized by a one-time interaction or a limited number of interactions by independent peer reviewers.")

⁷⁵ COMM. ON RESEARCH AND PEER REVIEW IN EPA ET AL., STRENGTHENING SCIENCE AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY: RESEARCH-MANAGEMENT AND PEER-REVIEW PRACTICES 102 (2000).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 102-103 (referring to EXPERT PANEL ON THE ROLE OF SCIENCE AT EPA, SAFEGUARDING THE FUTURE: CREDIBLE SCIENCE, CREDIBLE DECISIONS (1992)).

⁷⁹ *Id.* at 103.

⁸⁰ See Environmental Protection Agency, Peer Review Program, <http://www.epa.gov/peerreview> (last visited Apr. 15, 2007).

⁸¹ PEER REVIEW HANDBOOK, *supra* note 74, at 47.

a government employee.⁸² The handbook states "EPA considers peer review by [peer-reviewed scientific] journals as adequate for reviewing the scientific credibility and validity of the findings (or data) in that article, and therefore, a satisfactory form of peer review."⁸³ In addition, EPA scientists are encouraged to have their articles internally peer-reviewed prior to submitting to a journal for peer review.⁸⁴ The handbook further explains that "[a]rticles may also need examination in accordance with any organizational clearance procedures, especially when the author is presenting him or herself as an EPA employee."⁸⁵

In light of the recent holding in *Ceballos*, the above policy on the level of peer review that should be applied to articles destined for submission to scientific journals that are drafted by government scientists working in their official capacity leaves little, if any, room for dispute. While most scientists welcome preliminary critical reviews of their work, as the reviewers may identify possible errors or oversights that could lead to rejection during a journal's peer review process, there are potential drawbacks to this process.⁸⁶ For example, preliminary peer review rapidly loses its value when the reviews take weeks or months to complete. If a policy of review is in place that leaves the completion time open-ended, government scientists will be less compelled to contribute articles to peer-reviewed scientific journals. Additionally, if the peer reviewer serves a dual role as a supervisor or a clearance officer, and there is a difference of opinion, the article may be subject to prepublication restriction. Regrettably, the clearance policy enforced by the EPA's National Center for Environmental Assessment ("NCEA") suffers from precisely these types of problems.

IV. PRIOR RESTRAINT AND CENSORSHIP OF GOVERNMENT SCIENTISTS

A. *Prior Restraint and Censorship of Government Scientists*

On December 4, 2003, the Center Director of NCEA issued a memorandum on "Clearance Procedures for NCEA Work Products."⁸⁷ The

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See Peter M. Chapman, *When is Peer Review Excessive? Examples of Peer Review Hell*, 12 HUM. & ECOLOGICAL RISK ASSESSMENT 423, 423-26 (2006); see also Amy Mills, *IRIS from the Inside*, 26 RISK ANAL. 1409, 1410 (2006).

⁸⁷ Memorandum from the Director of the Nat'l Center for Env'tl. Assessment to NCEA Staff, Clearance Procedures for NCEA Work Products 1 (Dec. 4, 2003).

memorandum categorized NCEA work products and specified those that must be cleared by the Center Director versus those that may require lesser review if there are no policy implications.⁸⁸ The following reasons were given as driving the imposition of additional levels of review above and beyond those prescribed in the EPA's Peer Review Handbook:

- 1) To ensure our work products are of the highest quality;
- 2) To evaluate the potential policy implications and impacts of NCEA work products; and
- 3) To ensure that ORD and Agency management are provided a "heads-up" concerning work products that may be of a high level of interest to the public and other stakeholders.⁸⁹

Interestingly, journal manuscripts were classified as not having to go through the full chain of command to the Center Director, and were subcategorized into those with and those without policy implications.⁹⁰ However, the memorandum explains that:

[G]iven the nature of [the] work in NCEA, [the Center Director's] default position (i.e., the "presumption of policy philosophy") on work products about chemical risk and risk methods, is that they have policy implications and therefore require [the Center Director's] approval before being submitted to [a] journal for consideration.⁹¹

The clearance chain for work products detailed in the memorandum contains four levels of review.⁹² However, depending on the division within NCEA, manuscripts submitted through this clearance process may

⁸⁸ *Id.* at 3-4.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 3.

⁹² *Id.* at 2. The clearance path is listed as follows: "1. Group Chief/Branch Chief (1st level supervisor); 2. Division Director (including staff directors for IRIS, Global Change and Risk Assessment Forum); 3. Associate Directors (Associate for Health for human health documents and Associate for Ecology for ecological reports); [and] 4. Center Director/Deputy Director." *Id.*

have up to seven levels of review before they are cleared.⁹³ Even though this process states that it applies only to NCEA work products, it has been applied to manuscripts written by employees in their capacities as private citizens produced during non-duty hours.⁹⁴

As mentioned above, preliminary critical review can be a valuable service to the scientist eager to publish his or her work. The reviews performed in anticipation of clearance are not likely to be valuable, however, because the NCEA memorandum does not provide for consistency within the review process. The evaluation of each manuscript is left up to the prejudices and whims of each reviewing official, who has the authority to block the manuscript's progression.⁹⁵ Although it has not been formally challenged, this policy of prior restraint that has escalated to censorship on publishing appears to violate the First Amendment rights of government scientists who wish to contribute articles written outside of their official duty hours. The extensive clearance process is far above and beyond those encouraged in the EPA's Peer Review Handbook, yet fails to advance the interests of the government in a direct and material way. As stated by the Supreme Court, "[t]he First Amendment directs us to be

⁹³ Manuscripts submitted by Integrated Risk Information System ("IRIS") scientists have to be cleared through the following superiors: 1. Team Leader; 2. IRIS Program Director; 3. Peer-Review Coordinator; 4. Special Assistant to the Director; 5. Associate Director of Health; 6. Deputy Director for Management; and 7. Center Director. *See id.*

⁹⁴ The author was told that if he wanted to submit a manuscript to a law review that included a brief biographical sketch, including past and present employment, education, etc., he was required to send the article through clearance. Alternatively, he was told that he could submit the article to a law review if he removed any mention of EPA, despite the fact that a prominent disclaimer was to be placed on the cover page and that the manuscript was written outside of his duty hours. *See* Todd Stedeford & Amanda S. Persad, *The Influence of Carcinogenicity Classification and Mode of Action Characterization on Distinguishing 'Like Products' Under Article III:4 of the GATT and Article 2.1 of the TBT Agreement*, 15 N.Y.U. ENVTL L.J. (forthcoming 2007).

⁹⁵ The author has first-hand experience of the inefficiency and disorganization of this system. A manuscript entitled *The Application of Non-Default Uncertainty Factors in the U.S. EPA's Integrated Risk Information System (IRIS)* that he co-authored and submitted for clearance in February of 2006 (intended for a peer-reviewed scientific journal) was still in clearance as of July 19, 2006. Several sections were required to be removed during the first-round of clearance review that were later identified as necessary elements by subsequent reviewers. After repeated complaints by the authors about the management's timely review, the management stated on July 20, 2006, that the paper had policy implications. Since this time, two of the EPA co-authors requested that their names be removed from the manuscript. Further, the corresponding author of that manuscript, Dr. Ching-Hung Hsu, has since left the Agency because of the draconian restrictions placed on publishing.

especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”⁹⁶

Prior restraint is defined as a “governmental restriction on speech or publication before its actual expression.”⁹⁷ This is by far the most efficient means of controlling the free flow of information, and the Government can exercise this right, when acting as an employer, over its employee’s official communications. Codified exceptions are available for government employees acting in their capacity as private citizens. For instance, EPA provides procedural requirements for its employees wishing to engage in activities outside their official capacity, including “writing when done under an arrangement with another person for production or publication of the written product.”⁹⁸ Approval is required when the subject matter “deals in significant part with the policies, programs or operations of EPA or any matter to which the employee presently is assigned or to which the employee has been assigned during the previous one-year period.”⁹⁹ The standard for approval is that approval should be made “only upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 C.F.R. part 2635 [Standards of ethical conduct for employees of the executive branch] and § 6401.102 [Prohibited financial interests].”¹⁰⁰

Offices within the EPA have tailored these procedural requirements to suit their staff. For example, NCEA’s official memorandum entitled *Request for Approval to Engage in Outside Employment or Other Outside Activity* states that “approval must be obtained in advance of initiating or committing to the performance of this activity.”¹⁰¹ When a requested activity includes writing for publication, the following also applies:

⁹⁶ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

⁹⁷ BLACK’S LAW DICTIONARY 1232 (8th ed. 2004) (“Prior restraints violate the First Amendment unless the speech is obscene, is defamatory, or creates a clear and present danger to society.”).

⁹⁸ 5 C.F.R. § 6401.103 (2007).

⁹⁹ *Id.* § 6401.103(a)(4).

¹⁰⁰ *Id.* § 6401.103(c).

¹⁰¹ Memorandum from Nat’l Center for Env’tl. Assessment to NCEA Staff, *Request for Approval to Engage in Outside Employment or Other Outside Activity* (n.d.) [hereinafter *Outside Employment Memorandum*]. It should be noted that “employment” does not include participation in educational activities. 5 C.F.R. § 6401.103(e). The author drafted this manuscript as part of a course requirement on the First Amendment. Hence, no outside employment form was required.

[Employee] certifies] that [he or she] will not use or permit the use of [his or her] official title or position to identify [employee] in connection with this activity . . . except as one of several biographical details in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer indicating that the views expressed do not necessarily represent the views of the agency or the US.¹⁰²

A critical issue with the above restriction is the use of the title or position of the government employee. In scientific writing, the inclusion of an author's professional affiliation serves two important purposes. First, it provides a means of identification. Second, it aids with the reader's evaluation of possible bias or conflicts of interest, financial or otherwise, that may permeate the article. According to the regulation above, a government scientist who wishes to contribute his or her thoughts on a particular matter to a peer-reviewed scientific journal is allowed to use their title or position for institutional identification as long as it is suffixed with a disclaimer.¹⁰³ The inclusion of a disclaimer distinguishes the author's speech from that of the government. Hence, approval needed for an outside activity such as the submission of a manuscript for publication should not be subject to an extensive clearance process that might potentially delay its submission, perhaps indefinitely, or result in outright censorship of a manuscript. It is important to keep in mind that scientific manuscripts intended for peer-reviewed scientific journals are subjected to a peer review process by the journal that is independent of the review performed within the divisions of EPA. Therefore, the application of a prominent disclaimer should be more than adequate for curing any concerns that clearance officials may have.

B. Pearson v. Shalala¹⁰⁴

Perhaps the best example of disclaimers being used to protect speech arose from case law addressing the Food and Drug Administration's ("FDA") restrictions on health claims listed on the labels of dietary

¹⁰² Outside Employment Memorandum, *supra* note 101, at 3.

¹⁰³ *Id.*

¹⁰⁴ 164 F.3d 650 (U.S. App. D.C. 1999).

supplements. FDA has authority to require companies to obtain FDA's approval prior to marketing a dietary supplement that includes a "health claim" on the label.¹⁰⁵ This is the primary regulatory hurdle that marketers of these products face. Although the Supreme Court has not considered this subject, the Court of Appeals for the District of Columbia Circuit addressed this matter in *Pearson v. Shalala* in 1999.¹⁰⁶ Durk Pearson, a marketer of dietary supplements, asked FDA to authorize several health claims, including the following: ".8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form."¹⁰⁷ FDA rejected this health claim stating "the scientific literature does not support the superiority of any one source over others."¹⁰⁸ In addition, FDA refused to permit the health claim along with the following corrective disclaimer: "The FDA has determined that the evidence supporting this claim is inconclusive."¹⁰⁹ In FDA's view, "the disclaimer approach would be ineffective because 'there would be a question as to whether consumers would be able to ascertain which claims were preliminary [and accompanied by a disclaimer] and which were not.'"¹¹⁰

Pearson argued that FDA's refusal to consider the health claim with an appropriate disclaimer was a violation of the First Amendment.¹¹¹ In response, FDA advanced two arguments. First, they stated that approval of the health claim with a disclaimer would be inherently misleading. Second, even if the disclaimer option was only "potentially misleading," FDA still had no obligation to consider it in lieu of an outright ban.¹¹² Since expressions on the labels of commercial products are afforded diminished protection under the First Amendment, the Court evaluated Pearson's claim using a three-part test articulated by the Supreme Court in *Central Hudson Gas v. Public Service Commission*

¹⁰⁵ 21 C.F.R. § 101.14 (2007). A "health claim" is defined as a "claim made on the label or in labeling of . . . a dietary supplement that expressly or by implication . . . characterizes the relationship of any substance to a disease or health-related condition." *Id.* § 101.14(a)(1).

¹⁰⁶ *Pearson*, 164 F.3d 650.

¹⁰⁷ *Id.* at 652.

¹⁰⁸ *Id.* at 654 (quoting Health Claims and Label Statements, 61 Fed. Reg. 8752, 8760 (Mar. 5, 1996)).

¹⁰⁹ *Id.* at 654.

¹¹⁰ *Id.* at 653 (quoting General Requirements for Health Claims for Dietary Supplements, 59 Fed. Reg. 395, 405 (Jan. 4, 1994)).

¹¹¹ *Id.* at 654.

¹¹² *Id.* at 655.

of *New York* for evaluating a government scheme to regulate potentially misleading commercial speech.¹¹³

The *Central Hudson* test (as it is commonly known) begins by asking "whether the asserted government interest is substantial," and "whether the regulation *directly* advances the governmental interest asserted."¹¹⁴ The final inquiry determines whether the fit between the government's ends and the means chosen to accomplish those ends "is not necessarily perfect, but reasonable."¹¹⁵ In the *Pearson* case, the court answered the first question in the affirmative, recognizing that the Supreme Court has stated "that there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial"¹¹⁶ and the "government has a substantial interest in 'promoting the health, safety, and welfare of its citizens.'"¹¹⁷ However, the court found that FDA's regulatory scheme encountered difficulties with the second and third questions under *Central Hudson*. The court recognized that FDA did not assert that the dietary supplements in question "in any fashion threaten[ed] consumer's health and safety."¹¹⁸ The court did, however, recognize the "government's interest in preventing consumer fraud/confusion may well take on added importance in the context of a product such as dietary supplements, that can affect the public's health."¹¹⁹ However, the Court noted that the consumer fraud justification failed on the third question.¹²⁰ The Court relied on holdings from the Supreme Court that "the preferred remedy [for potentially misleading advertisements] is more disclosure, rather than less"¹²¹ and that disclaimers are constitutionally preferable to outright suppression.¹²² The Court did not attempt to draft disclaimers, but they did state that FDA should have done so.¹²³

¹¹³ *Id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980)).

¹¹⁴ *Id.* at 656 (quoting *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566).

¹¹⁵ *Id.* (quoting *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

¹¹⁶ *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 769 (1993)).

¹¹⁷ *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 656.

¹²⁰ *Id.*

¹²¹ *Id.* at 657 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

¹²² *Id.* (citing *In re R.M.J.*, 455 U.S. 191, 206 (1982); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 (1990)).

¹²³ *Id.* at 659.

C. *Disclaimers and NCEA Policy*

EPA's Office of Research and Development ("ORD") foresaw the need for its scientists to be able to submit independent research performed outside their working hours, and in June of 1991, issued the *Technical Information Policy and Guide of the Office of Research and Development*.¹²⁴ This document requested that manuscripts drafted by EPA employees during non-worktime include the following disclaimer:

The research described herein was developed by the author, an employee of the U.S. Environmental Protection Agency (EPA), on his/her own time. It was conducted independent of EPA employment and has not been subjected to the Agency's peer and administrative review. Therefore, the conclusions and opinions drawn are solely those of the author and are not necessarily the views of the Agency.¹²⁵

In March of 2003, NCEA revised the disclaimers listed in Appendix F of the *Technical Information Policy and Guide of the Office of Research and Development*, and stated that EPA employees should "use ORD disclaimers where applicable, but use the disclaimers/notices provided . . . for NCEA products that are not covered in [the *Guide*]."¹²⁶ Since the revised list of *Disclaimers for NCEA Use* does not address manuscripts authored by EPA employees during non-duty hours, it is clear that the ORD disclaimers are to be used.

CONCLUSION

In order to obtain First Amendment protection, government employees must ensure that their speech meets several requirements. First, the speech must relate to a matter of public concern.¹²⁷ If the expression addresses a matter of public concern, the courts will examine whether or not the expressions were made by the government employee acting as a

¹²⁴ OFFICE OF RESEARCH AND DEV., U.S. ENVTL. PROT. AGENCY, EPA/600/9-91/004, TECHNICAL INFORMATION POLICY AND GUIDE OF THE OFFICE OF RESEARCH AND DEVELOPMENT (1991). NCEA is part of ORD.

¹²⁵ *Id.* at 43.

¹²⁶ Nat'l Center for Env'tl. Assessment, U.S. Env'tl. Prot. Agency, Disclaimers for NCEA Use 1 (Mar. 2003) (on file with author).

¹²⁷ See *Connick v. Myers*, 461 U.S. 138 (1983).

private citizen or as an employee performing official government duties.¹²⁸ If the expressions are made as a private citizen, a court will proceed to balancing the potential interferences with the government's ability to perform its operations efficiently and the employee's interest in being allowed to comment on the subject.¹²⁹ In contrast, if the expressions are made as a part of official duties, then the Government is free to regulate them.¹³⁰

Despite the holding in *Pickering*, government employees do not have free reign to publish as private citizens. If the subject matter is significantly related to the employee's agency or official duties, prior approval may be required to ensure that the activity or speech will not violate ethical or financial responsibilities placed on the citizen as a government employee. Such requirements for engaging in outside activities are not offensive to the First Amendment given that the reasons listed for denying approval are established as safeguards to ensure there is no violation of the government employee's fiduciary obligation to the government from the expressions made by the employee as a private citizen.¹³¹ When government managers deny an activity for reasons other than those expressly stated, however, potential violations of First Amendment rights may result.

For contributions that are outside the enumerated examples of "outside activities," a government employee has the option of submitting a manuscript to a peer-reviewed journal without describing his or her professional affiliation (in which case a financial disclosure will often be required that identifies the author as a government employee), or including his or her affiliation with an appropriate disclaimer. The latter option is generally preferable, as it will satisfy any questions about potential conflicts of interest and serves as a source of identification for the author. The *Pearson* court provided some insight for addressing situations involving disclaimers and restrictions on speech by the government, stating that it was up to the agency to draft the disclaimers.¹³²

Clearly, the EPA addressed the use and application of disclaimers so that government scientists may publish at will in the peer-reviewed literature as private citizens with professional affiliations. This is a particularly appealing option as it avoids the chilling effects on speech that

¹²⁸ See *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

¹²⁹ See *id.*

¹³⁰ See *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

¹³¹ *Snepp v. United States*, 444 U.S. 507 (1980) (finding that a former CIA agent breached his fiduciary obligation by failing to submit material concerning the CIA for pre-publication review).

¹³² See *Pearson v. Shalala*, 164 F.3d 650 (U.S. App. D.C. 1999).

an excessive pre-clearance review system may ultimately cause. This is important given that any manuscript submitted to peer-reviewed scientific journal will undergo peer review. If the manuscript survives this process, it will eventually be published and subjected to an even more extensive degree of scrutiny by the scientific community as a whole.

One final point should be made with regard to disclaimers and scientific publications written by government employees on their own time, but utilizing their professional affiliations. This point stems from a piece of wisdom expressed by the *Pearson* court. When addressing FDA's contention that "[H]ealth claims lacking 'significant scientific agreement' are inherently misleading because they have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment *at the point of sale*," the court stated that "[i]t would be as if the consumers were asked to buy something while hypnotized, and therefore they are bound to be misled. We think this contention is almost frivolous."¹³³ The above passage has a similar analogue for the draconian clearance policies thought necessary by some government officials. It seems that they view the contributions by their scientists, expressed as private citizens, to be so impactful and potentially misleading to readers that it is necessary to remove any and all unintended meanings from each document prior to submission for peer review in a scientific journal. Review and clearance handled in such a way not only contradicts EPA's guidance documents, but also infringes on the First Amendment rights of EPA scientists.

¹³³ *Id.* at 655.