Public Workers’ Job-Related Speech: First Amendment Guards Lifted

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Having set the case for reargument to permit new Justice Samuel Alito Jr.’s voting participation, the Supreme Court decided in Garcetti v. Ceballos1 that public employees are not protected by the First Amendment for “expressions made pursuant to office responsibilities.”2

Justice Anthony Kennedy’s 5-4 opinion for the Court leaves open whether government attorneys have a somewhat broader scope of protection because of “rules of conduct and constitutional obligations apart from the First Amendment,” and whether “speech related to scholarship or teaching” might be accorded greater latitude because of considerations of academic freedom.3 Public employees might also in some circumstances be able to structure their remarks so as to create a clear line between their expression and job-related duties. State whistleblower and civil service statutes may also be available. Even with these caveats, however, the Court’s May 30, 2006, ruling marks an important limitation on the scope of freedom of speech in the workplace.

Garcetti highlighted for the Justices the tension between desirable personnel policy, which seeks to encourage employees to pursue internal channels before going public with their problems, and the difficulties inherent in “constitutionaliz[ing] the employee grievance.”4 Comforted in part by “the powerful network of legislative enactments—such as whistleblower protection and labor codes—available to those who seek to expose wrongdoing,”5 the majority opted to avoid what it regarded as a slippery constitutional slope involving “judicial oversight of communications between and among government employees and their supervisors in the course of official business.”6

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Background

Richard Ceballos, then serving as a calendar deputy in the district attorney’s office in Los Angeles county, was asked by a defense attorney to review the accuracy of representations made in an affidavit used to obtain a search warrant in a pending case. Mr. Ceballos determined that the affidavit contained serious misrepresentations; he then wrote a memorandum to Carol Najera and Frank Sundstedt, his supervisors in the district attorney’s office, recommending dismissal of the case. Ms. Najera and Mr. Sundstedt held a meeting with Mr. Ceballos, the warrant affiant, and other members of the police department to discuss the matter. Despite Mr. Ceballos’s concerns, Mr. Sundstedt decided to proceed with the prosecution. On defendant’s motion to traverse, Mr. Ceballos was called by the defense as a witness. The trial court, however, rejected the challenge to the warrant.

Mr. Ceballos subsequently complained that because of the concerns he had expressed about the search warrant affidavit, the district attorney’s office retaliated against him by reassigning him to a lower trial deputy position, transferring him to another courthouse further away (apparently known as “freeway therapy” in the city), and denying his due promotion. He then sued under 42 USC §1983, claiming that the district attorney and his supervisors violated his First and Fourteenth Amendment rights. The district court granted summary judgment in favor of the district attorney’s office because Mr. Ceballos wrote the memo pursuant to his employment duties.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that “[Mr.] Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.”7 The court drew a line based on the content of the speech: between speech on matters of “public concern” and those of “personal interest.”8 Mr. Ceballos’s speech did not fall into the category of “personnel grievances” or “routine discharge of assigned functions, where there is no suggestion of public motivation.”9 Rather, his memorandum and subsequent meeting with his supervisors and the warrant affiant involved allegations of police and prosecutorial misconduct, information within the “public interest” and constitutional protection. Judge Diarmuid F. O’Scannlain concurred separately, maintaining that public employees have no
personal interest—or should not have personal interest—in their speech as employees. Otherwise, “government offices could not function if every employment decision became a constitutional matter,”11

Supreme Court's Decision

The U.S. Supreme Court agreed to hear the case and reversed the appeals court's judgment by relying on the basic framework announced in Pickering v. Board of Education.12 Under Pickering, the Court employs a balancing test where the interests of the government worker “as a citizen, in commenting upon matters of public concern,” are weighed against the interests of the state “as an employer, in promoting the efficiency of the public services it performs through its employees.”13

The Garcetti holding creates an important new gloss on deciding the threshold inquiry: whether the government worker is speaking as a citizen on a matter of public concern. Unlike the Ninth Circuit’s analysis, which turned on the content of the speech, the Court emphasizes whether the speaker is acting in the role of “citizen.” When a citizen enters government service, he accepts certain limitations on his freedom; likewise, the government acting as an employer may control individuals in ways it cannot when the government acts as a regulator. In the Court’s view, the public employee speaks as a citizen only to the extent he engages in speech that could be made by a member of the general polity, not speech that flows out of his or her duties as a governmental agent. Justice Kennedy explained:

The controlling factor in [Mr.] Ceballos’ case is that expressions were made pursuant to his duties as a calendar deputy…. That consideration—the fact that [Mr.] Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes [Mr.] Ceballos’ case from those in which the First Amendment provides protection against discipline. We hold 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.14

The majority’s reasoning reveals its reluctance to “commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”15 However, the Court hints that academic scholarship may be an exception to Garcetti’s rule. Furthermore, Justice Kennedy for the Court takes comfort in state and federal whistleblower statutes that will protect the public interest in knowing about and guarding against government corruption in those situations where the First Amendment does not apply.

Justice David Souter’s dissent characterizes the Court’s threshold distinction between “citizen” and “employee” as arbitrary. For one, the Pickering test already balances the individual’s interest in free speech against the government’s interest in civility, consistency, and efficiency. Layering an additional inquiry onto the test does nothing to further these interests, as “a government paycheck does nothing to eliminate the value to an individual of speaking on public matters.”16 Furthermore, both employee and government interests may be even more pronounced when an employee speaks on issues intimate to his job, which means a balancing test for evaluating these interests is all the more essential. Souter questions whether First Amendment protection should be lifted from “a public auditor [who] speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior’s order to violate constitutional rights he is sworn to protect.”17

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The major exception to the Court’s holding is academic scholarship, which should receive First Amendment protection because its subject is subject to independent regulation by the legal profession, and it was arguably giving effect to an independent constitutional obligation to ensure disclosure of exculpatory information to the defense.

Open Questions

1. Scope of Official Duties. To what extent will an employee’s job description control the inquiry of whether the speech in question is job-related and hence outside First Amendment protection? In his opinion for the Court, Justice Kennedy suggests that a public employer cannot keep its workers on a leash by drafting vague, all-encompassing job descriptions. What constitutes an “employee’s official duties” will be determined by a functional, rather than a formal, inquiry. In the instant case, Mr. Ceballos’s duties as a prosecutor plainly included judgments on the sufficiency of a warrant affidavit, but there will be harder cases. For example, is holding a press conference on a case within the scope of a prosecutor’s duties? Hopefully, over time, a workable standard will emerge. One option is that “official duties” should mean functions that would be taken into account in making promotion and similar personnel decisions. Another possibility is to limit First Amendment protection to those actions falling outside the employer’s vicarious liability. If the state employer can be held vicariously liable for the action of the employee, then the employer should have complete discretion over the employee’s actions.

2. Job-Related but Not Job-Required Speech. To what extent is a public employee unprotected by the First Amendment if the subject matter of his expression is related to his job duties, even if the particular speech or memorandum is not required by the job? The Court’s prior decisions afford some guidance here. In Githan v. Western Line Consolidated School District,19 a schoolteacher could not be fired for complaining to the principal about the school’s discriminatory hiring practices—presumably because a schoolteacher’s reporting to her principal on such policy matters is not within her official job duties.

The Court has also held that a district attorney’s questionnaire asking her colleagues whether they felt pressure to work in political campaigns was protected, while the portions of
the questionnaire soliciting her colleague's views on office morale, the policy of transferring employees, the need for a grievance committee, and the level of confidence in her superiors were not protected.\textsuperscript{20} Pickering itself protected a schoolteacher who wrote a letter to a local newspaper addressing issues including the funding policies of his school board.\textsuperscript{21} In accounting for Girsh, Connick, and Pickering, Justice Kennedy reasons that public employees are protected when it is "the kind of activity engaged in by citizens who do not work for the government."\textsuperscript{22} Perhaps more instructive is the Court's reliance on official communications, which "have official consequences, creating a need for substantive consistency and clarity."\textsuperscript{23} These cases, coupled with the language of the Court in Garcetti, suggest that speech not required by the job could be protected by the First Amendment.

3. \textbf{Requiring Use of Internal Remedies.}

If an employer's policy requires public employees to pursue internal channels before going public with their grievances, does an employee honoring such a policy in effect waive his or her First Amendment rights?\textsuperscript{24}

The Court has been criticized for providing “[e]mployees who make public statements outside the course of performing their official duties [with] some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper…or discussing politics with a coworker.”\textsuperscript{25} Conceivably, Garcetti will create perverse incentives for public workers to hold press conferences, rather than use internal grievance procedures.

There are reasons, however, to qualify this assessment. First, Pickering itself does not insulate all public statements from employer retaliation: that case left open "some positions of expression is to state their views in the workplace, even when the First Amendment may not.

- \textbf{Alternative Remedies: Rights of Action Under Whistleblower Laws.} Are public employees defenseless? Justice Antonin Scalia evoked laughter during the oral argument when he asked: “Public employee unions are so weak? They're the only strong unions left in the country. I mean, really. You need the Constitution to protect employees against things of this sort?”\textsuperscript{26} As it turns out, public employees do enjoy considerable extrastitutional protections. In many jurisdictions, speech similar to that in Garcetti is protected through state whistleblower claims, state civil service law, and state constitutions. The Court itself gave three examples, two from California law and one from federal law.

The court cites California law: “state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution.”\textsuperscript{27} In addition to a statutory fine up to $10,000 imposed on employers who retaliate against those who report, the whistleblower law also provides for a private right of action, with potential punitive damages and attorneys fees for employees retaliated against as long as the employee first exhausted internal grievance procedures.\textsuperscript{28} Therefore, even as his attorney admitted during oral argument, Mr. Ceballos could have brought a state whistleblower claim, in addition to or in lieu of his 1983 suit. Most other states allow similar suits.\textsuperscript{29}

Garcetti’s public forum exception was intuitive. Justice Kennedy’s reasoning was...