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COMMENT

SILENCED CITIZENS: THE POST-GARCETTI LANDSCAPE FOR PUBLIC SECTOR EMPLOYEES WORKING IN NATIONAL SECURITY

I. INTRODUCTION

While serving on the Massachusetts Supreme Court, Justice Holmes dismissed a writ of mandamus in a case involving the right of police officers to invoke the First Amendment, noting that “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹ This oft-quoted statement accurately described the status of public employee free speech rights prior to the 1960s, when a series of Supreme Court cases concluded that public sector employees do not give up their right to free speech upon entry into public service.²

When the Supreme Court heard the landmark case *Pickering v. Board of Education*³ in 1968, its decision was merely the latest in a series of decisions striking down the Holmesian approach to public sector employee speech.⁴ The basic concept was to grant public sector employees the speech protections offered to private

1. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

2. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 602 (1967) (“There can be no doubt of the legitimacy of New York’s interest in protecting its education system from subversion. But even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960))); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.”).

3. 391 U.S. 563 (1968).

4. *Keyishian*, 385 U.S. at 602 (stating that although a state has a legitimate interest, it cannot stifle personal liberties); *see, e.g., Garrity*, 385 U.S. at 500 (stating that policemen are entitled to constitutional rights).

employees and citizens, while at the same time balancing the interests of the government employer against the employee's right to speak freely.⁵ With some modifications, most importantly *Connick v. Myers*⁶ in 1983, the *Pickering* test has stood as the public sector employee speech test since 1968.⁷

All of this changed in May 2006, when the Supreme Court decided *Garcetti v. Ceballos*⁸ and established new restrictions on the speech of public sector employees.⁹ Although the *Garcetti* decision affected all public sector employees, it especially harmed public sector employees working for national security agencies. First, *Garcetti* created a new requirement for employee speech: if the speech is made pursuant to an official job duty, then the employee speaks as an employee rather than as a citizen, and receives no First Amendment protection.¹⁰ Although this rule created a myriad of problems for most public sector employees, it created additional problems for national security employees, whose employers can always argue that part of their official job duty is protecting the country's national security interests. That is, even if the particular employee's job is only marginally related to national security, the employer could reasonably argue that the overall national security interest of the agency makes protecting that interest an official duty of the employee. As a result, national security employees cannot speak about even ordinary official duties, such as filling out forms, reporting budgeting mistakes, or any other matter that the government can tie to a national security interest, regardless of whether the employee speech is related to an official job duty.

Second, the *Garcetti* decision used the existence of statutory protections for employees, such as whistleblower acts, to justify its removal of First Amendment protections.¹¹ Although Justice Souter pointed out in his dissent that this option leaves many

5. See *infra* Part II.A.

6. 461 U.S. 138 (1983).

7. See *infra* Part II.A. Although some commentators and courts refer to the test as the *Connick* test, most refer to it by its original name, the *Pickering* test, even though the original test has been altered by *Connick*. This paper refers to the test as the *Pickering* test.

8. 126 S. Ct. 1951 (2006).

9. See *id.* at 1959–62 (determining that an employee is not protected by the First Amendment when speaking pursuant to his duties as a public officer).

10. See *id.* at 1960.

11. See *id.* at 1962.

employees with an uncertain future,¹² national security employees in particular have extremely limited statutory protection if they choose to speak out about legitimate problems within their agencies.¹³ Thus, national security employees cannot depend on First Amendment protections due to the government's ability to assert national security as a job duty, and they can rarely, if ever, turn to a federal whistleblower statute for protection because little protection exists for most of the affected employees.¹⁴ National security employees, then, are left exactly where Justice Holmes began: with a constitutional right to speak about politics, but without a constitutional right to keep their jobs.

Part II.A of this paper briefly outlines the *Pickering* balancing test, with the *Connick* modifications, and Part II.B describes how the *Garcetti* decision substantially changed the *Pickering* test. Part III details how the *Garcetti* decision fails national security employees in particular. Part III.A discusses the concept of "job duty," and how altering the test to that of "essential job function" might help some, but not all, national security employees. Part III.B discusses the Whistleblower Protection Act of 1989 and its impact on national security employees. Part III.C discusses the Intelligence Community Whistleblower Protection Act of 1998, and argues that even this attempt at protecting national security employees left a great deal of gray area, necessitating the return to the *Pickering* test. Part IV argues for a return to the traditional *Pickering* test, at least with respect to national security employees.

12. See *id.* at 1971 (Souter, J., dissenting) (explaining that an employee will receive different treatment under federal, state, and local laws).

13. See *infra* Parts III.B–C.

14. For the purposes of this paper, only the federal Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1201–1222 (2000), and the Intelligence Community Whistleblower Protection Act of 1998, 5 U.S.C. app. § 8H (2000 & Supp. IV 2006), have been analyzed. There may be other statutory recourse available to individual employees, such as the Military Whistleblower Protection Act, 10 U.S.C. § 1034 (2000), for those working in the armed forces. However, since these two statutes are the major federal statutes covering the affected employees, these are the only two discussed.

II. PUBLIC SECTOR EMPLOYEES AND THE FREEDOM OF SPEECH

A. *Pickering v. Board of Education: Creating a Balancing Test*

In 1968 the Supreme Court decided a case in which a public school teacher was fired for writing a letter to the newspaper criticizing the local board of education's handling of tax increases designed to raise new revenue for the school system.¹⁵ The teacher sued the board, claiming that the act of writing the letter was protected by his First Amendment right to free speech.¹⁶ The Supreme Court thus faced the issue of determining when an employee has First Amendment protection for addressing matters of "public concern," stating, "The problem in any case is to arrive at a balance 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 the efficiency of the public services it performs through its employees."¹⁷ While the Court did not offer a more precise definition for deciding what speech activities constitute matters of public concern, it found the teacher's letter about the handling of the tax increase to be such a matter.¹⁸ On the opposite end of the test, the Court characterized the employer's interests largely in terms of detriment to the employer: if the employer is relatively unharmed by the speech, the employee's speech is entitled to First Amendment protection.¹⁹ Thus, the Supreme Court in *Pickering* set out a relatively broad, albeit underdeveloped, test for certain types of employee speech. So long as the employee speaks about a matter of public concern, and the speech is not detrimental to the interests of the employer, the speech is protected.²⁰

The Court recognized the lack of definition in the *Pickering* balancing test when it decided *Connick v. Myers*.²¹ In *Connick*, Sheila Myers, an assistant district attorney, was fired after she circulated a questionnaire around the office concerning matters

15. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

16. *See id.* at 565.

17. *Id.* at 568.

18. *See id.* at 571-72 (discussing the importance of having teachers, who are informed about the subject of fund allocation, speak out about the issue).

19. *See id.* at 572-73.

20. *See id.* at 572-74.

21. 461 U.S. 138 (1983).

such as the office transfer policy, office morale, employee confidence in supervisors, and whether her fellow attorneys felt pressured to work on political campaigns.²² When the case came before the Supreme Court on a First Amendment claim, the Court first addressed whether Myers's speech was a matter of public concern.²³ The Court explained that this question should be decided after considering "the content, form, and context of a given statement."²⁴ Examining the questionnaire using this analysis, the Court held that only the question that asked if attorneys felt pressured to work on political campaigns was a matter of public concern.²⁵ The remaining questions were deemed to be questions regarding internal office policy, not matters of public concern.²⁶ Regarding the government interest side of the balancing test, the Court acknowledged *Pickering's* detriment analysis by concluding that Myers's actions disrupted the office.²⁷ However, the Court added to the detriment/disruption analysis by considering the "manner, time, and place" in which the disruption occurred.²⁸ The Court ultimately sided with the government, holding that Myers's discharge did not violate her First Amendment rights because only one question on the questionnaire was protected speech and the office was substantially disrupted by her actions.²⁹ *Connick*, therefore, clarified the balancing test broadly set forth in *Pickering*. While the test has been interpreted differently by the

22. *See id.* at 141. Myers circulated the questionnaire as a result of her unhappiness over a pending job transfer. *See id.* at 140–41.

23. *See id.* at 146. It is important to note that speech by public sector employees is only protected when they are speaking on matters of public concern. This is because "[w]hen 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." *Id.* Thus, an employee who repeatedly submits postings on an internal office blog complaining about the cafeteria food can theoretically be fired if she does not have a contract or a collective bargaining agreement protecting her from termination without just cause. Despite the employee's beliefs to the contrary, her concern about the food is not a matter of public concern, and thus is never, under any analysis, protected First Amendment speech.

24. *See id.* at 147–48.

25. *See id.* at 149.

26. *See id.* at 147–49.

27. *See id.* at 153.

28. *See id.* at 152–53.

29. *See id.* at 154.

circuit courts and varies slightly in different situations, the basic test has remained the same since 1983.³⁰

B. *Garcetti v. Ceballos: Altering the Pickering Landscape*

The *Pickering* landscape changed significantly in 2006 when the Supreme Court decided *Garcetti v. Ceballos*.³¹ Richard Ceballos worked as a deputy district attorney for the Los Angeles County District Attorney's Office.³² In February 2000, a defense attorney contacted Ceballos concerning a pending criminal case, requesting that Ceballos review suspected inaccuracies in an affidavit used to obtain a critical search warrant.³³ As such requests were routine, Ceballos investigated the affidavit and discovered that it did contain many misrepresentations.³⁴ Ceballos discussed his concerns with the deputy sheriff, and contacted his supervisors when he did not receive an adequate response.³⁵ In doing so, he prepared two memoranda: one discussing his concerns and another describing his phone conversation with the deputy sheriff.³⁶ Despite Ceballos's concerns about the affidavit, his superiors in the district attorney's office continued the prosecution.³⁷ Although the defense called Ceballos to testify to the misrepresentations in the affidavit, the trial court upheld the validity of the warrant.³⁸

After this incident, Ceballos was reassigned from his position as a calendar deputy to a trial deputy, transferred to another courthouse, and denied a promotion.³⁹ Alleging that these actions were retaliatory in nature, Ceballos filed an employment grievance.

30. Prior to *Garcetti*, federal courts pared *Pickering* and its progeny into a two-prong test to decide employee free speech cases. See Robert C. Cloud, *Public Employee Speech on Matters Pursuant to Their Official Duties: Whistle While You Work?*, 210 EDUC. L. REP. 855, 865 (2006). First, the First Amendment will only "protect[] public employees when they speak as citizens on matters of public concern," and not when they speak on matters of personal interest. *Id.* Second, "[g]overnment employers have the right and authority to restrict employee speech that disrupts organizational efficiency and to discipline employees who violate the employer-employee relationship." *Id.*

31. 126 S. Ct. 1951 (2006).

32. *Id.* at 1955.

33. *Id.*

34. *Id.*

35. *Id.* The meeting with his supervisors "allegedly became heated." *Id.* at 1956.

36. See *id.* at 1955-56.

37. See *id.* at 1956.

38. See *id.*

39. See *id.*

ance, but the grievance was denied.⁴⁰ Finally, Ceballos filed suit in the United States District Court for the Central District of California, asserting a claim under 42 U.S.C. § 1983 and alleging that his employer violated the First and Fourteenth Amendments by retaliating against him for the memo to his superiors.⁴¹ The district court granted the defendants' motion for summary judgment, "[n]oting that Ceballos wrote his memo pursuant to his employment duties . . . [and] conclud[ing] he was not entitled to First Amendment protection for the memo's contents."⁴² The United States Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment."⁴³ The court of appeals analyzed the case under the *Pickering* test, holding that the memo alleging government misconduct was clearly a matter of public concern, and that the defendants "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" due to the memo.⁴⁴

The Supreme Court reversed in a five-to-four decision.⁴⁵ Writing for the majority,⁴⁶ Justice Kennedy noted that the "controlling factor" in the case was that Ceballos's asserted expressions "were made pursuant to his duties as a calendar deputy."⁴⁷ The majority then 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."⁴⁸ In

40. *See id.*

41. *Id.*

42. *Id.*

43. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

44. *Id.* at 1178–80.

45. This case has an interesting political background. It was originally heard when Justice O'Connor was still on the Court, but had not yet been decided when Justice O'Connor retired and Justice Alito took her place. *See* Martin A. Schwartz, *Supreme Court Narrows Public Employee Free Speech Protection*, N.Y.L.J., July 21, 2006, at 3. The Court ordered a second oral argument, causing some to speculate that the Justices may have been evenly divided before Justice Alito was seated and therefore needed his vote to break the tie. *See id.* (citing Linda Greenhouse, *Some Whistle-Blowers Lose Free Speech Protection*, N.Y. TIMES, May 31, 2006, at A16).

46. Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. *Garcetti*, 126 S. Ct. at 1954.

47. *Id.* at 1959–60.

48. *Id.* at 1960. Judge O'Scannlain, concurring in the Ninth Circuit's judgment, may have given the Supreme Court the idea behind its holding when he wrote, "when public

creating this distinction between speech as a private citizen (protected) and speech as an employee pursuant to an official job duty (not protected), Justice Kennedy added, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."⁴⁹ The majority rejected the Ninth Circuit's interpretation of the *Pickering* balancing test, stating that allowing employers to restrict speech solely tied to job duties does not conflict with the First Amendment concept of allowing employees to speak out about matters of public concern.⁵⁰ If employers feared that employees lacked an outlet for airing their grievances, the majority assured them that they could craft internal policies and procedures for handling such matters.⁵¹ The majority also rejected a concern raised in Justice Souter's dissent regarding the suggestion that "employers can restrict employees' rights by creating excessively broad job descriptions."⁵² Finally, the majority asserted that employees were not left without any options:

Exposing governmental inefficiency and misconduct is a matter of considerable significance. . . . The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who . . . expose wrongdoing. . . . These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.⁵³

Although the *Pickering* test has not been abolished as a result of *Garcetti*, it is unclear what remains. Rather than first inquir-

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." *Ceballos*, 361 F.3d at 1189 (O'Scannlain, J., concurring).

49. *Garcetti*, 126 S. Ct. at 1960.

50. *See id.* at 1961.

51. *See id.*

52. *Id.* (citing *id.* at 1965 n.2 (Souter, J., dissenting)). A total of three dissenting opinions were filed. *Id.* at 1954. Justices Stevens and Breyer each dissented separately, while Justice Souter's dissenting opinion was joined by Justices Stevens and Ginsburg. *Id.* The dissents of Justices Stevens and Breyer will not be discussed due to their brevity and inapplicability to this article.

53. *Id.* at 1962. The majority also declined to decide "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching," leaving that problem for another day. *Id.*

ing whether the speech was a matter of public concern, the *Garcetti* Court asked as a threshold question whether the speaker acted as a citizen or as an employee.⁵⁴ Under this 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.”⁵⁵ If the employee’s speech was pursuant to an official job duty, he spoke as an employee, and not as a citizen. Only if the employee spoke as a citizen would the *Pickering* test come back into play; however, it is as yet unresolved what the lower courts will make of this citizen/employee distinction.⁵⁶ Nevertheless, the Court has tightened its restrictions considerably on what sort of speech public sector employees may make, thereby altering the *Pickering* landscape dramatically. Although all public sector employees are substantially affected, national security employees now have the least First Amendment protection as a direct result of the *Garcetti* decision.

III. GARCETTI’S IMPACT ON NATIONAL SECURITY EMPLOYEES

Although national security employees were never discussed in the *Garcetti* decision, they will be harmed more than any other type of government employee by the case. National security employees are employees of various federal agencies—the Central Intelligence Agency (“CIA”), the National Security Agency (“NSA”), the Federal Bureau of Investigation (“FBI”), the Department of Homeland Security (“DHS”), etc.—whose general job function is to protect the national security of the United States.⁵⁷

54. See *id.* at 1960; see also Samuel Estreicher, *Public Workers’ Job-Related Speech: First Amendment Guards Lifted*, N.Y.L.J., July 17, 2006, at 4. “The *Garcetti* holding creates an important new gloss in deciding the threshold inquiry: whether the government worker is speaking as a citizen on a matter of public concern. . . . [T]he Court emphasizes whether the speaker is acting in the role of ‘citizen.’” *Id.*

55. Estreicher, *supra* note 54, at 4.

56. Justice Souter’s dissent criticized the majority for creating this arbitrary distinction between speech made pursuant to an official job duty and speech made as a citizen. See *Garcetti*, 126 S. Ct. at 1964 (Souter, J., dissenting).

57. The vast majority of these agencies are part of the “intelligence community” created by the National Security Act of 1974, 50 U.S.C. § 401a(4) (2000 & Supp. III 2005). It is worth noting that, in today’s modern era, the terms “intelligence” and “national security” are used almost interchangeably throughout many of the statutes, agency definitions, and literature on this subject. For example, the National Security Act has as one of its definitional terms “intelligence related to the national security.” 50 U.S.C § 401a(5) (2000). “National security” is used in this paper as a broad, all-encompassing term, which includes

The *Garcetti* decision failed these employees in two respects. First, it failed them by making it extremely easy for the government to argue that it is a job duty of these individuals to protect national security, despite Justice Kennedy's assertion that overbroad job descriptions will not become an issue.⁵⁸ Second, the decision failed national security employees who seek to address government wrongdoing, because statutory protections available to other employees are largely unavailable.⁵⁹ As a result, national security employees are no longer offered First Amendment protections that were formerly available to them under the *Pickering* analysis, and cannot benefit from statutory protection because it is either nonexistent or extremely weak.⁶⁰ Therefore, an exception to *Garcetti* must be created for national security employees by allowing a return to the traditional *Pickering* analysis.

A. National Security as a Job Duty

1. Imputing National Security as a Job Duty

The *Garcetti* majority cast aside Justice Souter's suggestion that employers could restrict employees' rights by creating overly broad job descriptions, stating that job descriptions often differ from actual job duties.⁶¹ Justice Souter nonetheless cautioned the Court that he remained "pessimistic enough" to foresee a future in which government employers will merely expand job descriptions to include more official duties, thus excluding virtually all forms of currently protected First Amendment speech.⁶² He then noted that, were this expansion of job descriptions to occur, the litigation would evolve into a battle over whether the duties thus described were actually performed by the employee instead of a battle over whether the employer has a right to describe job duties in a way that will severely curtail permissible speech.⁶³

the intelligence community. As for the DHS, part of it falls under the "intelligence community" definition of 50 U.S.C. § 401a(4) (2000 & Supp. III 2005), and the rest of it falls under the Homeland Security Act of 2002, 6 U.S.C §§ 101–103, 111–113 (Supp. IV 2006).

58. See *Garcetti*, 126 S. Ct. at 1961.

59. See *infra* Parts III.B–C.

60. See *infra* Parts III.B–C.

61. See *Garcetti*, 126 S. Ct. at 1961–62.

62. See *id.* at 1965 n.2 (Souter, J., dissenting).

63. See *id.* (Souter, J., dissenting).

Does such a battle over job descriptions versus actual job duties matter when it comes to national security employees? That is, could an employee ever make a winning argument to a tribunal that it is *not* an “official job duty” to serve and protect the country’s national security interests? After all, this hypothetical employee would have already been fired, presumably for saying something he or she should not have said. Setting aside for the sake of argument any ulterior motive of the employer, such as discriminatory intent, what other possible argument would the employer have for firing the individual but to protect national security? That is the argument that the tribunal is most likely to believe and to accept—especially given the rule in *Garcetti* that an employer can fire an employee for speech made pursuant to an official job duty.

A quick perusal of the mission statements, major responsibilities, and purposes of most national security agencies reveals as a core goal the protection of national security. For example, the CIA’s website asserts that the agency’s function is “to assist the Director of the Central Intelligence Agency in carrying out [his or her] responsibilities.”⁶⁴ One of those responsibilities is to “[p]erform[] such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.”⁶⁵ The website goes on to list the new intelligence initiatives the CIA has engaged in to address the “changing global realities” that have “reordered the national security agenda.”⁶⁶ The CIA is not the only agency to prominently state its goal of protecting national security. The Defense Intelligence Agency, the FBI, the National Geospatial-Intelligence Agency, and the NSA, for example, all address national security as a prominent goal in their mission statements.⁶⁷

64. CIA, About the CIA, <https://www.cia.gov/cia/information/info.html> (last visited Feb. 17, 2007).

65. *Id.*

66. *Id.*

67. The mission statement of the Defense Intelligence Agency is to “[p]rovide timely, objective, and cogent military intelligence to warfighters, defense planners, and defense and national security policymakers.” Defense Intelligence Agency: Employment, <http://www.diajobs.us> (last visited Feb. 17, 2007). The FBI declares that its mission is “[t]o protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.” FBI, About Us—Quick Facts, <http://www.fbi.gov/quickfacts.htm> (last visited Feb. 17, 2007). The National Geospatial-Intelligence Agency maintains that it is “[a] Crucial Mem-

These are, of course, only mission statements or descriptions of the agencies' general functions and are not the actual "job duties" of individual employees. However, it would seem highly unusual for an employee's job duties *not* to include adhering to the overall function, goal, or mission of the employer. In this sense, employees working for the CIA would *always* have as a job duty upholding and protecting national security because that is an official duty of the employer itself, regardless of the individual employee's actual day-to-day activities.⁶⁸ If it is an official duty of the employer to protect the national security of the United States, is that official duty imputed to the individual employee? Given the high priority of national security, government agencies, such as the CIA, could easily impute their agency function onto every employee.

The *Garcetti* Court did not define "official duties," offering only the opinion that an employee's official duties do not merit judicial supervision:

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. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.⁶⁹

This statement seems to indicate that the Court did not wish to interfere with an employer's right to define job duties, or with the employer's right to appropriately discipline employees who disobey proscribed rules. At the same time, the Court claimed that employees retain First Amendment rights when they speak as

ber of the Intelligence Community," stating that it "provides timely, relevant, and accurate geospatial intelligence in support of national security objectives." Nat'l Geospatial-Intelligence Agency, <http://www.nga.mil> (follow "About NGA" hyperlink; then follow "Fact Sheets" hyperlink; then follow "The National Geospatial-Intelligence Agency" hyperlink) (last visited Feb. 17, 2007). As for the NSA, it derives its mission statement from Executive Order 12,333, and declares, "[t]he Information Assurance mission provides the solutions, products, and services, and conducts defensive information operations, to achieve information assurance for information infrastructures critical to U.S. national security interests." NSA, Mission Statement, <http://www.nsa.gov/about/about00003.cfm> (last visited Feb. 17, 2007) (citing Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981)).

68. See *supra* notes 61–63 and accompanying text.

69. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006).

citizens.⁷⁰ However, the Court never actually defined which statements fall into the protected speech category and which do not.⁷¹ Because the majority offered no protection for speech made pursuant to an “official duty,” without defining that speech, it seems that if an employer can point to a job description or offer evidence of official duties, the employee cannot win.

Because the *Garcetti* decision mandating the new employee/citizen distinction is relatively recent, it is primarily federal district courts, and not appellate courts, that have attempted to interpret whether the speech was made pursuant to a job duty. These courts have not been consistent in determining what constitutes a “job duty.” For example, the Northern District of Ohio held that *Garcetti* is to be “narrowly” interpreted, and that “[t]he preliminary analysis is one of ‘job relatedness,’” not whether the speech was made pursuant to a job duty.⁷² That court went on to explain that if the speech is not required by the employee’s job or related to the required part of the employee’s job then the traditional *Pickering* analysis still applied.⁷³

In *Rohr v. Nehls*,⁷⁴ the Eastern District of Wisconsin instead looked to the specifics of the speech activity itself. In that case, a deputy sheriff alleged that he was passed over for a promotion because he complained to supervisors about the new sheriff’s actions.⁷⁵ The court refused to grant summary judgment for the new sheriff, deciding that the deputy sheriff’s speech⁷⁶ was not barred by *Garcetti*.⁷⁷ The court concluded that because the deputy sheriff failed to go through the appropriate channels in making his complaint, he acted outside the scope of his employment, thus

70. *See id.*

71. *See id.*

72. *Pittman v. Cuyahoga Valley Career Ctr.*, 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006). *Pittman* involved a full-time substitute teacher who was not re-hired after several incidents of insubordination, including letting his students out early without approval and arguing with the principal in the school parking lot. *See id.* at 910–13. Along with a racial discrimination claim, *Pittman* alleged that he was fired because the school disapproved of his prior written proposals to change the school’s parking lot system. *Id.* at 913–14.

73. *Id.* at 929–30. The court ruled that Mr. *Pittman*’s speech activity was not a matter of public concern, as it mainly pertained to his anger at being given additional job duties. *See id.* at 930. Thus, *Garcetti* did not apply.

74. No. 04-C-477, 2006 WL 2927657 (E.D. Wis. Oct. 11, 2006).

75. *See id.* at *1–2.

76. Specifically, *Rohr* complained that the new sheriff improperly closed an investigation into the possession of illegal fireworks. *See id.* at *2.

77. *See id.* at *7.

freeing him from *Garcetti*'s "employee-speech" provisions.⁷⁸ According to the court, even though Rohr's complaints concerned his employment, they "were simply not the work product of the sheriff's department in the same way Ceballos' memo might have 'belonged' to the district attorney's office in *Garcetti*."⁷⁹ Because the deputy sheriff performed a job duty in an unofficial manner, his speech was that of a citizen and not that of an employee⁸⁰—an odd result that seems to hinge on a technicality. However, if this court had applied the test used in the Ohio case,⁸¹ the result might have been different. There were procedures in place to complain about the sheriff,⁸² and *unofficially* reporting problems in the department could reasonably be related to the job duty of *officially* reporting violations.

These two cases, while certainly not the only cases interpreting *Garcetti*, demonstrate the difficulty in determining what is a "job duty" and what is not. However, in the limited time that lower courts have had to interpret the *Garcetti* decision, at least some appear to have done so rather narrowly. For example, in *Green v. Barrett*,⁸³ the Northern District of Georgia considered the speech of a Chief Jailer, who testified in court that her prison was poorly maintained and "unsafe."⁸⁴ The court concluded that she was not acting pursuant to an official job duty, and that "the *Garcetti* holding is limited to the memorandum Ceballos wrote to his superiors."⁸⁵ The court focused on the fact that the speech at issue was in-court testimony⁸⁶ and seemed to hold that testifying in court is protected free speech, even though the Chief Jailer spoke about her official duty of operating the jail.⁸⁷ In comparison, the

78. *See id.*

79. *Id.*

80. *See id.*

81. *See Pittman v. Cuyahoga Valley Career Ctr.*, 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006) (finding that *Garcetti* applies when the employee's job requires the speech in question).

82. *Rohr*, 2006 WL 2927657, at *2.

83. No. 1:04 CV MHS, 2006 WL 2583291 (N.D. Ga. Sept. 8, 2006).

84. *See id.* at *1. The Chief Jailer gave testimony that prisoners could open locks and walk around freely, and that she felt high-security prisoners should not be housed at the facility. *See id.* She was fired the day after giving testimony in court. *See id.*

85. *Id.* at *2.

86. *Id.*

87. It is worth noting that, although Ceballos was demoted from his job due to his memorandum, he too spoke out about his job duty in court. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956 (2006).

deputy sheriff's actions in *Rohr* were protected because his complaints were not the work product of the department.⁸⁸

The Middle District of Pennsylvania ruled similarly in a case involving a police officer who was disciplined after reporting other officers' conduct.⁸⁹ Specifically, the officer disclosed instances where an officer attempted to have him falsify a report, an officer tampered with someone's vehicle, and an officer mishandled a criminal investigation.⁹⁰ Although the Pennsylvania State Police relied heavily on *Garcetti*⁹¹ and offered as evidence job descriptions regarding reporting improper conduct,⁹² the court decided that the reporting was protected speech because a private citizen could have reported all of the claims.⁹³

These examples demonstrate a sampling of the lower courts' current narrow interpretation of *Garcetti*: unless the case is nearly factually identical to *Garcetti*, they decline to apply the new "job duty" rule.⁹⁴ However, none of the above cases dealt with national security employees reporting gross mismanagement of a federal agency.

National security employees cannot rely on the lower courts' narrow interpretation of *Garcetti* due to the tendency of these same courts to broadly protect national security interests. For example, an issue currently under scrutiny is the right of the NSA

88. *Rohr v. Nehls*, No. 04-C-477, 2006 WL 2927657, at *7 (E.D. Wis. Oct. 11, 2006).

89. *Skrutski v. Marut*, No. 3:CV-03-2280, 2006 WL 2660691, at *2 (M.D. Pa. Sept. 15, 2006).

90. *See id.* at *3-4.

91. *See id.* at *9.

92. *Id.* at *5-6.

93. *Id.* at *10.

94. Some district courts, however, have broadly applied the "job duties" limitation on employee speech. For example, although the Fourth Circuit has only heard a handful of *Garcetti* cases, it appears to have taken this approach. In *Franklin v. Clark*, 454 F. Supp. 2d 356 (D. Md. 2006), the police chief of human resources sued after being terminated for preparing an analysis on the inefficient use of take home vehicles by police officers. *See id.* at 359-60. The court determined that the report, as well as an e-mail discussion about the fleet report with the deputy mayor, fell within the scope of *Garcetti* because both were speech activities made pursuant to an official job duty. *See id.* at 360-61. In *Andrew v. Clark*, Civ. No. AMD 04-3772, 2007 WL 325271 (D. Md. Feb. 5, 2007), a police officer involved in a deadly barricade incident was "deeply disturbed" by the way in which the incident was handled. *See id.* at *1. The officer prepared an "internal memorandum" describing the event in detail, and after the police commissioner failed to respond, released it to the *Baltimore Sun*. *Id.* The court held that *Garcetti* applied and that the officer could not transform his speech into protected public speech merely by releasing it to the media. *See id.* at *2-3.

to eavesdrop on individuals suspected of involvement in terrorist activity.⁹⁵ The President gave this power to the NSA⁹⁶ after receiving congressional authorization “to use all necessary and appropriate force” against “persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁹⁷ Although the authorization does not expressly provide for the warrantless wiretap program, the Department of Justice has argued that Supreme Court precedent gives substantial authority to the President when it comes to matters of national security and that the authorization should therefore be interpreted broadly.⁹⁸ Although the wiretap program has recently come under severe scrutiny, it has existed without judicial interference since 2002, proving the government’s ability to successfully assert national security as a justification for taking away long-held rights, such as the right to be free from warrantless searches.⁹⁹ As the NSA program demonstrates, courts (as well as Congress and the general public) give more weight to national security interests than to other governmental interests. For this reason, national security employees cannot rely on the lower courts’ current narrow interpretation of *Garcetti*.

95. See Katherine Wong, Recent Development, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 517 (2006) (noting that questions exist as to the validity of the new NSA program).

96. See *id.* at 518.

97. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

98. U.S. DEPT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (2006), <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

99. Although the NSA program was authorized in 2002, President Bush is currently pressing Congress to officially authorize it via a bill, which may not happen given the outcome of the recent elections. See Eric Litchtblau, *The 2006 Elections: With Power Set to Be Split, Wiretaps Re-emerge as Issue*, N.Y. TIMES, Nov. 10, 2006, at A28. Courts have already begun to struggle with the issue of national security as a government interest. In response to a lawsuit by the ACLU, the Eastern District of Michigan issued a landmark decision holding the wiretap program unconstitutional. *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *appeal docketed*, Nos. 06-2095, 06-2140 (6th Cir. Aug. 17, 2006). The case is currently on appeal to the Sixth Circuit, and the government has successfully argued for a stay of the district court’s order pending the appeal. *ACLU v. NSA*, 467 F.3d 590, 591 (6th Cir. 2006).

2. Job Duty as an Essential Job Function

Although the *Garcetti* decision has only recently introduced the concept of job duties or descriptions to the arena of employee speech, the area of employment discrimination has some established law on the concept. The Americans with Disabilities Act of 1990 (“ADA”)¹⁰⁰ defines a “qualified individual with a disability” as:

an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.¹⁰¹

Some significant provisions in the statute are worth noting. First, someone seeking ADA protection must prove, among other things, that he or she can perform the essential functions of the position.¹⁰² In a similar vein, employees seeking First Amendment protection must prove that their speech was not made pursuant to an official duty. In both cases, then, employees must rely on the court’s decision regarding job duties as a threshold determination of whether they will receive statutory or constitutional protections. In the case of the ADA, the statute states that “consideration *shall* be given” to the employer’s assessment of essential job functions.¹⁰³ Additionally, the court *shall* consider as evidence of essential functions any written descriptions of the job.¹⁰⁴ As written, the ADA appears to give considerable deference to the employer’s assessment of essential job functions.

Courts, however, do not always give deference to the employee’s job description.¹⁰⁵ Indeed, an Equal Employment Oppor-

100. 42 U.S.C. §§ 12101–12213 (2000).

101. *Id.* § 12111(8).

102. *See id.*

103. *Id.* (emphasis added).

104. *Id.*

105. *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998), explains the concept of the essential function. In *Deane*, the Third Circuit concluded that an employee need only be able to perform essential job functions, not *all* job functions. *Id.* at 146–47. The employee in *Deane* was a nurse who could no longer lift patients. *Id.* at 141. As evidence

tunity Commission (“EEOC”) regulation regarding the implementation of the ADA offers helpful guidance on how to determine whether a particular job duty is an “essential job function”: “[t]he term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.”¹⁰⁶

In looking at the EEOC’s definition of “essential function” in the context of national security employees and the restriction of free speech, lower courts should interpret *Garcetti* as if it said *essential* duties, rather than simply “duties.”¹⁰⁷ It is critical to note that the term “job duty” is substantially broader than the ADA’s “essential function.” A job duty may include *any* duties that an employee performs while an essential job function does not include marginal duties, but rather, includes only those constituting the “fundamental job duties of the employment position.”¹⁰⁸ As the *Garcetti* holding did not define job duty,¹⁰⁹ this more narrow definition would prevent national security employers in particular from firing employees whose specific jobs have nothing to do with protecting national security.

For example, imagine that part of a secretary’s job at the CIA is to answer the phone for her boss, a high-ranking official with a security clearance.¹¹⁰ The secretary begins to handle many phone calls from a suspected leader of a foreign terrorist group, and although she does not know much about her boss’s job, she knows that it should not involve this sort of activity. She is also concerned about his suspicious behavior. The secretary decides to re-

that lifting patients was an essential job function, the Medical Center offered a written job description, which clearly listed the duties the nurse could no longer perform. *See id.* at 147–48. The nurse explained that orderlies do the majority of heavy lifting and, additionally, the medical center used a team approach to patient lifting, making it highly unlikely that she would even need to lift a patient by herself, regardless of her disability. *Id.* at 147. The court found that there was a genuine issue of material fact as to whether patient lifting was an essential job function, deciding that “the job description is not, as [the Medical Center] contends, incontestable evidence that unassisted patient lifting is an essential function of [the nurse’s] job.” *Id.* at 148.

106. 29 C.F.R. § 1630.2(n)(1) (2006) (emphasis added).

107. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

108. 29 C.F.R. § 1630.2(n)(1) (2006).

109. *See Garcetti*, 126 S. Ct. at 1961.

110. This example assumes an entry-level secretary with no access to classified documents and no security clearance. Therefore she performs her daily tasks with no knowledge of any data critical to national security.

port this activity to the appropriate supervisor within her division. The supervisor becomes angry with her for betraying the secrets of her boss, and fires her without investigating the situation. Although reporting such activity was not one of the secretary's job duties,¹¹¹ the CIA could argue that it was her duty to protect the country's national security interests by not revealing any information to her division supervisor. The CIA's broad mission would therefore become her specific job duty. If a court read *Garcetti* broadly, it could conclude that protecting national security is one of her job duties, as it is for all CIA employees.¹¹² If, however, the court adopted an essential job function test, it could conclude that protecting national security is not an essential function of this employee. Although the CIA's primary purpose is to protect national security interests, that duty is marginal to the secretary's specific position within the CIA. Because protecting national security by reporting the activity of her boss is not an essential job function, she speaks as a citizen,¹¹³ and the traditional *Pickering* balancing test would apply.¹¹⁴

Changing the *Garcetti* test from "pursuant to an official job duty" to "pursuant to an essential job function" would help many national security employees for whom protecting national security is a marginal rather than essential job function. As discussed in Parts III.B and III.C below, many national security employees are offered little statutory protection if they choose to be a whistleblower.¹¹⁵ Additionally, the agency as a whole, rather than the individual employee, is exempt from the Whistleblower Protection Act.¹¹⁶ Consequently, many employees whose jobs are unrelated to protecting national security cannot rely on whistleblower statutes if they suddenly discover important information. National security employees therefore need more First Amendment protection than *Garcetti* has provided.

111. Again, assuming any duty to report this behavior is not in her job description.

112. Indeed, the *Garcetti* Court offered little guidance for determining what is an official duty, but held that an employee is not protected if the speech is communicated while the employee is "simply performing his or her job duties." *Garcetti*, 126 S. Ct. at 1961.

113. *See id.* at 1960.

114. *See id.* at 1958 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). *See infra* Part IV for an analysis of this example under the *Pickering* test.

115. *See infra* Part III.B–C.

116. *See* 5 U.S.C. § 2302(a)(2)(C)(ii), (b)(8) (2000 & Supp. IV 2006).

There is one problem, however, with the “essential job function” test: while it prevents the government from universally invoking national security as a defense for firing any national security employee, it does not prevent the government from firing people who speak out against legitimate problems. National security employees are even more at risk than other public sector employees because their employers can argue they have a duty to protect national security in addition to all their other job duties. For example, suppose an entry-level accountant at the NSA discovers that key officials have mishandled funds. He reports the error to his immediate supervisor but is told to say nothing further. Disregarding this directive, the accountant prepares a memo detailing his concerns and sends it to the head of his department. The head of the department criticizes the accountant’s supervisor, who retaliates by firing the accountant. Setting aside any whistleblower protection the accountant may have, he files suit in federal court, arguing that his memo was protected speech under the First Amendment. The government employer, the NSA, has two possible responses: (1) that one of the accountant’s official job duties is to prepare such memoranda, and as in *Garcetti*, the employer can fire the accountant for the content of his memo; or (2) in disclosing that key officials at the NSA mishandled funds, the accountant failed to protect national security, which is one of his official job duties as an employee of the NSA. If the court invoked an “essential job function” test, the government could still argue that preparing memoranda and reporting errors are essential job functions for accountants. However, the employer could no longer argue that protecting national security is an essential job function for an accountant.

Furthermore, those national security employees for whom protecting national security *is* an essential job function continue to pose a problem. The EEOC regulations regarding essential functions in the ADA also note:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.¹¹⁷

Thus, protecting national security is an essential job function of many national security employees. For example, an Operations Officer in the CIA's Clandestine Service collects foreign intelligence while living and working undercover at an undisclosed location abroad.¹¹⁸ Therefore, this position exists specifically to protect national security interests. There are likely a limited number of these positions available, and the positions are highly specialized. As another example, an FBI Special Agent is "responsible for conducting sensitive national security investigations and for enforcing over 300 federal statutes."¹¹⁹ A Special Agent's primary responsibility is protecting national security. For these and many other national security employees, an essential function test would not help protect their right to free speech. In sum, although an "essential job function" test would be an improvement over the current "official job duty" test and would offer more First Amendment protection to some national security employees, the test would still leave many national security employees without adequate First Amendment protection. Therefore, at least with respect to national security employees, the courts should make an exception to *Garcetti*, allowing a return to the traditional *Pickering* analysis.

B. *The Garcetti Safeguard—The Whistleblower Protection Act*

The *Garcetti* majority offered the existence of statutory protections as a justification for its denial of First Amendment protection for public sector employees.¹²⁰ The Court recognized the need for employees to expose government inefficiency and misconduct. *Garcetti* concluded that, although employees can no longer claim a First Amendment right to blow the whistle, they can claim a right to do so under "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—

117. 29 C.F.R. § 1630.2(n)(2)(i)–(iii) (2006).

118. See CIA, About the Clandestine Community, https://www.cia.gov/careers/clan_aboutcomm.html (last visited Feb. 17, 2007).

119. FBI, Become an FBI Special Agent, <http://www.fbijobs.gov/11.asp> (last visited Feb. 17, 2007).

120. See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

available to those who seek to expose wrongdoing.”¹²¹ The Court then cited a provision from the federal Civil Service Reform Act of 1978 (“CSRA”), as well as two state provisions.¹²² This federal provision, § 2302(b)(8), discusses prohibited personnel practices, and allows an employee to disclose, without retribution, any information which he “reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”¹²³ The employee can disclose such information only if the “disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”¹²⁴ Employees are also protected when making these disclosures to the Special Counsel or Inspector General, or another individual designated by the agency.¹²⁵

This section of the CSRA is part of the Whistleblower Protection Act of 1989 (“WPA”). The WPA amended the CSRA, adding additional whistleblower protections.¹²⁶ At first glance, the WPA appears to offer substantial protection to all public sector employees, including those in the national security arena. However, § 2302(a)(2)(C)(ii) defines “agency” so as to expressly *exclude* the FBI,¹²⁷ the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the NSA, and, “as determined by

121. *Id.*

122. *Id.* (citing 5 U.S.C. § 2302(b)(8) (2000 & Supp. IV 2006)). This paper is concerned only with national security employees who work for the federal government and does not address state statutes that purport to protect state employees working in the arena of national or state security.

123. 5 U.S.C. § 2302(b)(8)(A)(i)–(ii).

124. *Id.* § 2302(b)(8)(A).

125. *Id.* § 2302(b)(8)(B).

126. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989).

127. Although this section, 5 U.S.C. § 2302(a)(2)(C)(ii), excludes the FBI from the WPA, another section of the WPA expressly *includes* the agency. Under § 2303(a), it is a prohibited personnel practice for an employee of the FBI to take or fail to take personnel action with respect to any other employee of the FBI who discloses information relating to a violation of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2303(a). The employee can make this disclosure to the Department of Justice’s Office of Professional Responsibility, the FBI’s Office of Professional Responsibility, the Attorney General, the Deputy Attorney General, the Director of the FBI, or the Deputy Director of the FBI. 28 C.F.R. § 27.1 (2006). In sum, these regulations undo the prohibition in § 2302(a)(2)(C)(ii) by creating whistleblower protection for FBI employees that is identical to the WPA’s protection, with the only differences being the reporting official and the investigating office.

the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”¹²⁸ In addition to these specific prohibitions, both §§ 2302(b)(8)(A) and 1213(a)(1) limit the disclosure of information when the disclosure is prohibited by law or the information is “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”¹²⁹ The WPA, with its prohibitions against the listed agencies and presidential and legislative power to limit access to national defense material, essentially offers no protection to many national security employees.¹³⁰

National security employees who work for an agency such as the DHS, which is not explicitly excluded from WPA’s protection under the agency definition in § 2302(a)(2)(C)(ii), still face a precarious situation even though they may currently enjoy WPA protection. Section 2302(a)(2)(C)(ii) allows the President to exempt from the WPA’s protections “any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”¹³¹ For example, even though the DHS is currently an “unlisted” executive agency,¹³² as long as one could argue its principal function is the conduct of foreign intelligence or counterintelligence activities, the President could mandate the DHS’s exemption from the WPA.¹³³ If the

128. 5 U.S.C. § 2302(a)(2)(C)(ii). The WPA also exempts the General Accounting Office. *Id.* § 2302(a)(2)(C)(iii). However, for a non-listed agency to be exempted from the WPA under § 2302(a)(2)(C)(ii), the President or his “lawful delegate” must specifically exempt the agency; the Merit Systems Protection Board, which handles whistleblower cases, cannot make such a determination absent this specific exemption by the President. *See Czarkowski v. Merit Sys. Prot. Bd.*, 390 F.3d 1347, 1350 (Fed. Cir. 2004).

129. 5 U.S.C. § 2302(b)(8)(A); *id.* § 1213(a)(1).

130. In addition, the government has made frequent use of the almost identical provision in the Freedom of Information Act (“FOIA”) that excludes national defense information from public disclosure. *See id.* § 552(b)(1). *See*, for example, *Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C. 2003), in which a former FBI employee sued the FBI under the FOIA, seeking documents relating to the whistleblowing activities that led to her termination. *Id.* at 42. The court held that the vast majority of the documents she requested were properly withheld from her under FOIA’s national security exemptions, deferring to the government’s claimed national security interests. *See id.* at 45–47. The use of FOIA to further limit the speech and whistleblowing activities of national security employees, while interesting, is beyond the scope of this paper.

131. 5 U.S.C. § 2302(a)(2)(C)(ii).

132. *See id.* § 105 (“‘Executive agency’ means an Executive department, a Government corporation, and an independent establishment.”).

133. The President or his agent must specifically mandate that an unlisted agency is exempt from the WPA. *See Czarkowski*, 390 F.3d at 1350. It is not clear how one determines whether conducting intelligence or counterintelligence activities is the principal

President were to take this action,¹³⁴ DHS employees would find themselves suddenly unprotected by the WPA.

National security employees currently protected by the WPA fear more than the chance of being declared exempt by the President; they face the additional hurdle of §§ 2302(b)(8)(A) and 1213(a)(1), which preclude whistleblower protections for disclosure of certain protected material if a statute or Executive Order has specifically prohibited disclosure of the material in the interest of national security.¹³⁵ Of course, not even *Pickering* will save employees who wish to reveal documents and materials that are clearly protected in the interest of national security. The First Amendment should not go so far as to allow employees to reveal security secrets that are critical to the government's interests. However, national security should not be used as a weapon to prevent employees from speaking out about matters traditionally protected by the First Amendment and whistleblower statutes, such as fraud, mismanagement, abuse of authority, and threats to the public safety.

C. *The Garcetti Solution? The Intelligence Community Whistleblower Protection Act*

There is another, less-known, federal whistleblower statute designed to fill the gaps left by the WPA. After much debate, the In-

function of an agency. However, the DHS states that its mission is to protect the United States from terrorist attacks—a function that surely involves many intelligence and counterintelligence activities. U.S. DEP'T OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 4 (2004), available at http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

134. However, in this example, the President would have to face a statutory rule suggesting that employees of the DHS are to have protection under the WPA. Section 9701 requires any human resources system set up by the DHS to respect the provisions regarding “protection of employees against reprisal for whistleblowing” as well as “any provision of section 2302, relating to prohibited personnel practices.” 5 U.S.C. § 9701(b)(3)(A)–(B) (Supp. IV 2006). The fact that the President has the authority to specifically exempt a national security agency under § 2302(a)(2)(C)(ii) while § 9701 mandates that employees of the DHS have § 2302 protection appears at first glance to be a statutory inconsistency. However, the mandate in § 9701 merely states that any human resources system set up by the DHS must “not waive, modify, or otherwise affect—(A) the public employment principles . . . set forth in section 2301 . . . [or] (B) any provision of section 2302.” *Id.* Thus, if the President exempted the DHS under § 2302, a human resources department set up by the agency would not be waiving a right to whistleblower protection because such a right would no longer exist. This issue has not been addressed by any court.

135. See *id.* § 2302(b)(8)(A) (2000 & Supp. IV 2006); *id.* § 1213(a)(1) (2000).

telligence Community Whistleblower Protection Act of 1998 (“ICWPA”) was passed as part of the Intelligence Authorization Act for Fiscal Year 1999.¹³⁶ The ICWPA essentially provides limited whistleblower protection to agencies specifically excluded from the broader WPA. It states:

An employee of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, or the National Security Agency . . . who intends to report to Congress a complaint or information with respect to an urgent concern may report the complaint or information to the Inspector General of the Department of Defense (or designee).¹³⁷

The ICWPA also allows employees of the FBI to report to the Inspector General of the Department of Justice.¹³⁸ The Act mirrors the WPA in that it allows any employee of an agency “determined by the President under section 2302(a)(2)(C)(ii) . . . to have as its principal function the conduct of foreign intelligence or counterintelligence activities” to report urgent concerns to the appropriate Inspector General.¹³⁹ The Inspectors General have a limited amount of time to act on any complaint received.¹⁴⁰ If an Inspector General finds the information not credible or otherwise fails to report the information to the appropriate intelligence committee heads, the employee “may submit the complaint or information to Congress by contacting either or both of the intelligence committees directly.”¹⁴¹

136. Pub. L. No. 105-272, 112 Stat. 2413 (1998). See Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235 (2001), for a detailed account of the legislative history of the ICWPA.

137. 5 U.S.C. app. § 8H(a)(1)(A) (2000 & Supp. IV 2006).

138. *Id.* app. § 8H(a)(1)(B).

139. *Id.* app. § 8H(a)(1)(C). Additionally, “[t]he ICWPA further supports the clear intent of Congress that a determination made pursuant to section 2302(a)(2)(C)(ii) by the President, or his delegate, must be explicit in order to give exempted employees an opportunity to participate in the alternate whistleblowing scheme provided for exempted intelligence employees.” *Czarkowski v. Merit Sys. Prot. Bd.*, 390 F.3d 1347, 1351 (Fed. Cir. 2004). Thus, as previously discussed, some national security employees who currently enjoy the WPA’s protection could have that protection removed by the President at any time, at which point they would have to turn to the much weaker ICWPA for whistleblower protection.

140. See 5 U.S.C. app. § 8H(a)(2)(b).

141. *Id.* app. § 8H(d)(1). However, the employee can only contact the intelligence committees directly if he first furnishes to the head of his agency a statement of his complaint and obtains from the Inspector General directions on how to contact the intelligence committees according to established security practices. *Id.* app. § 8H(d)(2)(A)–(B).

An employee covered by the ICWPA may only contact the Inspector General and Congress if it is a matter of "urgent concern."¹⁴² The term "urgent concern" is defined as:

(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but [not including] differences of opinions concerning public policy matters.

(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, administration, or operation of an intelligence activity.

(C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, constituting reprisal or threat of reprisal prohibited under section 7(c) in response to an employee's reporting an urgent concern in accordance with this section.¹⁴³

It is immediately evident that the ICWPA and the WPA differ substantially in their protections. The WPA allows employees to report matters concerning mismanagement, waste of funds, abuse of authority, substantial dangers to public health and safety, and violations of law without fear of reprisal.¹⁴⁴ By contrast, the ICWPA only addresses "urgent concerns."¹⁴⁵ The ICWPA essentially serves as a mechanism for the Inspectors General and intelligence committees to bring urgent concerns before Congress in an indirect manner.¹⁴⁶ However, what about concerns that do not rise to the level of "urgent"? Although the purpose of the ICWPA is to bring problems to Congress,¹⁴⁷ Congress specifically limited the scope of the Act to "urgent concerns," excluding an array of issues covered by the much broader WPA. For example, although the ICWPA covers employees who wish to report "flagrant problem[s] . . . relating to the funding" of an agency,¹⁴⁸ language that sounds similar to the WPA's "gross waste of funds,"¹⁴⁹ employees

142. *Id.* app. § 8H(a)(1)(A)–(C).

143. *Id.* app. § 8H(h)(1).

144. *Id.* § 2302(b)(8)(A)–(B) (2000 & Supp. IV 2006).

145. *Id.* app. § 8H(h)(1).

146. *See* Newcomb, *supra* note 136, at 1267.

147. "Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community." Pub. L. No. 105-272, 112 Stat. 2396, 2413 (1998).

148. 5 U.S.C. app. § 8H(h)(1)(A).

149. *Id.* § 2302(b)(8)(B)(ii).

covered by the ICWPA can only report flagrant funding problems that relate to an “intelligence activity” and involve “classified information.”¹⁵⁰ This limitation gives rise to two questions. First, what if the problem does not involve “funding” but instead involves a superior’s “waste” of funds? Second, what constitutes a flagrant problem involving classified information? What if the concern is flagrant and involves funding, but does not involve classified information? Does the ICWPA then not apply?

Although this is only one example, it illustrates the fundamental problem with the current federal whistleblower laws as they pertain to the majority of national security employees: there is simply too much gray area. Initially, which statute applies to the employee, the WPA or the ICWPA? Although some agencies employees are specifically exempted from the WPA and must rely on the weaker ICWPA for protection, others currently fall into a “holding pattern”; due to the nature of their jobs they enjoy protected status only at the whim of the President.¹⁵¹ For those who are specifically exempted from the WPA—employees of the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, and the NSA—some, but not all, are offered limited protection under the ICWPA. Of these, the ICWPA offers specific protection only to employees of the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and the NSA.¹⁵²

After determining which statute applies to a national security employee, what type of whistleblowing activity may he or she engage in? If the employee is protected only by the ICWPA, his or her disclosures are limited to matters of “urgent concern”—essentially, matters serious enough to warrant congressional hearings. On the other hand, if the employee falls under the WPA, his or her protection from speech-related retaliation is considerably broader.

150. *Id.* app. § 8H(h)(1)(A).

151. *See id.* § 2302(a)(2)(C)(ii). *See also supra* text accompanying notes 126–33.

152. 5 U.S.C. app. § 8H(a)(1)(A). Oddly enough, although FBI employees are afforded special protections under the WPA, they are allowed some protections under the ICWPA as well. *See id.* app. § 8H(a)(1)(B). As for the CIA, although it is not listed in 5 U.S.C. app. § 8H(a)(1)(A), its employees do receive some whistleblower protection under the ICWPA. The Central Intelligence Agency Act was amended to allow CIA employees to report directly to the CIA Inspector General flagrant problems that they would ordinarily report to Congress. 50 U.S.C. § 403q(d)(5)(A) (2000).

D. A New Possibility—The Executive Branch Reform Act

Certain members of Congress have recognized the gap left by the current state of whistleblower statutes. In April 2006, Representative Thomas Davis introduced House Bill 5112, the Executive Branch Reform Act of 2006 ("Reform Act").¹⁵³ The whistleblower provisions in the Reform Act essentially fill the gaps left by the ICWPA and mirror the WPA with regard to national security employees. In addition to rights provided in § 2303, under the Reform Act national security employees would also be protected from having their security clearances revoked as a result of reporting "a violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."¹⁵⁴ Covered agencies include the CIA, the FBI, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the NSA, and the National Reconnaissance Office.¹⁵⁵ Under this statute employees would report their concerns to their agency's Inspector General.¹⁵⁶ In remarking on the need for this legislation following the *Garcetti* decision, Representative Davis stated:

Whistleblowers often play an important role in exposing government misconduct. . . . From a practical standpoint, the decision and the reporting that followed the decision may give whistleblowers the impression that they're better off just taking their problems to the press. Some people might be okay with that, but the real goal should be the creation of a workplace environment where employees feel free to discuss waste, fraud, and abuse with employers, and employers feel more comfortable fixing the problem than covering it up. We need better government, not more headlines.¹⁵⁷

153. Executive Branch Reform Act of 2006, H.R. 5112, 109th Cong. (2006), available at <http://www.fas.org/sgrp/congress/2006/hr5112.pdf>.

154. *Id.* § 8(a), (e)(1).

155. *Id.* § 8(e)(2).

156. *Id.* § 8(b).

157. *What Price Free Speech: Whistleblowers and the Ceballos Decision: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2006) (statement of Rep. Thomas Davis, Chairman, H. Comm. on Gov't Reform). Although the Reform Act is seen as an attempt to fill in the gaps left by other whistleblower statutes, and gives much-needed protection to national security employees, it faces an uphill battle. In the fall of 2005, the House Government Reform Committee rejected a measure that would have provided stronger protection for national security whistleblowers. See Chris Strohm, *Security Agency Whistleblowers Seek Stronger Protections*, Feb. 14, 2006, <http://www.govexec.com/dailyfed/0206/021406c1.htm>.

Although the Reform Act would offer substantial whistleblower protection to the listed agencies, it does not solve the problem of agencies that are currently locked in § 2302(a)(2)(C)(ii)'s "holding pattern."¹⁵⁸ These agencies are not specifically exempted by the WPA, but could be added to the WPA's list of exempted agencies at the President's discretion.¹⁵⁹ In an age of uncertainty, where terrorism is a constant threat and even news reporters face imprisonment for failing to reveal sources,¹⁶⁰ it is not hard to imagine a situation where a President invokes his statutory power under § 2302(a)(2)(C)(ii) to exempt particular agencies from whistleblower protection. If this occurs, the statutory safety net envisioned by the *Garcetti* Court disappears for national security employees. Although the Court attempted to justify its denial of First Amendment freedoms owing to existing statutory protections, "[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law."¹⁶¹ Justice Souter also noted the impropriety of relying on variable statutes to protect the First Amendment right to free speech: "[i]ndividuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them."¹⁶² Additionally, research has demonstrated that national security whistleblowers "operate within a system of mixed messages," caught in the midst of a power struggle between Congress and the Executive Branch.¹⁶³

158. See *supra* text accompanying notes 130–33.

159. See 5 U.S.C. § 2302(a)(2)(C)(ii) (2000 & Supp. IV 2006).

160. See, e.g., Eric Schmitt, *Senator Calls for Inquiry into Journalists' Access*, N.Y. TIMES, Oct. 16, 2005, at A23 (discussing the sensational case of Judith Miller, a *New York Times* reporter who was imprisoned for eighty-five days for refusing to identify a confidential source).

161. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1970 (2006) (Souter, J., dissenting) (quoting *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996)).

162. *Id.* at 1971 (Souter, J., dissenting).

163. See LOUIS FISHER, CONG. RES. SERV., CRS REPORT FOR CONGRESS: NATIONAL SECURITY WHISTLEBLOWERS 1–2 (2005), available at <http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf>. The CRS report describes multiple whistleblower protection options available to national security employees, including the ICWPA and the WPA, as well as other, lesser-known options not discussed in this paper. The report suggests that the battle between Congress's need for critical information and the President's desire for silence has hindered the development of whistleblower laws: "Congress has never accepted the theory that the President has exclusive, ultimate, and unimpeded authority over the collection, retention, and dissemination of national security information." *Id.* at 41. See also Chris Strohm, *Report Finds Government Whistleblowers Lack Adequate Protections*, Jan. 10, 2006, <http://www.govexec.com/dailyfed/0106/011006c1.htm>.

As a whole, forcing employees who blow the whistle on matters of public concern to rely on limited and inconsistent statutes for protection against reprisal makes little sense. The *Pickering* test would instead provide more flexibility while still preserving the government's legitimate interest of protecting critical information.

IV. A RETURN TO *PICKERING*

Although the majority found reasons to create a distinction between employee speech and citizen speech, Justice Souter could not, stating:

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object . . . to unite [m]y avocation and my vocation;" these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract. There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would.¹⁶⁴

For this very reason, the courts should return to the *Pickering* balancing test, at least (or perhaps especially) with respect to national security employees. Under *Pickering*, the government employer does not lack a voice; indeed, the government maintains a substantial legitimate interest in maintaining its own workplace.

[T]he government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.¹⁶⁵

The *Pickering* test sufficiently protects government interests, whereas the *Garcetti* modifications virtually destroy any chance

164. *Garcetti*, 126 S. Ct. at 1966 (Souter, J., dissenting) (alterations in original) (quoting ROBERT FROST, *Two Tramps in Mud Time*, in COLLECTED POEMS, PROSE, AND PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995)).

165. *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part).

of a national security employee seeking First Amendment protections, with no appreciable gain in government protection. It makes little sense to strengthen a “balancing” test in favor of one side when it is intended to balance two equal, but competing, interests. The *Garcetti* Court first allowed the government employer to argue that the employee’s official job duty is to protect national security.¹⁶⁶ If the employee can prove that protecting national security is not his or her job duty, the government employer may argue that the employee’s speech should still not be protected due to national security interests if the employer can demonstrate under *Pickering* that the speech is a detriment to the government agency’s interests.¹⁶⁷ The government is essentially permitted to make the same argument twice. This is precisely what Justice Brennan argued against in his dissenting opinion in *Connick*.¹⁶⁸ There he stated that the Court’s holding improperly weighed one factor, the context in which the speech was made, twice—first in determining whether the speech was a matter of public concern, and again in weighing the government’s interest.¹⁶⁹ Although Justice Brennan agreed that the context of the speech was relevant in assessing the government’s interests as an employer, he felt that it should not also be considered when deciding whether the speech was a matter of public concern.¹⁷⁰ In an identical situation, the *Garcetti* Court indicated (with respect to national security employees) that the issue of national security should be weighed twice. Just as the context of the speech is relevant to the government’s interest, the national security argument is relevant to the government’s interest—it *is* the government’s interest. However, whether someone works for a national security agency should not be the determining factor in whether he or she is protected by *Pickering*. Unfortunately, the current job duty test creates just that situation for national security employees. As Justice Souter pointed out, the employee who finds a problem while doing his or her job is often in the best position to report the problem and correct it.¹⁷¹ In the national security context, where significant problems could mean the difference between life and

166. See *Garcetti*, 126 S. Ct. at 1960.

167. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

168. See *Connick v. Myers*, 461 U.S. 138, 157–59 (1983) (Brennan, J., dissenting).

169. See *id.* at 157–58 (Brennan, J., dissenting).

170. See *id.* at 159 (Brennan, J., dissenting).

171. See *Garcetti*, 126 S. Ct. at 1966 (Souter, J., dissenting).

death, employees should arguably be rewarded for addressing these problems. Instead, as a result of *Garcetti*, employees are punished for any speech made pursuant to an official job duty. As the *Pickering* test already filters out speech that may harm the agency (such as someone attempting to reveal critical security secrets because she is angry at her manager), the additional filtering of any speech pursuant to an official job duty is unnecessary.

The *Pickering* test protects employee speech that did not harm the agency. Reexamining the aforementioned scenario of the secretary working for the CIA, the *Pickering* test becomes very appealing for national security employees. As demonstrated above, the employee faces a loss under *Garcetti* because the CIA can argue that her official duty is to protect national security. However, under *Pickering*, she would win. Because she fears her boss may harm the country, her speech is a matter of public concern. Assuming she reported the concern internally to an appropriate official, the CIA was not disrupted nor harmed by her disclosure. Of course, if she told everyone in the office that her boss was a spy, or gave this information to another country's intelligence officers, then obviously the government would be harmed and her speech should not be protected. This demonstrates that *Garcetti* substantially limited the ability of national security employees to speak about matters of public concern, whereas the *Pickering* test would still work in the national security context.

Public sector employees simply cannot rely on whistleblower statutes to save them. From 1999 to 2005, only two out of thirty whistleblower claims prevailed before the Merit Systems Protection Board; from 1995 to 2005, only one out of ninety-six claims prevailed before the Federal Circuit.¹⁷² National security employees also face the unique punishment of having their security clearances revoked if they speak out against wrongdoing.¹⁷³ Without a security clearance, national security employees cannot work. In light of these repercussions, without a return to

172. FISHER, *supra* note 163, at 21 (citing Project on Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005, at 8, available at <http://www.pogo.org/m/gp/wbr2005/WBR-04282005.pdf>).

173. See Project on Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005, at 11, available at <http://www.pogo.org/m/gp/wbr2005/WBR-04282005.pdf>. The Executive Branch Reform Act's removal of this particular punishment is another point in the Act's favor. H.R. 5112, 109th Cong. § 8(a) (2006).

Pickering, national security employees may *never* speak up when an issue arises, even when they ideally *should* speak up.

V. CONCLUSION

The unclear nature of the whistleblower statutes and the *Garcetti* Court's uncertain definition of "job duty"¹⁷⁴ have the potential to create a chilling effect on the speech of national security employees who wish to disclose important information. First, national security employees have reason to fear that their agency's duty to protect national security will be imputed to them as their official job duty, regardless of their daily tasks.¹⁷⁵ Second, the limited nature of the federal whistleblower statutes leaves national security employees with little statutory protection.

In June 2006, Richard Ceballos testified before the House Committee on Government Reform as to his views on the *Garcetti* decision.¹⁷⁶ His statements poignantly illustrate why the *Garcetti* modifications to the *Pickering* test should be rejected, and why a return should be made to the traditional *Pickering* test, especially with respect to national security employees:

This ruling creates a predicament for government employees who in the future witness corruption, fraud, waste, or mismanagement in the workplace: either disclose their observations internally by following proper procedure and run the risk that their reports will be met by hostile and unsympathetic supervisors in which case they will not be protected by the First Amendment, or, alternatively, hold a press conference on the front steps of the government building and publicly embarrass government officials to assure themselves First Amendment protection. Being placed in this predicament is as illogical as it is bizarre.

Actually, employees will have another choice, one that public employees are more likely to follow than the two options above: Keep quiet and say nothing. Most employees will simply look the other way and feign ignorance of corruption, waste, fraud, or mismanagement that they witness in their workplace.

174. See *supra* Part III.A.

175. See *supra* Part III.A.

176. *Whistleblowers and Free Speech: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2006) (statement of Richard Ceballos, Deputy District Attorney of Los Angeles County).

And, if this occurs, not only public employees will have lost. More importantly, the public will have lost. The people will have lost their right to know what is happening in their own government; their right to know what their elected and non-elected public officials are doing in government; their right to know if their taxpayer money is being spent properly or being wasted; and their right to know if their public officials are engaged in corrupted or fraudulent conduct.¹⁷⁷

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177. *Id.*