

## IF YOU WORK FOR THE GOVERNMENT, THEN SHUT YOUR MOUTH: *GARCETTI V. CEBALLOS* AND THE FUTURE OF PUBLIC EMPLOYEE SPEECH

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### I. INTRODUCTION

If you work for the government beware. You may not be a citizen, but merely dispensable property of the state, if you say anything that could be termed part of your “official duties.”<sup>1</sup> The Supreme Court’s recent five to four decision in *Garcetti v. Ceballos*<sup>2</sup> holds, “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.”<sup>3</sup> This means that dedicated government employees who would otherwise voice concerns over inefficiency and corruption must make a difficult decision. Speak up and try to improve the government they have dedicated themselves to or keep their mouths’ shut for fear of being fired by supervisors who don’t want to hear it?<sup>4</sup> The ultimate irony comes from the basis of the majority’s reasoning in *Garcetti*: promote governmental efficiency by giving supervisors latitude to control their employees,<sup>5</sup> when the effect of this decision will be the chilling of employees willing to expose inefficiency internally, because it would be safer to expose the grievance off the clock by holding a press conference on the office lawn.<sup>6</sup>

1. See *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006); *Id.* at 1968 (Souter, J., dissenting) (“The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of employment duties is the government’s own speech.”).

2. 126 S. Ct. 1951 (2006).

3. *Id.* at 1968.

4. Christopher Dunn, *Civil Rights and Civil Liberties*, 235 N.Y.L.J., June 27, 2006 (“[A]ny public employee who learns of misconduct but is concerned about the potential for retaliation for disclosing it will be well-advised not to report that misconduct to supervisors or others inside the government.”).

5. *Garcetti*, 126 S. Ct. at 1959.

6. *What Price Free Speech? Whistleblowers and the Ceballos Decision: Hearing Before the Comm. on Gov’t Reform*, 109th Cong. 4 (2006) [hereinafter *Hearings*] (statement of Stephen M. Kohn, Chair of the Bd. Of Dir. of the Nat’l Whistleblower Ctr.) (“[T]he majority opinion in *Ceballos* created a standard which employees have an incentive to avoid reporting concerns through the chain of command, and are encouraged to immediately file whistleblower disclosures to the news media or other entities outside their workplace.”).

Before *Garcetti*, such statements by public employees were not categorically eliminated from First Amendment protection, but rather, were evaluated on a case by case basis using a balancing test that was articulated in *Pickering v. Board of Education*.<sup>7</sup> This test has served courts for thirty-eight years as the foundation for modern speech jurisprudence of public employees,<sup>8</sup> but now with the Court’s new composition, *Garcetti* may be an indication of a bench willing to chip away fundamental rights that were previously protected.

Section II of this article will examine the history of public employee speech protection. Section III will magnify *Garcetti* and Section IV will explore exactly what is meant by “official duties” and track cases in the wake of *Garcetti*.

## II. PUBLIC EMPLOYEE SPEECH BEFORE *GARCETTI V. CEBALLOS*

Back in the not so distant dark ages of the Holmes’ Court, public employees had virtually no speech protection.<sup>9</sup> “For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”<sup>10</sup>

### A. *The Dark Age*

When Justice Holmes was sitting on the Supreme Judicial Court of Massachusetts, he made the infamous statement: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>11</sup> The rationale was obviously rooted in the idea that public employment is a privilege, not a right. Holmes Reasoned, if you wanted to work for the government, you had to be willing to concede or seek employment else where. There existed a bright line between the state as sovereign and the state as employer. “Donning its ‘employer’ cap, the government could restrict employee speech with little or no constitutional scrutiny.”<sup>12</sup> As harsh as this logic sounds to Generation X sensibilities, keep in my mind that during this era, women could not vote and the practice of segregation was upheld by the Supreme Court. Under the dim glow of this unenlightened time, public employee rights were essentially nonexistent.

The importance of understanding the Holmesian rationale, is to become aware of the excruciatingly slow process it has been for the Court to recognize protected speech rights for public employees, so that the categorical stripping of these rights in *Garcetti* seems even more appalling.

The Court adhered to the Holmesian iron-fist of logic for sixty years after the infamous ‘policeman’ statement was made in 1892. While the First Amendment was enjoying fanfare between what would otherwise be a despotic sovereign and its citizens, government employees were leaving their constitutional rights at the office doorstep to toil away in what can be imagined as dimly lit and hushed governmental offices.

In a line of cases spawned from the Red Scare in the 1950s and 60s, the Court examined the constitutionality of laws rooted in paranoia, requiring public employees to swear their loyalty to the State and disclose any groups with whom they associated.<sup>13</sup> The first seed of public employment rights was planted by *Wiemann v. Updegraff*.<sup>14</sup> The Court held that a state could not require an oath denying past

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7. 391 U.S. 563, 568 (1968). *E.g.*, *Connick v. Myers*, 461 U.S. 138 (1982).

8. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, 2d ed., §11.3.8 (2002) (“*Pickering v. Board of Education* is a key case in holding that speech by governmental employees is protected by the First Amendment.”).

9. Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1007 (2005).

10. *Connick v. Myers*, 461 U.S. 138, 143 (1982).

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

12. Kozel, *supra* note 9, at 1011.

13. *Connick*, 461 U.S. at 144.

14. 344 U.S. 183 (1952).

affiliations with communists as a prerequisite for public employment.<sup>15</sup> Though the Court based its opinion on due process, the court defiantly rejected Holmesian logic: “[t]o draw [a] generalization that there is no constitutionally protected right to public employment is to obscure the issue.”<sup>16</sup> In an eloquently stated concurring opinion, Justice Black observed:

Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven. And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually wholly lost.<sup>17</sup>

Thus, began the evolution of constitutional rights for public employees fifty-eight years ago, that is, until *Garcetti* marked an unfortunate swing of the pendulum. It was a full decade and a half after *Wiemann*, that the Court coddled the seed that would soon become the modern jurisprudence of protected public employee speech. In *Keyishian v. Board of Regent*,<sup>18</sup> the Court promulgated the notion that freedom of expression is the most valued freedom the Constitution has to offer and that “First Amendment freedoms need breathing space to survive, [so] government may regulate in the area only with narrow specificity.”<sup>19</sup> In ruling that a complicated New York statutory scheme regulating the hiring of public school teachers was invalid, Justice Brennan, speaking for the majority, affirmed a statement made by the Court of Appeals for the Second Circuit, “the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”<sup>20</sup> This phrase has been reiterated in nearly every case dealing with public employee speech since and thus laid the foundation for the infamous *Pickering* Test.

## B. *The Pickering Test*

In 1964, a public school teacher was fired for writing a letter to the local newspaper, criticizing the school board’s allotment of funds.<sup>21</sup> The Court ruled in favor of the teacher and *Pickering v. Board of Education*<sup>22</sup> struck a workable balance between state as sovereign versus state as employer.<sup>23</sup> Part of the illusive-underlying rationale of the opinion is that these honorable public servants can be both government employees and concerned citizens at the same time. The problem the Court faced was taking this into account, while making it agree with the government’s need for some control over its employees. These employees needed some speech protection, but not the full protection afforded a common citizen. The Court formulated a balancing test: “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.”<sup>24</sup>

Of course this test would not be complete without subsequent tweaking by latter opinions, but the importance of the emergence of the *Pickering* Test lies in the Court’s embrace of the First Amendment. Justice Marshall, writing for the majority, expressed the belief that the public’s interest in having free and open debate on matters of public importance is the “core value” of the Free Speech Clause of the First

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15. *Id.* at 191.

16. *Id.*

17. *Id.* at 193. (Black, J., concurring)

18. 385 U.S. 589 (1966).

19. *Id.* at 604. (quoting *NAACP v. Button*, Att’y Gen. of Va., 371 U.S. 415, 433 (1963)).

20. *Id.* at 605–606 (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2nd Cir. 1965)).

21. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 566 (1968).

22. 391 U.S. 563 (1968).

23. *Id.* at 568.

24. *Id.*

Amendment.<sup>25</sup> In what is perhaps one of the most profound and well-reasoned statements in free speech public employment law, Marshall observed:

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak freely on such questions without fear of retaliatory dismissal.<sup>26</sup>

The idea that public employees have more to offer the internal governmental debate (more than say, an uninformed citizen who is not at a vantage point to see the inefficiencies of a self-government or would have an internal forum to address the grievance for that matter) therefore their speech should be afforded some protection, runs deep through subsequent opinions on the issue.<sup>27</sup> Supreme Court opinions promulgate this notion as the vital organ to democratic self-governance and that this was the goal and purpose of the First Amendment.<sup>28</sup> If there is a problem with government, like say, inefficiency or corruption, “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies,” and the solution “is more speech, not enforced silence.”<sup>29</sup>

### C. *Evolution of Enlightenment*

The reverence the Court held for these First Amendment principals shined through in *Connick v. Myers*,<sup>30</sup> a case that was argued fifteen years after *Pickering*. Despite deciding against the party claiming speech protection, the court reaffirmed the balancing test and clarified the notion that employee speech, whether uttered while performing the job or not, must be on a matter of public concern. The Court’s opinion hinged on the “public concern”<sup>31</sup> phrase of the *Pickering* Test by qualifying protected employee speech deserving a chance at the balancing test as “any matter of political, social, or other concern to the community.”<sup>32</sup> Though this may sound rather indefinite, it can simply be re-phrased in the negative. Employee speech is not protected when it’s only concerning a purely personal interest. This clarification still leaves room for debate and many courts and scholars alike have cringed at the idea of content based speech protection,<sup>33</sup> but nonetheless, if public employee speech is to be afforded some constitutional protection, there must be some mechanism to evaluate that speech. The *Pickering* Test has provided the apparatus and follows the Supreme Court’s authoritative precedence in this area of law:

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25. *Id.* at 573.

26. *Id.* at 572.

27. *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (“Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”); *accord* *Board of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996); *see also* *San Diego v. Roe*, 543 U.S. 77, (2004) (“Underlying the decision in *Pickering* is the recognition that public employees are . . . likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public.”).

28. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (“[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.”); *Butterworth, Att’y Gen. of Fla. v. Smith*, 494 U.S. 624, 632 (1990) (“[I]nformation relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment.”); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”).

29. *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring).

30. 461 U.S. 138 (1982).

31. *Pickering*, 391 U.S. at 568. *See Connick*, 461 U.S. at 142.

32. *Connick*, 461 U.S. at 146.

33. Kozel, *supra* note 9, at 1025 (“Generally, content-based restrictions on speech are disfavored and subject to strict scrutiny, reflecting the notion that ‘[to] permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship,’ and ‘[t]he essence of this forbidden censorship is content control.’”) (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 95–96 (1972)).

“[w]e are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they are of a character which the principals of the First Amendment protect.”<sup>34</sup> Constitutionally-guaranteed rights are generally considered too precious of a commodity for the Court to categorically eliminate, even if this requires a tricky balancing test that is applied on a case-by-case basis. This is especially so, in the area of freedom of speech as Justice Stevens explained:

When the standard governing the decision of a particular case is provided by the Constitution, this Court’s role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance. This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of “unprotected” speech.<sup>35</sup>

Not only had courts used the *Pickering* test to resolve issues surrounding content, they also used the ruling in regards to context. In the wake of *Pickering*, a public school teacher was fired for privately expressing her views to the principal concerning racist hiring practices. Speaking for the majority, Justice Rehnquist clarified the idea that speech is protected regardless of the setting: “[n]either the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”<sup>36</sup>

It took the law over a century to evolve from Justice Holmes’ statement, “[t]here are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech by the implied terms of his contract[.]”<sup>37</sup> to the recent reaffirmation of the value of protected public employee speech: “[a] government employee does not relinquish all *First Amendment* rights otherwise enjoyed by citizens just by reason of his or her employment.”<sup>38</sup>

What essentially defines employment is what the employee performs as official duties. Now that any speech uttered as part of this vast rubric is categorically denied protection, much of this progressive evolution has been lost.

### III. *GARCETTI V. CEBALLOS*

The single most important fact leading up to this case is that it is nearly impossible to leave detectable tire tracks on a road composed of broken asphalt and gravel. In February 2000, a lawyer by the name of Richard Ceballos became aware of this fact.<sup>39</sup> He was working as a Deputy District Attorney in the Los Angeles County District Attorney’s Office when he was asked by a defendant’s lawyer to investigate whether one of the Los Angeles County Sheriff’s Deputies had lied in an affidavit to obtain a search warrant in his client’s case.<sup>40</sup> This came in the immediate aftermath of the breaking of one of the worst police scandals in United States’ history. The *Rampart* Scandal caused more than a hundred convictions to be overturned, the departure of more than a dozen officers, the payment of \$70 million to victims, and the Los Angeles Police Department’s entry into a decree with the United States Department of Justice requiring reform.<sup>41</sup> Against this backdrop, Ceballos took the tip seriously.

Ceballos pulled the file and discovered that the property description in the affidavit did not match the photographs of the scene.<sup>42</sup> What was described as a long-driveway was actually a road and supposedly the affiants followed tire tracks along the driveway to a house in pursuit of a stripped truck

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34. *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

35. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984).

36. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1978).

37. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517-18 (Mass. 1892).

38. *San Diego v. Roe*, 543 U.S. 77, 80 (2004).

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

40. *Id.*

41. Scott Glover & Matt Lait, *LAPD Settling Abuse Scandal*, LA TIMES, March 31, 2005, at A1.

42. Brief for Respondent at 3, *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (No. 04-473).

leading to a chop-shop.<sup>43</sup> What the officers actually found in the home were methamphetamines and firearms, but no stolen property.<sup>44</sup> The truck was found on a street some distance from the premise.<sup>45</sup> Ceballos went to the crime scene to investigate and discovered that it was impossible to leave any discernible tire marks, because the road was made of “broken asphalt, gravel, and dirt . . . .”<sup>46</sup>

On March 2, 2000, Ceballos wrote a memorandum for his supervisors expressing his belief that the prosecution could not justify pursuing the case if the warrant was invalid. His supervisors did not want to hear it and neither did the Supreme Court of the United States.

#### A. *The Majority Rationale*

Justice Kennedy, backed by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito reasoned that “[t]he controlling factor in Ceballos’ [sic] case is that his expressions were made pursuant to his duties as a calendar dupty.”<sup>47</sup> What the majority failed to recognize, is that the memo would not have been submitted as part of Ceballos’s official duties if his supervisors had had their way. In holding, “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,”<sup>48</sup> the majority has effectively eliminated speech protection for public employees, because it’s not the paycheck that defines an employee, but rather the duties that employee performs as his or her job.

The Court found solace in reverting back to a clear distinction between “employee” and “citizen,” as gleaned from an interpretation of the phrase in *Pickering*, “speak[ing] as citizens on matters of public concern.”<sup>49</sup> The Court’s scintilla of precedence comes from the one word, “citizen,” nakedly exposed in a time capsule, ignoring forty years of subsequent precedence expounding on this phrase to protect public employee speech in a manner more consistent with the letter and spirit of the First Amendment.<sup>50</sup> Surprisingly enough, the majority acknowledges this proposition in the first sentence of the opinion by quoting *Connick v. Myers*: “‘a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.’”<sup>51</sup> The key word here is “employee.” What has been understood ever since is that it is the employee as an employee who deserves some constitutionally protected speech rights. The riddle had been solved long ago concerning the reality

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43. *Id.* at 2.

44. *Id.*

45. *Id.*

46. *Id.* at 3.

47. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959–60 (2006).

48. *Id.* at 1960.

49. *Id.*

50. *Hearings, supra* note 6, at 2–3 (statement of Stephen M. Kohn).

*Garcetti v. Ceballos* represents a radical departure from this long line of cases. In a remarkable holding, the Supreme Court concluded that speech of ‘public concern’ was not protected under the First Amendment. The *Garcetti v. Ceballos* decision represents the most significant judicial threat to employee whistleblowers in nearly forty years, not only on the basis of its holding, but on the tone it has set for countless lower court rulings.

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[T]he decision broke with prior Supreme Court precedent and the precedent followed by nearly every other state and federal court that previously interpreted the scope of First Amendment protections for government employees.

*Id.*

51. *Garcetti*, 126 S. Ct. at 1955 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)).

that an employee can speak as both a concerned citizen and as an employee at the same time.<sup>52</sup> This principle was clearly stated in *City of Madison Joint School District v. Wisconsin Employment Relations Committee*,<sup>53</sup> when Chief Justice Burger proclaimed that a teacher could “address the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.”<sup>54</sup> Perhaps if Ceballos had made it clear to his supervisors that he was not only submitting the memo because he felt it was his duty as a prosecutor, but also, because he was genuinely concerned about police corruption as a citizen, the Court would have afforded him some protection?

In order to illuminate this break from precedence and to understand the need for the Supreme Court to create this new and formalistic category of per se exclusion to obtain their desired outcome, it is useful to outline the Ninth Circuit’s methodology in disposing of this case. Judge Reinhardt began the inquiry at “a two-step test that stems from the Supreme Court’s holdings in *Connick v. Myers* and *Pickering v. Board of Education*.”<sup>55</sup> You first, “ask whether the speech addresses a matter of public concern, and, if it does, we engage in an inquiry commonly known as the *Pickering* balance test, to determine whether Ceballos’s interest in expressing himself outweighs the government’s interests ‘in promoting workplace efficiency and avoiding workplace disruption.’”<sup>56</sup> This is a textbook formulation of the rule.<sup>57</sup> Judge Reinhardt continues by clarifying the phrase that the Court revisits: “[T]he Supreme Court has distinguished between speech ‘as a citizen upon matters of public concern’ at one end and speech ‘as an employee upon matters only of personal interest’ at the other.”<sup>58</sup> The Ninth Circuit easily determined that Ceballos’s memo satisfied the public concern threshold, because “when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern.”<sup>59</sup>

Then Judge Reinhardt eliminates the defendants’ argument (which is later adopted by the majority) that employees are denied protection when the speech is made pursuant to employment duties.<sup>60</sup>

We have repeatedly held that speech exposing official wrongdoing is no less deserving of First Amendment protection because the public employee reported the misconduct to his supervisors rather than to the news media. Nor do our cases provide any support for the defendant’s contention that a public employee’s speech is deprived First Amendment Protection whenever those views are expressed . . . pursuant to an employment responsibility.<sup>61</sup>

An interesting illustration of the absurdity created by such a per se exclusion comes from the facts in *Roth v. Veteran’s Administration of United States*.<sup>62</sup> Roth was fired from his job as a “trouble shooter” for the Veterans Administration after exposing corruption and mismanagement in written reports prepared

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52. *City of Madison Joint Sch. Dist. v. Wis. Employment Relations Comm’n*, 429 U.S. 167 (1976). *See also e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1978); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1966); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

53. 429 U.S. 167 (1976).

54. *Id.* at 175–74.

55. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004).

56. *Id.* at 1173 (quoting *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001)).

57. *CHEMERINSKY*, *supra* note 8, § 11.3.8.

The employee can prevail . . . if he or she convinces the court that speech was the basis for the adverse employment action, and if the court concludes that the speech related to matters of public concern, and if the court decides on balance, the speech interests outweigh the government’s interests in regulating the expression for the sake of the efficiency of the office.

*Id.*

58. *Ceballos*, 361 F.3d at 1173 (quoting *Connick*, 461 U.S. at 147).

59. *Id.* at 1174.

60. *Id.* at 1175.

61. *Id.* at 1174.

62. 856 F.2d 1401, 1403 (9th Cir. 1988).

pursuant to his job duties.<sup>63</sup> The Court in *Roth* held that Roth could not be denied First Amendment protection simply because his efforts to expose wrongdoing were included in reports written pursuant to his employment duties.<sup>64</sup> The Ninth Circuit saw similarities between a Veteran’s Administration “trouble shooter” and a prosecutor whose job it is to pursue truth and justice under constitutional obligations.<sup>65</sup> Judge Reinhardt observed, “[t]o deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.”<sup>66</sup>

The Ninth Circuit recognized that a per se exclusion of speech protection for “official duties” would mean that those government employees whose jobs are to essentially “blow the whistle” will have no protection at all. After determining that Garcetti offered no explanation as to how Ceballos’s memorandum resulted in inefficiency or office disruption, the Court struck the *Pickering* balance in favor of Ceballos and held that his speech was protected pursuant to the First Amendment and Supreme Court precedence.<sup>67</sup>

The Supreme Court discards the Ninth Circuit’s rationale in one short sentence: “[t]he court, did not, however, consider whether the speech was made in Ceballos’ [sic] capacity as a citizen.”<sup>68</sup> Not only does the Court commit a grammatical error,<sup>69</sup> but the majority avoids the Ninth Circuit’s argument with out any authority citation.<sup>70</sup> Later in the opinion, The Court expounds on its rationale as focused on governmental efficiency (with out citation) and on paranoia rooted in intrusive judicial oversight (also with out citation).<sup>71</sup> In order to find Ceballos’s memo unprotected, the Court needed to create a category that would exclude speech that would have been previously protected if striking a *Pickering* balance after meeting the public concern threshold. This leads to the overly inclusive “official duties” category.

The majority recounts a summary of the evolution of public employee speech protection and states that the underlying premise behind this evolution is that “while the *First Amendment* invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’”<sup>72</sup> As applied to this case, the fact “[t]hat Ceballos expressed his views inside his office, rather than publicly, is not dispositive” (to hold otherwise would directly overrule *Givhan v. Western Line Consolidated School District*).<sup>73</sup> The Court then explains that simply because, “[t]he memo concerned the subject matter of Ceballos’ [sic] employment” is also not dispositive (obviously, or else employees would be completely gagged).<sup>74</sup> This leads the Court to declare the controlling factor in the case: “that his expressions were made pursuant to his duties as a calendar deputy.”<sup>75</sup> In one of the most telling statements made by the majority: “[w]hen a public employee speaks pursuant to employment responsibilities, there is no relevant analogue to speech by citizens who are not government employees,”<sup>76</sup> one can see the ominous shadow of Holmes lurking nearby.

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63. *Id.*

64. *Id.* at 1406.

65. *Ceballos*, 361 F.3d at 1176.

66. *Id.* at 1176.

67. *Id.* at 1179.

68. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956 (2006).

69. LYNNE TRUSS, EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION, 55 (2003) (“Current guides to punctuation, including that ultimate authority, *Fowler’s Modern English Usage*, state that with modern names ending in ‘s,’ the ‘s’ is required after the apostrophe.”).

70. *Garcetti*, 126 S. Ct. at 1956.

71. *Id.* at 1961.

72. *Id.* at 1959 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

73. *Id.*

74. *Id.*

75. *Garcetti*, 126 S. Ct. at 1959–60.

76. *Id.* at 1961.



The majority leans on a reading of *Waters v. Churchill*<sup>77</sup> for supporting the governmental efficiency concern.<sup>78</sup> *Waters* reaffirmed the notion that the “government as employer, indeed has far broader powers than does the government as sovereign.”<sup>79</sup> The majority clearly phrases one of its chief concerns and premises for the holding: “[g]overnment employers, like private employers, need a significant degree of control over their employee’s words and actions; without it, there would be little chance for the efficient provision of public services.”<sup>80</sup> To add a bit more urgency to this concern, the Court continues, “[w]hen [public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.”<sup>81</sup> This is a real and legitimate concern; however, the unfortunate effect may also be an impairment of efficiency if employees are unlikely to report inefficiency. This is a paradox at the heart of the case and is what perhaps made it a controversial and difficult decision to make.

As stated earlier, another of the majority’s major concerns was intrusive judicial oversight. The Court, in taking on a heavy-handed parental role, makes it known that what little speech rights still retained by public employees “does not invest them with a right to perform their jobs however they see fit.”<sup>82</sup> Such a skeptical view of the behavior of governmental employees could only stem from too many hours at the local department of motor vehicles. The Court carries on, “[t]o 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.”<sup>83</sup> This is another legitimate concern as governmental offices “could not function if every employment decision became a constitutional matter.”<sup>84</sup>

This concern was expressed by counsel for Garcetti in oral argument and questioned by Justice Souter:

Counsel, you’ve made the point that if we go the Ninth Circuit way, every time an employee gets in Dutch there’s a potential first amendment issue. Why hasn’t that been a problem since 1988 in the Ninth Circuit? I think 1988 was the year of the Circuit’s Roth decision. So, we haven’t seen a deluge, and doesn’t that rather discount your argument?<sup>85</sup>

The last and probably weakest of the majority’s justifications come from a self-defeating argument based on the existence of “whistle-blower” statutes. “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 seek to expose wrongdoing.”<sup>86</sup> This is a two-fold fallacy. Whistle-blower statutes resemble a loose patchwork, where in some instances protection will not be afforded<sup>87</sup> and to preface an unconstitutional act by citing other lesser authorities that protect these rights

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77. 511 U.S. 661 (1994).

78. *Garcetti*, 126 S. Ct. at 1958.

79. *Waters*, 511 U.S. at 671.

80. *Garcetti*, 126 S. Ct. at 1958.

81. *Id.*

82. *Id.* at 1960.

83. *Id.*

84. *Connick v. Meyers*, 461 U.S. 138, 143 (1982).

85. Transcript of Oral Argument at 5, *Garcetti v. Ceballos*, 126 S. Ct. 151 (2006) (No. 04–473).

86. *Garcetti*, 126 S. Ct. at 1962.

87. *Hearings*, *supra* note 6, at 5, 7 (statement of Stephen M. Kohn) (“58% of state whistleblower laws do not explicitly protect internal/official duty whistleblowers. These Statutes do not contain any safety net whatsoever for employers who lost protection under *Garcetti v. Ceballos*. Thus, the “powerful network” alluded to in the majority opinion does not exist.”).

is like saying, “this is unconstitutional, but that’s fine, because there are other laws in place.”<sup>88</sup> This reasoning is not only self-incriminating, but dangerous.<sup>89</sup>

In sum, the majority’s position is that speech made pursuant to official duties is speech that is owned by the government. According to the majority, there is a distinctive line between government speech and citizen speech. “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.”<sup>90</sup>

## B. *The Dissenting Arguments*

Though the dissenters disagree on the level of deference the First Amendment plays in trumping the government’s interest in maintaining an efficient and disruption-free work environment, they all agree that the Free Speech Clause holds enough authority to never say never. In other words, they would not categorically eliminate speech made pursuant to official duties from First Amendment protection, but would answer the question at issue as “sometimes official speech is protected” according to a qualified *Pickering* balance.

Let us examine each of the three dissenting opinions in turn.

### 1. Justice Stevens: Good Ole’ *Givhan*

Justice Stevens poses a question, “[o]f course a supervisor may take corrective action when such speech is ‘inflammatory or misguided,’ but what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?”<sup>91</sup>

Stevens continues by explaining that the answer to the citizen versus employee anomaly was decided way back in *Givhan v. Western Line Consolidated School District*, by pointing out the silence in that opinion towards whether or not the speech was made according to job duties proves the point was immaterial.<sup>92</sup> Twenty-seven years ago, Justice Stevens concurred with then Justice Rehnquist, in the opinion in *Givhan*,<sup>93</sup> so it is no surprise that he revisits this case in his short dissenting opinion. Perhaps he remembers something from the chamber that day that the other Justices simply could not fathom, since Stevens was the only current Justice who was there?

### 2. Justice Souter, joined by Stevens and Ginsburg: A higher Burden

The dissenting opinion authored by Justice Souter is eighteen pages long, which is four pages longer than Kennedy’s majority opinion and in it, Souter proclaims the notion that employee speech uttered pursuant to official duties should be given *Pickering* balancing whenever the speech concerns “official wrongdoing and threats to health and safety.”<sup>94</sup> Essentially, this would mean that *Pickering* would apply, if the claimant could meet this higher burden.

Souter explains that a First Amendment protective shroud looms “in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters,” and

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88. See Brief for Respondent, *supra* note 42, at 49.

89. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O’Connor, J., concurring) (“The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.”).

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

91. *Id.* at 1962 (Stevens, J., dissenting).

92. *Id.* at 1963.

93. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1978).

94. *Garcetti*, 126 S. Ct. at 1963 (Souter, J., dissenting).

moreover, the protection is to serve the “value to the public of receiving the opinions and information that a public employee may disclose.”<sup>95</sup>

This opinion goes on to support Justice Stevens’ contention on *Givhan* by applying the practical effect of the majority’s official duties distinction to an analogous hypothetical.<sup>96</sup> The schoolteacher is still protected when complaining to a principle concerning racist hiring practices, but not a school personnel officer.<sup>97</sup> Justice Souter believes this is a strange place to draw a line, especially considering the fact that the value of speech when made within an employee’s duties may actually be greater because the employee is “addressing a subject he knows intimately for the very reason that it falls within his duties.”<sup>98</sup> In a footnote, Souter brings up the “expansive job description” argument.<sup>99</sup> Government supervisors can expand job descriptions to avoid liability. An example would be “defining [a] teacher’s job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.”<sup>100</sup> In this circumstance, Miss Bessie Givhan’s speech is no longer protected when she complains about racist hiring practices of the school administration and though this prospect may sound pleasing to Jim Crow and the Grand Wizard, anyone who has read the First Amendment would understand this as counter-intuitive to its principle.

Justice Souter, then explores the paradox of separating the citizen’s interest from the employee’s interest.<sup>101</sup> As he observes “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.”<sup>102</sup> In a cheeky injection, Souter footnotes various government agency employment advertisements (including one from Ceballos’s employer) that try to match idealistic citizens with public employment obligations.<sup>103</sup> Though this is a bit belaboring, the point is well taken. Public employees are often more concerned than the average citizen, which is exactly why they have devoted their vocation to public service.

This dissenting opinion acknowledges the majority’s concern by stating “government needs civility in the workplace, consistency in policy, and honesty and competence in public service.”<sup>104</sup> The essential break stems from Justice Souter’s belief that the *Pickering* test provides for this concern, especially when it is qualified with his higher standard espoused for speech made pursuant to official duties.<sup>105</sup> Souter declares:

This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need to actually disrupt government if its officials are corrupt or dangerously incompetent. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize the government has a huge interest in managing its employees . . . the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.<sup>106</sup>

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95. *Id.* at 1964.

96. *Id.* at 1965.

97. *Id.*

98. *Id.*

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

100. *Id.* at 1965.

101. *Id.* at 1966.

102. *Id.*

103. *Id.*

104. *Garcetti*, 126 S. Ct. at 1967 (Souter, J., dissenting).

105. *Id.* at 1967.

106. *Id.*

Though Souter’s qualification for using classic *Pickering* balancing only when the employee “speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it”<sup>107</sup> leaves room for future doubt in actual application, he points out a fallacy in the application of the majority’s underlying premise. In creating a bright-line category of exclusion, the majority seeks to prevent judicial oversight into governmental affairs, but now fact bound litigation will follow concerning whether statements were made pursuant to official duties.<sup>108</sup> Justice Souter gives us two examples: “Are prosecutors’ discretionary statements about cases addressed to the press on the courthouse steps made pursuant to official duties? Are government nuclear scientists’ complaints to their supervisors about a colleague’s improper handling of radioactive materials made pursuant to duties?”<sup>109</sup> Using the majority’s own language, Souter declares that this new breed of litigation will “have the unfortunate result of ‘demanding permanent judicial intervention in the conduct of governmental operations.’”<sup>110</sup>

### 3. Justice Breyer: The Exceptional Circumstance Exception

Justice Breyer has his own take. Though he believes that Souter’s opinion does not give enough weight to the government’s interest, he also believes that there are exceptional circumstances when official speech should be protected and this is one of those circumstances.<sup>111</sup>

Breyer claims that Ceballos’s speech was not only official, but also “professional speech—the speech of a lawyer” and that “[s]uch speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government’s own interest in forbidding that speech is diminished.”<sup>112</sup>

Another factor that makes this case exceptional is that the Constitution imposes obligations on a prosecutor “to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government’s possession.”<sup>113</sup>

Because of these two factors combined, Justice Breyer would give Ceballos a chance at the traditional balancing test, but only because of “the presence of augmented need for constitutional protection and [a] diminished risk of undue judicial interference . . . .”<sup>114</sup> Though Breyer’s stance is the most hardened of the dissenters, he agrees with them all on one point. Ceballos deserved a chance at showing his interest in the speech outweighed the Los Angeles County District Attorney’s Office’s interest in maintaining a controlled and status quo environment. It is easily insinuated by all the dissenters, that if Ceballos had been given a chance at *Pickering* balancing, he would have won the suit. Otherwise they would have concurred. The majority needed a new categorical threshold in order to exclude Ceballos from protection. Unfortunately, what the majority hopes will be a simplified and lucid class of unprotected speech, will most likely become a callously ambiguous setback to what was already an imperfect, but albeit—much needed doctrine.

## IV. PUBLIC EMPLOYEE SPEECH IS SEVERELY LIMITED

The day after the decision was made, The New York Times headlined its coverage as “Some Whistle—Blowers Lose Free—Speech Protections.”<sup>115</sup> The vast majority of a concerned press issued

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107. *Id.* at 1967.

108. *Id.* at 1968.

109. *Garcetti*, 126 S. Ct. at 1968 (Souter, J., dissenting).

110. *Id.* at 1968 (quoting the majority at 1961).

111. *Id.* at 1974 (Breyer, J., dissenting).

112. *Id.*

113. *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

114. *Garcetti*, 126 S. Ct. at 1976 (Breyer, J., dissenting).

115. Linda Greenhouse, *Some Whistle-Blowers Lose Free-Speech Protection*, N.Y. TIMES, May 31, 2006, at A16.

similar taglines, which is understandable, because limits on speech invade their livelihoods. As one editorial explained, freedom of press becomes worthless if nobody is talking and then “we might as well start running government press releases verbatim.”<sup>116</sup> Perhaps this speculation is also fueled by a popular public sentiment demanding more transparency out of a government that seems to be keeping a lot of secrets lately, but before we end up waist high in hyped conjecture, let’s take a closer look at The Court’s idea of exactly what is meant by “official duties.”

A. *What Are “Official Duties?”*

This ruling adds constitutional significance to the age-old complaint: “This wasn’t in my job description.” Though the Court states, “The proper inquiry is a practical one,”<sup>117</sup> this is followed up by a very broad and inclusive observation:

Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for *First Amendment* purposes.<sup>118</sup>

The majority effectively makes waste of the dissenter’s “job description” concern, by leaving us with virtually no parameters to gauge “official duties.” The effect of this ambiguous label is illustrated by a district court’s interpretation immediately following *Garcetti*. In *Ryan v. Shawnee Mission*,<sup>119</sup> the plaintiff seeks to avoid summary judgment because the parties dispute whether the speech at issue was made pursuant to official duties.<sup>120</sup> Because the parties in *Garcetti* did not dispute whether Ceballos’s memo was written pursuant to his duties as a prosecutor,<sup>121</sup> this possibly leaves a door open for claimants to argue an “employment duties caveat.”<sup>122</sup> The plaintiff in *Ryan* points out language from *Garcetti* where the majority admits to not having an “occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is serious debate.”<sup>123</sup> Though this argument has merit, the District Court grants summary judgment for the defendant.<sup>124</sup> Though the opinion in *Garcetti* does not give any concrete parameters for measuring official duties, there is a brief analysis concerning the nature of Ceballos’s memo.<sup>125</sup>

In the opinion’s fact-bound analysis of Ceballos’s memo, there is a reliance on the underlying citizen-employee dichotomy.<sup>126</sup> Ceballos “did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.”<sup>127</sup> This adds a new dimension to the inquiry the Court calls “practical.” Does this mean if Ceballos had written the memo late at night and off the clock, simply because he was so concerned he couldn’t sleep, that even if the memo still falls into the official duties rubric, the “citizen” aspect would trump? The answer seems to be “no,” as indicated by the majority’s language: “When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.”<sup>128</sup>

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116. Editorial, *Our View: Ruling Prods Government Workers to be Closed Mouted*, THE CAPITAL (Annapolis, MD), June 7, 2006, at A12.

117. *Garcetti*, 126 S. Ct. at 1961.

118. *Id.*

119. No. 05–2213–JWL (D. Kan. July 7, 2006).

120. *Id.*

121. *Garcetti*, 126 S. Ct. at 1961.

122. *Ryan*, No. 05–2213–JWL at 29.

123. *Garcetti*, 126 S. Ct. at 1961.

124. *Ryan*, No. 05–2213–JWL at 1.

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

126. *Id.*

127. *Id.*

128. *Id.* at 1961; *Hearings, supra* note 6, at 5 (statement by Roger Pilon) (Dr. Pilon addresses this phrase of the

Garcetti’s counsel relied heavily on arguing that Ceballos’s memo was “routine.”<sup>129</sup> At first blush, this seems to be an intelligent argument, after all, if you are trying to persuade the Court to diminish an area of constitutionally-protected rights, you would want to argue for a narrow elimination because it would be more plausible and “routine” is a little narrower than “official.” However, Ceballos persuasively argued that this particular memo was anything but routine.<sup>130</sup> In fact, Ceballos claimed it was extraordinary because it was “the first disposition report I’ve ever written where I was recommending a dismissal or had dismissed a case because of questions regarding the credibility of a police officer.”<sup>131</sup> One of Ceballos’s supervisors even admitted on record that in his “25-plus years with this office, [he had] never come across this.”<sup>132</sup> Because of this, the Court could not rely on “routine” in defining its category of eliminated rights, or else Ceballos would have slid on by.

Though the meaning of “official” is not yet certain, claimants now have another obstacle to overcome. The limitations in place before *Garcetti* were already criticized for not providing enough protection for public employees “because the First Amendment generally has no such limitation and because of the narrow definition of public concern in *Connick*.”<sup>133</sup> The *Pickering—Connick* test has been traditionally held as deferential to the government as courts consider such factors as; proper performance of the employee’s duties, level of interference the speech causes, effects of the speech on co-workers, and supervisors, and this only after passing the *Connick* public concern threshold.<sup>134</sup> As counsel for Ceballos points out, “The bar [was] already quite high for the employee, coupled with causation burdens, qualified immunity, and so on.”<sup>135</sup> So the naysayers from the beginning, now have more to complain about, but if you work for the government, you better be careful who you complain to.

#### B. *The Immediate Real-Life Application*

One of the most apparent consequences of *Garcetti* is that employers will soon be arguing that nearly all speech made while at the job is pursuant to official duties.<sup>136</sup> Many of these public employees’ jobs require interacting with the public and communities at large. The extent to which the gag covers beyond hushed offices will have to be exhaustively litigated and determined by factual inquires on a case by case basis just as pre-*Garcetti* cases.<sup>137</sup> Though a list of factual circumstances that will not neatly fit into a category of official duties can be added to ad infinitum, a majority of claims will fall into this inclusive category by its very nature. An example of this comes from the Seventh Circuit’s interpretation of *Garcetti* in *Mills v. City of Evansville*.<sup>138</sup>

Brenda Mills was a sergeant for the Evansville Police Department and was in charge of supervising a number of crime prevention officers who acted as community liaisons between the department and the public.<sup>139</sup> After attending a meeting where the Chief of police announced his plan to reduce the number of crime prevention officers, Mills “discussed the subject in the building’s lobby.”<sup>140</sup> Mills expressed her disapproval of the plan and was subsequently demoted from her supervisory position.<sup>141</sup> Before the appeal, the District Court Judge ruled that “Mills’s statements at the meeting are

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opinion in an analysis of the possible ruling in such a “mixed case.” After offering a statement on the possibility that the Court might entertain a “mixed case,” Dr. Pilon concludes that this phrase in the opinion “seems to go the other way.”)

129. Petitioners’ Brief on the Merits at 31–32, *Garcetti v. Ceballos*, 126 S. Ct. 151 (2006) (No. 04–473).

130. Brief for Respondent, *supra* note 42, at 42.

131. *Id.* at 5.

132. *Id.* at 6.

133. CHEMERINSKY, *supra* note 8, § 11.3.8.

134. Transcript of Oral Argument, *supra* note 85, at 33.

135. *Id.*

136. Dunn, *supra* note 4.

137. *Id.*

138. No. 05–3207 (7th Cir. June 20, 2006).

139. *Id.* at 2.

140. *Id.*

141. *Id.*

protected by the first amendment because she addressed issues of public concern but that the department's interest in efficient management of its operations must prevail."<sup>142</sup> This was before *Garcetti*. On appeal, the Seventh Circuit quotes the holding of *Garcetti* in the first sentence of the opinion and declares the case is finished.<sup>143</sup> The court reasons: "[s]he spoke in her capacity as a public employee contributing to the formation and execution of official policy."<sup>144</sup> The court points out that this "promotes rather than undermines first amendment values when those who make decisions, and are held accountable for them at the polls, can ensure their implementation within the bureaucracy,"<sup>145</sup> in speaking on behalf of the police chief who served as a "politically accountable manager." The court applies "official duties" as an expansive category which covers police officers complaining about policy in precinct lobbies.<sup>146</sup> The Seventh Circuit is due credit, because this seems wholly consistent with the principle of *Garcetti*.<sup>147</sup>

In the wake of *Garcetti* and *Mills*, a United States District Court states the new inquiry as asking if "the employee's expression arise[s] from her employment duties?"<sup>148</sup> The employee's speech must merely "owe its existence" to a public employee's job duties.<sup>149</sup> In this case, a public official had complained about the serious problems with the nursing care of a correctional facility, but this was not considered protected speech pursuant to *Garcetti*.<sup>150</sup>

The Eleventh Circuit has had occasion to make a clear-cut decision after *Garcetti*.<sup>151</sup> A high school science teacher who also served as the junior varsity cheerleading sponsor was asked by the principle to investigate the fairness of cheerleader try-outs after a couple of parents complained.<sup>152</sup> The teacher raised concerns regarding the try-outs and the principle did not renew her contract.<sup>153</sup> The Eleventh Circuit easily disposed of the case, because the teacher was speaking "pursuant to her duty as a junior varsity cheerleader sponsor rather than as a citizen . . . ."<sup>154</sup>

Though these cases show a relative ease in a post-*Garcetti* era for determining a public employee's speech was made pursuant to official duties, one court has had a much more difficult time in deciding the issue. In *Locklear v. Person County Board of Education*,<sup>155</sup> a school principal's employment contract was cut short after she complained to the superintendent regarding a policy that would lower the student's test scores. The school board inquired the reason why the principal's contract was rescinded and the superintendent explained that she had "shared information with her staff inappropriately" and that she was "domineering" which was a trait that the superintendent "attributed to the fact that [she] is a Native American woman."<sup>156</sup> Though the superintendent wrote a letter to an offended school board member after the gender biased comment, he included research in the letter that allegedly supports his contention that "Indian culture is matriarchal in nature," but the principal's contract was still cut short.<sup>157</sup> The principal filed several causes of action, all of which were dismissed, except for a First Amendment claim that her speech was protected when "she voiced her concerns over the new test score allocation policy."<sup>158</sup> The Court first decides that the speech was on a matter of public concern.<sup>159</sup> The Court then takes a cue from *Garcetti* in determining that the fact the principal "voiced her concerns over the new test

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142. *Id.* at 3.

143. *Mills*, No. 05-3207 at 1.

144. *Id.* at 4.

145. *Id.*

146. *Id.*

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

148. *Logan v. Ind. Dep't of Corr.*, No. 1:04-cv-0797-SEB-JPG (S.D. Ind. June 26, 2006).

149. *Id.* at 3.

150. *Id.*

151. *Gilder-Lucas v. Elmore County Bd. of Educ.*, No. 05-1656 (11th Cir. June 26, 2006) (unpublished).

152. *Id.* at 2.

153. *Id.* at 3.

154. *Id.* at 5.

155. *Locklear v. Person County Bd. of Educ.*, 1:05CV00255 (M.D. N. C. June 22, 2006).

156. *Id.* at 3.

157. *Id.*

158. *Id.* at 16, 19.

159. *Id.* at 21.

score policy in a private meeting with [the superintendent] and in meetings with her staff does not render this speech any less a matter of public concern.”<sup>160</sup> After the Court also determined that the principal made a sufficient showing to withstand *Pickering* balance, Judge Tilley decided the record was not sufficient to determine whether the statements were made pursuant to official duties.<sup>161</sup> The litigation continues just as Justice Souter predicted in his dissenting opinion, “the majority invites such litigation by describing the enquiry as a ‘practical one,’ apparently based on the totality of employment circumstances.”<sup>162</sup>

### C. *A Sign of the Times and a Cloudy Crystal Ball*

*Garcetti* was a rare 5-4 decision from a Court that had been unusually unified after Chief Justice Roberts had publicly called for more homogeneity on the Court.<sup>163</sup> The case was originally argued in October of 2005, before it was set for re-argument.<sup>164</sup> The Court did not announce why they needed another hour of oral argument, but the implication is that Justice Sandra Day O’Connor left behind a 4-4 tie.<sup>165</sup> With two new appointees, “[t]he Bush administration backed the district attorney’s office, citing the U.S. government’s interest as ‘the nation’s largest public employer.’”<sup>166</sup>

In what is perhaps an interesting indicator of the current socio-political atmosphere is *Garcetti*’s invocation of the war on terror. In the petitioner’s brief, *Garcetti* argues that protecting government speech “undermines the democratic process, by hindering the ability of politically accountable officials to run their agencies” and it “encroaches on the authority of the Executive Branch.”<sup>167</sup> Ceballos counters this argument with a hypothetical regarding a United States Customs Officer who learns that his colleagues are accepting bribes from a foreign entity, “known to have ties to terrorist organizations, to ignore certain shipments when they arrive at U.S. ports.”<sup>168</sup> In the respondent’s hypothetical, the officer reports the bribe and is fired and the respondent declares that it would be “perverse to protect speech of such public significance *less* because the person *best* situated to alert his agency to the danger was the one who spoke.”<sup>169</sup>

The complex reality of employment situations when public servants expose corruption pursuant to official duties, yet counter to the actual atmosphere created by peers and supervisors is illustrated by another recent case being litigated in the aftermath of *Garcetti*. The scenario of *Batt v. City of Oakland*<sup>170</sup> is reminiscent of the days of Frank Serpico and his crusade against police corruption in New York and ironically concerns police misconduct just like *Garcetti*. Newly minted police officer Keith Batt was assigned to work with a group of officers known as the “Riders.”<sup>171</sup> Officer Batt “witnessed numerous illegal and brutal acts on the part of his supervising officer and three other . . . officers.”<sup>172</sup> Though the Oakland Police Department’s handbook states that it is an officer’s duty to report misconduct, Officer Batt’s peers and supervisor made it clear that “[s]nitches lie in ditches.”<sup>173</sup> The District Court, apparently

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160. *Locklear*, 1:05CV00255 at 21.

161. *Id.* at 22.

162. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1968 (2006) (Souter, dissenting) (quoting majority at 1961); *see also* *Kodrea v City of Kokomo, Ind.*, 1:04-cv-1843-LJM-WTL 20 (S.D. Ind. June 22, 2006) (Court denies summary judgment on disputed facts whether claimant reported misconduct pursuant to duties as a recreational programmer for the city’s parks department).

163. Charles Lane, *High Court’s Free—Speech Ruling Favors Government; Public Workers on Duty Not Protected*, WASH. POST, May 31, 2006 at A1.

164. *Garcetti*, 126 S. Ct. at 1951.

165. Lane, *supra* note 163.

166. *Id.*

167. Petitioners’ Brief on the Merits, *supra* note 129, at 36–37.

168. Brief for Respondent, *supra* note 42, at 43.

169. *Id.*

170. No. C 02-04975 MHP (N.D. Cal. July 13, 2006).

171. *Id.*

172. *Id.*

173. *Id.*



baffled by the situation, states that a “fact issue remains,” in order to determine whether it was Officer Batt’s “official duty” or not to report misconduct?<sup>174</sup>

A month after *Garcetti* was decided, Congressman, Tom Davis, Chairman of the Committee on Government Reform, held a committee hearing on the effects of the decision.<sup>175</sup> The majority of the speakers promulgated immediate legislation to provide the protection that was eliminated by *Garcetti*.<sup>176</sup> The passage of any such legislation seems unlikely and the future of public employee speech jurisprudence is grave considering the direction taken by this newly composed Supreme Court.

## V. CONCLUSION

Richard Ceballos probably never imagined that by driving out to a crime scene to investigate what he believed to be a fabricated affidavit used to obtain a search warrant would ultimately result, six years later, as an occasion for a newly composed Supreme Court to limit the speech protection he enjoyed as a lawyer working for his government. Unfortunately though, this is exactly what happened. One can only hope that the ultimate effect of the opinion on government employees will not be what Richard Ceballos himself predicted in his testimony at the congressional hearing, “that public employees are more likely to . . . [k]eep 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.”<sup>177</sup>

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174. *Id.* at 4.

175. *Hearings, supra* note 6.

176. *Id.* at 14 (statement of Stephen Kohn) (“The bottom line: without a legislative response to *Garcetti v. Ceballos*, government employees who report valid concerns regarding the violation of federal laws will not have adequate protection.”); *Id.* at 3 (statement of Richard Ceballos) (“I urge you to take a leadership role to amend the Whistleblower Protection Act.”); *Id.* at 1 (statement of William L. Bransford, Gen. Counsel, Senior Executives Ass’n) (“Over the last decade, whistleblower protection for federal employees has eroded because court decisions have limited the impact of the Whistleblower Protection Act. The Supreme Court’s decision in *Garcetti v. Ceballos* further erodes those protections and provides an impetus for Congress to act.”); *Id.* at 1 (statement of the Nat’l Treasury Emp. Union) (“[T]he Court’s decision in *Garcetti* makes more urgent the needs for reform to the Whistleblower Protection Act.”); *Hearings, supra* note 6, at 5. (statement of Joe Goldberg, Assistant Gen. Counsel for Litig., Am. Fed’n of Gov’t Emp.) (“Congress must act to extend whistleblower protections to national security workers by enacting legislation . . .”).

177. *Id.* at 3 (statement of Richard Ceballos).