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## The Espionage Act and National Security Whistleblowing After Garcetti

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# The Espionage Act and National Security Whistleblowing After Garcetti

## **Abstract**

Should government employees ever have a right to disseminate classified national security information to the public? As a general matter, of course, the answer is "no." It is necessarily tautological that the central purpose of classifying information is to keep that information secret. But what if the information pertains to what we might describe as "unlawful secrets," and the individual in question has exhausted all possible non-public remedies - and to no avail? Are there any circumstances in which the law enables the government employee to come forward? Should there be? As this Essay suggests, because of the broad language of the Espionage Act and the narrow language of certain whistleblower laws, a government employee would enjoy no statutory whistleblower protection whatsoever from either an adverse employment action or a criminal prosecution for disclosing classified national security information. And because of the Supreme Court's pronounced constriction of the First Amendment rights of public employees two years ago in *Garcetti v. Ceballos*, in which the Court effectively abandoned the idea of "Pickering balancing" for speech performed by a public employee as part of his professional duties, the employee would not be entitled to a constitutional defense, either. Reasonable minds can certainly disagree about whether there should ever be circumstances where federal law entitles a government employee in possession of classified information about illegal governmental activity to publicly disclose that information, even as a last resort. The purpose of this Essay is not to offer an argument for or against such a right; rather, my goal is to suggest that federal law today includes absolutely zero protection for employees in such a position, and that, perhaps unintentionally, *Garcetti* is the reason why.

## **Keywords**

Garcetti, Espionage Act, Whistleblowing, Leaks, National Security, Pickering

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THE ESPIONAGE ACT AND  
NATIONAL SECURITY WHISTLEBLOWING  
AFTER *GARCETTI*

STEPHEN I. VLADECK\*

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INTRODUCTION

Should government employees ever have a right to disseminate classified national security information to the public? As a general matter, of course, the answer is “no.” It is necessarily tautological that the central purpose of classifying information is to keep that information secret.<sup>1</sup> But what if the information pertains to what we

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\* Associate Professor, *American University, Washington College of Law*. This Essay is derived from remarks given at the *American University Law Review*'s September 2007 Symposium, “Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America.” I am grateful to Jasmine Watson, Megan Romigh, and the staff of the *American University Law Review* for inviting me to participate in such an important conference, and to my co-panelists—Valerie Caproni, Mike German, and Colleen Rowley—for sharing their own (far more sophisticated) perspectives on the role of governmental whistleblowers today.

1. See, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 174 (1983) (arguing that some documents should remain secret such as government personnel files and tentative inter-agency memorandums circulated in order to formulate new policy); ARVIN S. QUIST, *1 SECURITY CLASSIFICATION OF INFORMATION* (rev. 2002), <http://www.fas.org/sgp/library/quist/index.html>

might describe as “unlawful secrets,”<sup>2</sup> and the individual in question has exhausted all possible non-public remedies—and to no avail? Are there *any* circumstances in which the law enables the government employee to come forward?<sup>3</sup> Should there be?

These questions are hardly academic. Any list of the most important news stories of the past five years would likely include at least a handful of reports resulting from national security leaks and/or “whistleblowing” by federal government employees. Take the disclosures of the National Security Agency (“NSA”) wiretapping program<sup>4</sup> and the existence of “black sites,”<sup>5</sup> just to name two. And although some critics have publicly called for the prosecution of those responsible for the leaks,<sup>6</sup> the continuing national debate over these controversial initiatives suggests, at bottom, that these programs were (and remain) a matter of enormous public concern—at least, once they *became* public.<sup>7</sup> Ultimately, then, and regardless of the merits of each individual case, it should go without saying that the legal landscape governing the potential liability of the

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(providing an overview of numerous classification policies); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (“Secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results.”).

2. I use this term as shorthand for the two different types of illegally classified information: information that is “secretly unlawful,” i.e., secret information about unlawful governmental programs and activities; and information that is “unlawfully secret,” i.e., secret information that was improperly classified in the first place. For the currently applicable limitations on classification, see Exec. Order No. 13,292 § 1.7, 3 C.F.R. 196, 200 (2004), *reprinted in* 50 U.S.C. § 435 (Supp. II 2002).

3. For a discussion of our increasing tolerance of leaks (as part of a far more exhaustive analysis of some of the topics discussed herein), see William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453 (2008).

4. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

5. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

6. See, e.g., Dan Eggen, *Justice Dept. Investigating Leak of NSA Wiretapping*, WASH. POST, Dec. 31, 2005, at A1; Scott Shane, *Criminal Inquiry Opens into Leak in Eavesdropping*, N.Y. TIMES, Dec. 31, 2005, at A1. The *Times* story recounted a statement by Vice President Cheney at a press conference that the newspaper’s decision to publish the information “damages national security.” Shane, *supra*; see also Editorial, *The Press and Mr. Bush*, ST. LOUIS POST-DISPATCH, June 27, 2006, at B6 (quoting a statement by Republican Congressman Peter King of New York that the disclosures were “treasonous,” and should lead to criminal prosecutions).

7. For a pointed defense of the government employee behind the leak of the NSA wiretapping program, see Jesselyn Radack, *A Legal Defense of Russell Tice, the Whistleblower Who Revealed the President’s Authorization of NSA’s Warrantless Domestic Wiretapping*, FINDLAW.COM’S WRIT, Jan. 27, 2006, [http://writ.news.findlaw.com/commentary/20060127\\_radack.html](http://writ.news.findlaw.com/commentary/20060127_radack.html).

leakers/whistleblowers—and of those journalists involved in reporting their stories—merits further illumination.<sup>8</sup>

Although a number of scholars (and I) have written about the potential liability of the journalists in these cases,<sup>9</sup> the question of what rights (if any) the relevant governmental employees might have has been largely neglected.<sup>10</sup> In this short Essay, I offer a few thoughts on the relevant legal considerations governing national security whistleblowing (and whistleblowers) today.

As this Essay suggests, because of the broad language of the Espionage Act<sup>11</sup> and the narrow language of certain whistleblower laws,<sup>12</sup> a government employee would enjoy no statutory whistleblower protection whatsoever from either an adverse employment action or a criminal prosecution for disclosing classified national security information.<sup>13</sup> And because of the Supreme Court's pronounced constriction of the First Amendment rights of public employees two years ago in *Garcetti v. Ceballos*,<sup>14</sup> in which the Court effectively abandoned the idea of “*Pickering* balancing”<sup>15</sup> for speech

8. For a general overview of the history of national security whistleblowing, see generally LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS 1–43 (2005), available at <http://www.fas.org/sgp/crs/natsec/RL33215.pdf>.

9. See, e.g., Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992); Laura Barandes, Note, *A Helping Hand: Addressing the New Implications of the Espionage Act on Freedom of the Press*, 29 CARDOZO L. REV. 371 (2007); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); see also Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219 (2007).

10. For the one apparent counterexample, see Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759 (2007). Curiously, Sasser's otherwise thorough analysis completely overlooks the important role the Espionage Act plays in vitiating any statutory whistleblower protections that would otherwise be available, an important part of the puzzle that I discuss in Part II.

11. Espionage Act of 1917, 18 U.S.C. §§ 793–799 (2000).

12. The specific whistleblower statutes considered herein are the Federal Whistleblower Protection Act, 5 U.S.C. §§ 1201–1222 (2000 & Supp. II 2002), the Intelligence Community Whistleblower Protection Act of 1998, 5 U.S.C. app. § 8H (Supp. II 2002), and the Military Whistleblower Protection Act, 10 U.S.C.A. § 1034 (West 2008).

13. Throughout this Essay, I assume for convenience that the relevant legal considerations—or, at bottom, the relevant *constitutional* protections—are effectively identical with respect to their applicability to adverse employment action and to criminal prosecutions.

14. 547 U.S. 410 (2006). Although the plaintiff in the case (and thus the uncommon party) was Richard Ceballos, the case is generally referred to as “*Garcetti*,” a convention I follow throughout.

15. See *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968) (balancing the government employee's interests as a citizen in commenting upon “matters of public concern” and the State's interests as an employer in fostering efficient public services).

performed by a public employee as part of his professional duties, the employee would not be entitled to a constitutional defense, either.<sup>16</sup>

Reasonable minds can certainly disagree about whether there should ever be circumstances where federal law entitles a government employee in possession of classified information about illegal governmental activity to publicly disclose that information, even as a last resort. The purpose of this Essay is not to offer an argument for or against such a right; rather, my goal is to suggest that federal law today includes absolutely zero protection for employees in such a position, and that, perhaps unintentionally, *Garcetti* is the reason why.<sup>17</sup>

I begin in Part I with the Espionage Act and the various potentially applicable federal whistleblower statutes. As Part I demonstrates, even where they *apply*, virtually all of the relevant statutory whistleblower protections turn on the requirement that the disclosure *itself* not be illegal. The Espionage Act, however, includes a broad and sweeping prohibition of the dissemination of classified national security information “to any person not entitled to receive it.”<sup>18</sup> Thus, because it appears that there can never be a “legal” public disclosure of classified national security information under the Espionage Act, it also appears that there is no statutory whistleblower protection for such disclosures.

That result, of course, should not be surprising. What is perhaps more troubling is the constitutional question, to which I turn in Part II: Does the First Amendment *ever* provide a defense to adverse employment actions—or even criminal prosecution—based upon the disclosure of classified national security information? As Part II explains, the answer before *Garcetti* (under *Pickering* and its progeny) was “yes, albeit extremely rarely.”<sup>19</sup> *Garcetti*, however, adopted an effectively categorical rule that the First Amendment does not protect public employee speech “that owes its existence to a public

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16. On the more general question of *Pickering*'s relevance and applicability post-*Garcetti*, see Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. (forthcoming 2008). See also *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 273 (2006) (discussing *Garcetti*).

17. As I note in Part II, the majority in *Garcetti* relied on the existence of statutory whistleblower protection to bolster their conclusion that constitutional protection was not just unwarranted, but unnecessary. But the majority did not consider those contexts, such as national security, where statutory whistleblower protections are, to put it mildly, far less robust.

18. *E.g.*, 18 U.S.C. § 793(d)–(e) (2000).

19. Or, as Justice Stevens put it, “Sometimes.” *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting).

employee's professional responsibilities."<sup>20</sup> Because the disclosure of classified national security information would undoubtedly constitute speech that could not have existed but for the "public employee's professional responsibilities," *Garcetti*, as Part II concludes, necessarily vitiates any possible First Amendment protection for national security whistleblowers.

Finally, in Part III, I turn to perhaps the hardest question: Is the problem identified in Parts I and II worth a solution? There are several powerful counterarguments to the need for *any* statutory or constitutional protection for public national security whistleblowing. First is the possibility of internal, non-public whistleblowing via disclosures to the various Inspectors General or the Special Counsel, something for which the Federal Whistleblower Protection Act expressly provides<sup>21</sup>—and which, at least arguably, does not violate the Espionage Act. Second is the possibility of disclosure to Congress (or, at least, to the intelligence committees thereof), something for which the Intelligence Community Whistleblower Protection Act ("ICWPA") expressly provides<sup>22</sup>—and which, again, at least arguably does not violate the Espionage Act.

As Part III concludes, these other protections take care of *many* cases where we might otherwise want to allow for the public disclosure of classified national security information, but not all. After all, internal whistleblowing may not be enough when the relevant program has been approved at the highest levels of the Executive Branch, or when there are other reasons to doubt the impartiality of the relevant Inspector General or the Special Counsel.

And disclosure to the House and Senate intelligence committees is a feasible option only if those committees have the authority to act upon the information they receive—a point that recent events suggest is very much debatable. In whatever cases remain, the Espionage Act, read together with *Garcetti*, effectively guarantees that a government employee will be liable for the disclosure of classified national security information. Whether we ultimately want the employee in that situation to have to make the moral (as opposed to legal) choice, it is understandable why such a legal regime would give pause to even the most altruistic and well-intentioned whistleblowers.<sup>23</sup> And that may be the problem in and of itself.

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20. *Id.* at 421 (majority opinion) (citation omitted).

21. 5 U.S.C. § 1213(a)(2) (Supp. II 2002).

22. 5 U.S.C. app. § 8H (Supp. II 2002).

23. See Posting of Marty Lederman to Balkinization, *Ceballos and Public Speech: Response to Roosevelt*, <http://balkin.blogspot.com/2006/06/ceballos-and-public-speech-response-to.html> (June 1, 2006, 11:34 EST).

I. THE ESPIONAGE ACT AND STATUTORY WHISTLEBLOWER PROTECTION

Section 1(d) of the Espionage Act,<sup>24</sup> which was trifurcated into present-day 18 U.S.C. § 793(d), (e), and (f) in 1950,<sup>25</sup> is the principal statutory bar to the willful<sup>26</sup> dissemination of classified national security information—defined by the statute as

any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.<sup>27</sup>

Although § 793(e) proscribes the dissemination of such information by individuals in the unauthorized possession thereof, and is therefore of more significance vis-à-vis the potential liability of third parties (including the press),<sup>28</sup> § 793(d) likewise prohibits the dissemination of such information by individuals in *lawful* possession thereof. Thus, § 793(d) prohibits government employees lawfully in possession of “information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation” from disclosing that information “to any person not entitled to receive it.”<sup>29</sup>

Section 793(d) is hardly unique. A host of other overlapping statutes arguably prohibit variants of the same conduct at the core of § 793(d)—the dissemination of classified national security information.<sup>30</sup> But more important than an exhaustive recounting of these provisions, is the basic idea at their core: whether one is in lawful possession of classified national security information or not, it

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24. For what remains the definitive academic survey of the Espionage Act (along with other statutes relating to the publication of classified national security information), see generally Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973). See also Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986) (updating their earlier analysis).

25. The three provisions were modified and separated by the Subversive Activities Control Act, part of the Internal Security Act of 1950, tit. I, § 18, Pub. L. No. 81-831, 64 Stat. 987, 1003 (1950).

26. 18 U.S.C. § 793(f) (2000) also prohibits *negligence* that leads to the loss and/or theft of classified national security information, an issue not relevant here.

27. *E.g.*, 18 U.S.C. § 793(d) (2002).

28. See, *e.g.*, Vladeck, *supra* note 9, at 223–24 (discussing § 793(e) and the issue of third-party liability).

29. 18 U.S.C. § 793(d).

30. See generally Vladeck, *supra* note 9 (surveying the relevant statutes).

is against the law to disclose that information “to any person not entitled to receive it,”<sup>31</sup> a phrase that has been interpreted expansively.<sup>32</sup>

The significance of the Espionage Act’s preclusion of the disclosure of national security information “to any person not entitled to receive it” quickly becomes apparent in perusing the relevant federal whistleblower protection statutes. For example, the Federal Whistleblower Protection Act (“WPA”),<sup>33</sup> protects the public disclosure of “a violation of any law, rule, or regulation” only “if such 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.”<sup>34</sup> Indeed, even *without* the Espionage Act, the WPA would not protect the public disclosure of national security information so long as the information was classified under an executive order.

Similar language appears in virtually all of the other federal whistleblower protection statutes.<sup>35</sup> Thus, unsurprisingly, there is no statutory bar to adverse employment action—or even potential criminal prosecution—for the unauthorized disclosure of classified national security information. The only true statutory whistleblower protection in such cases are the internal disclosures provided for by the WPA and the disclosures to Congress provided for by the ICWPA, to which I return in Part III.

## II. *GARCETTI*, PUBLIC EMPLOYEE SPEECH, AND THE FIRST AMENDMENT

In 1968, the Supreme Court first identified limited circumstances where a public employee’s speech *as* a public employee would be entitled to First Amendment protection.<sup>36</sup> As Justice Marshall wrote for the majority in *Pickering v. Board of Education*,<sup>37</sup> “The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting

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31. *E.g.*, 18 U.S.C. § 793(d). Similar language appears in § 793(e).

32. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1064–70 (4th Cir. 1988) (recounting exhaustively the history of § 793(d) and concluding that it applies to—and prohibits—any public disclosures, including disclosures to the press).

33. 5 U.S.C. §§ 1201–1222 (2000 & Supp. II 2002).

34. *Id.* § 1213(a) (emphasis added).

35. *See, e.g.*, 5 U.S.C. § 2303(b)(8)(A) (2000); 10 U.S.C. § 1587(b)(1) (2000); 22 U.S.C. § 3905(b)(2) (2000).

36. *See Leading Cases, supra* note 16, at 273. As the case note describes, “From the end of the nineteenth century to the middle of the twentieth century, the Court considered government employment not a right but a privilege.” *Id.* at 273 n.2.

37. 391 U.S. 563 (1968).

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the efficiency of the public services it performs through its employees.”<sup>38</sup>

Such “*Pickering* balancing” necessarily presupposed that there could be cases—such as *Pickering* itself—where the public interest in the government employee’s speech outweighed the government’s interest in maintaining the confidentiality of governmental information and in promoting the efficiency of internal operations. Thus, as a unanimous Court summarized in 2004 in *City of San Diego v. Roe*<sup>39</sup>:

Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it.

*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. This concern prompted the Court in *Connick [v. Meyers]* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee’s speech must touch on a matter of “public concern.”<sup>40</sup>

Although *Connick* and the Court’s other post-*Pickering* cases did little to elaborate on the definition of “public concern,” *Roe* defined “public concern” as “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”<sup>41</sup> Under that definition, it stands to reason that various of the more important national security “leaks” and/or whistleblowing since September 11 would easily constitute “matters of public concern.” That conclusion does not necessarily compel the result that such speech is entitled to First

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38. *Id.* at 568. The Court made clear shortly thereafter that *Pickering*’s understanding of the First Amendment rights of local and state governmental employees applied equally to *federal* employees. See *Arnett v. Kennedy*, 416 U.S. 134, 160–61 (1974) (plurality opinion).

39. 543 U.S. 77 (2004) (per curiam).

40. *Id.* at 82–83 (internal citations omitted). See generally *Connick v. Myers*, 461 U.S. 138 (1983).

41. 543 U.S. at 83–84.

Amendment protection, but it *would* be sufficient to trigger *Pickering* balancing. Or, at least, it would have been before *Garcetti*.

At issue in *Garcetti* was a memorandum written by Richard Ceballos while serving as a deputy district attorney in Los Angeles. Ceballos argued that the memo concerned a matter of public concern and that, under *Pickering* balancing, it was protected by the First Amendment.<sup>42</sup> The Ninth Circuit agreed on both counts, concluding that the Los Angeles District Attorney's Office "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" resulting from the public disclosure of Ceballos's memo.<sup>43</sup>

Specially concurring, Judge O'Scannlain agreed that prior Ninth Circuit precedent compelled the result reached by Judge Reinhardt's majority opinion, but questioned whether the time had come to revisit the earlier case—*Roth v. Veterans Administration*.<sup>44</sup> In his words,

While the court quite properly applies *Roth* as binding precedent in this case, the time has come for us to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer. Because *Roth* is inconsistent with *Connick's* careful differentiation between public employees' speech as citizens and speech in their role as employees, I believe that *Roth* should be overruled—if not by our court sitting en banc, then, in due course, by the Supreme Court, to steer this court's drifting First Amendment jurisprudence back to its proper moorings.<sup>45</sup>

The Supreme Court took up Judge O'Scannlain's invitation, holding that Ceballos's memo was not subject to *Pickering* balancing and was therefore not protected by the First Amendment.<sup>46</sup> Writing for a 5-4 majority, Justice Kennedy emphasized that "[t]he controlling factor in Ceballos' case is that [the memorandum was] made pursuant to his duties as a calendar deputy."<sup>47</sup> Thus, "[w]e hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>48</sup> In other words,

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42. See *Ceballos v. Garcetti*, 547 U.S. 410, 416 (2006) (citing the Court of Appeals for the Ninth Circuit, holding that the memo "was 'inherently a matter of public concern'" (citation omitted)).

43. See *Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (9th Cir. 2004), *rev'd*, 547 U.S. 410; see also *Leading Cases*, *supra* note 16, at 274–75 (summarizing the background).

44. *Garcetti*, 361 F.3d at 1185 (O'Scannlain, J., specially concurring) (citing *Roth v. Veterans Admin.*, 856 F.2d 1401 (9th Cir. 1988)).

45. *Id.*

46. *Garcetti*, 547 U.S. at 424.

47. *Id.* at 421.

48. *Id.*

because Ceballos wrote the memo at issue *for his job*—that is, because the speech at issue was itself conducted in furtherance of his job responsibilities—the memo was not entitled to First Amendment protection. So construed, *Garcetti* contemplated a narrow exception to *Pickering* balancing in those cases where the speech at issue was performed by a public employee *as a public employee*.

But the *Garcetti* Court went further, and concluded that “[r]estricting 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.”<sup>49</sup> In other words, the rule *Garcetti* enunciated did not just apply to speech performed *as a government employee*, but to all speech that “owes its existence to a public employee’s professional responsibilities”—a *per se* “but-for” rule that denies First Amendment protection to any speech by a public employee that could not have been undertaken but for his or her “professional responsibilities.”<sup>50</sup> Thus, instead of limiting itself to speech performed *as part of* a government employee’s responsibilities, *Garcetti* also appears to preclude First Amendment protections for any speech made by a government employee that would not have been possible if he were not a government employee, even if the speech itself is not made as part of the employee’s official duties.

Where classified national security information is concerned, the stopping point of this logic is immediately clear: National security secrets are, by definition, information to which the average private citizen does not have access. Speech related to national security secrets, then, would seem to fall squarely within the category of speech Justice Kennedy identified in *Garcetti* as falling outside the First Amendment’s umbrella. And whatever the merits of such a

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49. *Id.* at 421–22 (emphasis added).

50. One of the more thoughtful analyses of *Garcetti*’s implications suggests that the real focus of post-*Garcetti* courts will be on the true scope of a government employee’s “job duties.” See Sasser, *supra* note 10, at 768–79. But the language quoted above suggests that the rule enunciated in *Garcetti* is far broader than speech conducted as part of an employee’s “job duties,” and that it actually includes *all* speech that the employee is only able to make by virtue of their governmental employment, whether it is part of their professional responsibilities—such as the memo prepared by Ceballos—or not.

Finally, it bears noting that the en banc D.C. Circuit has recently held that the disclosure or publication of information of significant public concern is not protected by the First Amendment if the disclosure or publication is made with knowledge that it was unlawfully obtained or leaked. See *Boehner v. McDermott*, 484 F.3d 573, 580–81 (D.C. Cir.) (en banc), *cert. denied*, 128 S. Ct. 712 (2007). Thus, even if *Garcetti* could be read more narrowly to preclude First Amendment protection only when the speech at issue was itself made as *part of* a government employee’s official duties, the D.C. Circuit’s decision seems to preclude First Amendment protection for any and all unlawful leaks, whether covered by *Garcetti* or not.

rule,<sup>51</sup> its implications were readily understood by the dissenting Justices, each of whom wrote separately to emphasize the implications of the majority's categorical departure from *Pickering* balancing.<sup>52</sup> Ultimately, *Garcetti* seems to stand for the unequivocal proposition that, where the government employee is engaging in speech that is only made possible *by* his governmental employment, that speech is unprotected by the First Amendment.

In response to the dissents, Justice Kennedy conceded that “[e]xposing governmental inefficiency and misconduct is a matter of considerable significance.”<sup>53</sup> He nevertheless concluded that such an interest could be adequately vindicated without First Amendment protection:

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 . . . . 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.<sup>54</sup>

Thus, the crux of the majority's defense of its evisceration of First Amendment protections for government employee speech was the availability of whistleblower (and other statutory) protection to shield the employee from sanctions.

In his dissent, Justice Souter took substantial issue with Justice Kennedy's rosy characterization of the availability of whistleblower protection. In his words, “[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.”<sup>55</sup> To rely upon such an incomplete and varying scheme of state and federal laws and regulations would, from Souter's perspective,

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51. I, for one, agree with one student commentator, who noted that, “[a]lthough *Garcetti* aimed to provide clarity and limit judicial interference in government operations, the rule that the Court established is troubling because it deviates from precedent in ways that may thwart the interests of the individual speaker, the public, and the state employer.” *Leading Cases, supra* note 16, at 277.

52. See, e.g., *Garcetti*, 547 U.S. at 426–27 (2006) (Stevens, J., dissenting); *id.* at 427–44 (Souter, J., dissenting); *id.* at 444–50 (Breyer, J., dissenting).

53. *Id.* at 425 (majority opinion).

54. *Id.* at 425–26 (citations omitted).

55. *Id.* at 441 (Souter, J., dissenting).

undermine the speech interests that *Pickering* and its progeny identified.<sup>56</sup>

Ultimately, regardless of who has the better argument about the viability of whistleblower protections in general,<sup>57</sup> the salient question here is the availability of such protections to federal employees in possession of classified national security information. As Part I suggested, the relevant statutes provide no protection for public disclosure of such information, no matter how illegal the governmental conduct is or how grave the potential public concern. The only remaining question, then, is whether the provisions for *non*-public disclosure are sufficient. It is to that question that this Essay now turns.

### III. NON-PUBLIC FEDERAL WHISTLEBLOWER PROTECTIONS

As identified above, the *Garcetti* Court's analysis of the First Amendment suggests that potential whistleblowers must look to state and federal statutes—and not to the Constitution—to find any protection for their decision to disclose internal governmental information. Because of the interaction between the Espionage Act and the various federal whistleblower protection laws identified in Part I, federal employees in possession of classified national security information are, at best, left with one of two possible options: disclosure to the relevant Inspector General or Special Counsel, under the terms of the Federal Whistleblower Protection Act;<sup>58</sup> or disclosure to particular members of Congress, under the terms of the Intelligence Community Whistleblower Protection Act of 1998.<sup>59</sup>

With respect to the WPA, the first serious issue is easy enough to describe: Most government employees who might lawfully be in possession of classified national security information are not even *covered* by the WPA, which expressly excludes from its scope employees of “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof

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56. *Id.*; see also *id.* at 439–41 (summarizing the myriad of incongruities and disparities between various state and federal whistleblower protections).

57. A separate critique of Kennedy's analysis, also noted by Justice Souter, is the canon that “[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law.” *Id.* at 439 (quoting *Bd. of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 680 (1996)). Souter's point, put differently, is that the *possible* availability of statutory relief should not be the basis for *categorically* precluding a previously available constitutional claim.

58. 5 U.S.C. §§ 1201–1220 (2000 & Supp. II 2002).

59. 5 U.S.C. app. § 8H (2000).

the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”<sup>60</sup> Thus, for the vast majority of federal employees in possession of classified national security information, the WPA is simply inapplicable.

Second, even for those few employees who *might* fall within the WPA’s umbrella,<sup>61</sup> its provisions for internal reporting are somewhat convoluted. As an oversimplification, the WPA authorizes disclosures “to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information,” *without* the limitations placed upon the public disclosure of similar information.<sup>62</sup> Thus, where the employee is not excluded from the WPA’s coverage, the Act itself places no limit on whether classified national security information can be disclosed to the Special Counsel or Inspector General.

Moreover, the fact that the WPA explicitly authorizes the Special Counsel or Inspector General to receive such information is probably sufficient to vitiate the Espionage Act’s prohibition on the disclosure of classified national security information to anyone “not entitled to receive it.”<sup>63</sup> Under the WPA, the Special Counsel or Inspector General *is* “entitled to receive” such information, so long as it pertains to “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.”<sup>64</sup>

The harder question is what happens next? According to 5 U.S.C. § 1213(j),

With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the Senate.<sup>65</sup>

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60. 5 U.S.C.A. § 2302(a)(2)(C)(ii) (2007); *see also* Sasser, *supra* note 10, at 780–81 & nn.127–34 (noting the implications of this exception). As Sasser notes, although the WPA excludes the FBI, another section of the WPA, combined with regulations implemented thereunder, serve to effectively cover the FBI. *See* Sasser, *supra* note 10, at 780 n.127 (citing 5 U.S.C. § 2303(a) (2000) and 28 C.F.R. § 27.1 (2006)).

61. *See* Sasser, *supra* note 10, at 781–72.

62. 5 U.S.C. § 1213(a)(2) (Supp. II 2002).

63. *E.g.*, 18 U.S.C. § 793(d) (2000). Similar language appears in § 793(e).

64. 5 U.S.C. § 1213(a)(2)(A)–(B).

65. 5 U.S.C. § 1213(j).

In other words, if the information at issue relates to foreign intelligence or counterintelligence information, the Inspector General may only pass along the information to the National Security Advisor and certain members of Congress.

Relatedly, and perhaps most importantly, there is the practical problem posed by cases where disclosure to the Inspector General or Special Counsel might prove unproductive. This problem could occur in cases where the “unlawful secret” has been approved at the highest levels of the federal government—as we now know to have been true with respect to the wiretapping program. It could also occur in cases where the Inspector General is failing to perform his statutory responsibilities, a charge that is not as unrealistic as we might previously have hoped.<sup>66</sup>

All of this is not to say that disclosure to the Inspector General or Special Counsel will not work in the vast majority of cases—it certainly will.<sup>67</sup> But the cases where it is the least likely to be effective are arguably the cases where whistleblowing is the *most* important—where government employees are involved in an illegal program that has approval from the most senior officials in the relevant agencies and departments.

Largely with that tension in mind, Congress in 1998 enacted the Intelligence Community Whistleblower Protection Act.<sup>68</sup> The purpose of the Act could not have been more explicit; as one of the findings accompanying the Act states, “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.”<sup>69</sup>

Thus, the ICWPA empowers certain employees of certain agencies to report either to Congress or to the Inspector General of the Department of Defense if it is a matter of “urgent concern,” including as here relevant:

- (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

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66. See, e.g., William Branigin, *Inspector General Will Leave State Department*, WASH. POST, Dec. 8, 2007, at A3; Glenn Kessler & Karen DeYoung, *State IG Accused of Averting Probes*, WASH. POST, Sept. 19, 2007, at A21.

67. See, e.g., Valerie Caproni, Symposium Transcripts, *Panel: The Role of Whistleblowers to Facilitate Government Accountability*, 57 AM. U. L. REV. 1244–47 (2008).

68. 5 U.S.C. app. § 8H (2000). See generally Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235 (2001) (discussing the origins and legislative history of the ICWPA).

69. 5 U.S.C. app. § 8H (2000).

classified information, but does not include 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.<sup>70</sup>

But the ICWPA has its own limitations. First, and most importantly, its central provisions appear to apply to employees of only four agencies—the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and the NSA.<sup>71</sup> The statute also provides procedures for Central Intelligence Agency (“CIA”) employees to report abuses and violations of the law to the CIA Inspector General,<sup>72</sup> but that still leaves countless federal employees unprotected.<sup>73</sup>

Second, even in those cases where the ICWPA *does* apply, disclosure to the House and Senate intelligence committees may not accomplish anything. As the controversy over the government’s waterboarding of various non-citizens detained as “enemy combatants” demonstrates, even when certain members of Congress are briefed on a classified—and potentially unlawful—governmental program, they may not be legally entitled to *act* upon that information, at least publicly.<sup>74</sup> As a result, even after the ICWPA, employees of various national security agencies have continued to call for further—and less convoluted—whistleblower protections.<sup>75</sup>

The upside of the above analysis is fairly straightforward: the various internal disclosure mechanisms will likely work in cases where

70. *Id.* § 8H(g)(1)(A)–(B).

71. *See id.* § 8H(a)(1)(A); *see also* Sasser, *supra* note 10, at 785 & n.152.

72. *See generally* 50 U.S.C. § 403q (Supp. IV 2004). I thank Professor Lee for his clarification of this point.

73. The Military Whistleblower Protection Act, 10 U.S.C.A. § 1034 (West 2008), confers similar protections upon active servicemembers.

74. *See, e.g.*, Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST, Dec. 9, 2007, at A1. The story suggests that one of the reasons the Democratic members briefed on the controversial interrogation techniques did not publicly reveal what they knew is that federal law prevented them from doing so. My former colleague Michael Froomkin suggests, to the contrary, that the Constitution’s Speech and Debate Clause, *see* U.S. CONST. art. I, § 6, cl. 1, would protect any member of Congress publicly revealing classified information on the floor of the House or Senate. *See* Posting of Michael Froomkin to Discourse.net, *Senators and Representatives Could Have Spoken Out on Waterboarding*, [http://www.discourse.net/archives/2007/12/senators\\_and\\_representatives\\_could\\_have\\_spoken\\_out\\_on\\_waterboarding\\_the\\_constitution\\_protects\\_their\\_right\\_to\\_speak\\_out\\_without\\_fear\\_of\\_legal\\_consequences.html](http://www.discourse.net/archives/2007/12/senators_and_representatives_could_have_spoken_out_on_waterboarding_the_constitution_protects_their_right_to_speak_out_without_fear_of_legal_consequences.html) (Dec. 9, 2007, 17:28 EST). Regardless of who is actually correct, the mere fact that this is an open question suggests that disclosure to Congress—and to the intelligence committees, in particular—will not necessarily provide a remedy for the “unlawful secret” at issue.

75. *See, e.g.*, Chris Strohm, *Security Agency Whistleblowers Seek Stronger Protection*, GOV. EXEC., Feb. 14, 2006, <http://www.govexec.com/dailyfed/0206/021406c1.htm>.

individual (and fairly low-level) government officers are breaking the law. But where a government employee is in possession of classified national security information about a potentially illegal governmental program approved at the highest levels of the federal government, the likelihood that disclosure pursuant to the WPA or ICWPA (to the extent they apply) will actually allow for meaningful oversight of the program is fleeting, at best.

#### CONCLUSION

As I noted above, my goal in this Essay is not to take a substantive position on whether it should ever be appropriate for a government employee in the possession of classified national security information to publicly disclose that information, especially to members of the news media. I have my own views, but reasonable people can certainly disagree about the answer to this question.

It is worth noting, however, that without national security whistleblowers, we would still be in the dark about various controversial aspects of the U.S. government's conduct in the war on terrorism, including the wiretapping program, the "black sites," the waterboarding of terrorism suspects, the abuses at Abu Ghraib, and so on. *If* one believes that these disclosures have been a necessary and indispensable contribution to the ongoing debate, then the absence of protection for similar disclosures in the future under either the Constitution or federal statutory law should give all of us—and not just the next government employee in the wrong place at the wrong time—serious cause for concern.