

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2017

Checking the Government's Deception Through Public Employee Speech

Helen Norton

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Labor and Employment Law Commons](#), and the [Supreme Court of the United States Commons](#)

Citation Information

Helen Norton, Checking the Government's Deception Through Public Employee Speech, JOTWELL (Sept. 25, 2017) (reviewing Heidi Kitrosser, The Special Value of Public Employee Speech, 2015 Sup. Ct. Rev. 301 (2016)), <https://conlaw.jotwell.com/checking-the-governments-deception-through-public-employee-speech/>, available at <http://scholar.law.colorado.edu/articles/779/>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.

Checking the Government's Deception Through Public Employee Speech

Author : Helen Norton

Date : September 25, 2017

Heidi Kitrosser, [The Special Value of Public Employee Speech](#), 2015 **Sup. Ct. Rev.** 301 (2016).

Suppose the United States elected a president with authoritarian tendencies. Imagine that the president regularly attacked and undermined institutions and individuals that sought to hold his administration accountable for its actions. Assume, for purposes of the hypothetical, that members of the President's party controlled both the House and the Senate and saw little partisan self-interest in checking the executive branch. Just pretend.

Under those circumstances, where else might we turn for help in ensuring that our government remains accountable to us? In *The Special Value of Public Employee Speech*, [Heidi Kitrosser](#) reminds us that "government employees are crucial safety valves for protecting the people from abuse and incompetence, given their unique access to information and to a range of avenues for transmitting the same." More specifically, she points out that the everyday heroism of public employees includes

the simple acts of employees doing their jobs conscientiously and in accordance with the norms of their professions. When employees engage in such behavior – for instance, when government auditors honestly and competently investigate and report in a manner consistent with professional auditing standards – they help to maintain consistency between the functions the government purports to perform and those that it actually performs. In this sense, public employees are potential barriers against government deception. They can disrupt government efforts to have it both ways by purporting publicly to provide a service while distorting the nature of that service. When they do this through their speech acts—for example, by reporting the results of budgetary analyses or scientific studies—they engage in speech of substantial First Amendment value. (Pp. 302-303).

In [Garcetti v. Ceballos](#), however, the Supreme Court interpreted the First Amendment to offer no protection for public employees' truthful speech in a broad range of circumstances—including their truthful reports of governmental lies and other misconduct. Rejecting a First Amendment challenge by a prosecutor disciplined for writing an internal memo that criticized a police affidavit as including serious misrepresentations, the Court held by a 5-4 vote 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." In concluding that a government employer should remain free to assert "control over what the employer itself has commissioned or created," the majority thus created a bright-line rule that treats public employees' speech delivered pursuant to their official duties as speech that the government may restrain and punish without running afoul of the First Amendment.

As I have detailed [elsewhere](#), lower courts have applied *Garcetti's* bright-line rule to reject the First Amendment claims of a wide swath of government workers punished for reporting all sorts of government misconduct. Examples include financial managers fired after reporting public agencies' fiscal improprieties; an array of public employees terminated after reporting health and safety violations; public health care workers and public school teachers punished after expressing concerns about patient care and student welfare; and police officers discharged after reporting government officials' illegal or unethical behavior. As Seventh Circuit Judge Ilana Diamond Rovner explained in [one such case](#): "Detective Kolatski was performing his job admirably at the time of these events, and although his demotion for

truthfully reporting allegations of misconduct may be morally repugnant, after *Garcetti*, it does not offend the First Amendment.”

Some lower courts have even understood *Garcetti* to mean that the First Amendment offers no protection to public employees punished for testifying truthfully about their on-the-job observations of government misconduct, because such testimony concerns information that they received pursuant to their official duties. The Eleventh Circuit, for example, applied *Garcetti* to conclude that the Constitution posed no obstacle to the termination of a state employee who testified under oath about his discovery that an Alabama state legislator on a state agency payroll had not been reporting for work. Fortunately, the Supreme Court reversed the lower court, [holding](#) in *Lane v. Franks* that the First Amendment “protects a public employee who provide[s] truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities.” In other words, the Court held that *Garcetti* did not apply, even though the plaintiff’s testimony concerned information related to his public employment, because his ordinary job duties did not include sworn testimony.

In short, *Garcetti* slammed the door shut on the prospect of First Amendment protection for public employees’ speech pursuant to their official duties. *Lane* cracked that door a bit, recognizing that “speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.” Whether *Lane* signals any further limitation of *Garcetti*, however, remains unclear, as the Court noted that it did “not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee’s ordinary job duties.” Incredibly, we don’t yet know whether the First Amendment protects law enforcement officers and government lawyers who testify truthfully about public corruption when it is their job to do so.

Kitrosser’s valuable article seeks to push the First Amendment door open still wider for public employees. She offers a road map for mitigating *Garcetti*’s damage by emphasizing the special value of public employee speech to democratic accountability. Here, Kitrosser is pragmatic but optimistic: “The hope is that *Lane* provides occasion to dig more deeply into both the special value of public employee speech and the government interests at issue and thus to rethink *Garcetti* entirely. More modestly, *Lane* can point the way to means by which *Garcetti* can be limited.”

Kitrosser urges the Court to revise and limit *Garcetti* to permit the government to discipline public employees for speech that they are hired to produce *only* when such discipline is based on the government’s *genuine*, rather than pretextual, assessment of that expression’s quality. Her proposal would protect the special value of public employee speech while recognizing and accommodating public employers’ compelling managerial needs, in that she seeks “not to second-guess supervisor assessments of work product quality, but to smoke out retaliation against work product speech for reasons other than quality”—e.g., public employee speech that discloses “inconvenient” facts or offers truthful but unwelcome analysis.

Most important, “in cases where employees were hired to render independent professional judgment, disappointment with those judgments, not because they reflect low quality, but because they are politically or personally inconvenient for employers, should *not* be deemed quality-based assessments.” As Kitrosser explains, the government engages in deception when it “hires climate scientists to make climate projections but insists that they alter their findings for political reasons as a condition of their continued employment.” The same would be true of labor economists hired by the government to report unemployment rates. It would apply as well to law enforcement officers hired to investigate, and lawyers hired to prosecute, government corruption.

Kitrosser also identifies more minor doctrinal adjustments as a “second-best, but perhaps more realistic near-term alternative” for limiting *Garcetti*’s reach. These include “carv[ing] out an exception to *Garcetti*, a presumption against its application, or at least a factor in weighting against its application whenever truthful reporting of corruption or serious governmental misconduct is at issue,” and “deem[ing] the fact that information was learned on the job irrelevant to this inquiry.” I’d add that legislatures also have an important role to play in enacting statutory protections for public employees who engage in such speech.

In this important article, Kitrosser reminds us that we lose something of great value when government workers can be, and are, fired for telling the truth about their jobs. That reminder is necessary now more than ever.

Cite as: Helen Norton, *Checking the Government's Deception Through Public Employee Speech*, JOTWELL (September 25, 2017) (reviewing Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 **Sup. Ct. Rev.** 301 (2016)), <https://conlaw.jotwell.com/checking-the-governments-deception-through-public-employee-speech/>.