UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM

"What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision"

TESTIMONY OF STEPHEN M. KOHN[1/]

June 29, 2006

Chairman Tom Davis, Ranking Minority Member Henry A. Waxman and Honorable Members of the Committee on Government Reform:

Thank you for the opportunity to share my views on the recent Supreme Court decision in *Garcetti v. Ceballos*.[2/]

The credo of the National Whistleblower Center is the "Freedom to Tell the Truth." The truth about the safety of the Space Shuttle before it is scheduled to launch, the truth about the financial condition of a corporation where Americans have invested their life savings, the truth about the need for a FISA search warrant when a suspected terrorist is identified.

Before *Garcetti v. Ceballos*, the Supreme Court's precedent supported this credo. The Court had repeatedly reaffirmed the principle that the First Amendment protected "free discussion of governmental affairs" and the "manner in which government is operated or should be operated."[3/] Consistent with these principles, in adjudicating public employee First Amendment cases, the Supreme Court premised its analysis on an

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[2/] *Garcetti v. Ceballos,* Supreme Court Case No. 04-473, reported in 126 S.Ct. 1951 (2006).

[3/] *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

understanding that "government employees are often in the best position to know what ails the agencies for which they work."[4/]

Garcetti v. Ceballos represents a radical departure from this long line of cases. In a remarkable holding, the Supreme Court concluded the 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.

Legislative action is now necessary.

Background to the *Garcetti v. Ceballos* Case

Garcetti v. Ceballos arose as a typical whistleblower case. Mr. Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, in the course of his work, identified a major problem: "serious misrepresentations" in a sworn affidavit.[5/]

Mr. Ceballos next did what every honest and dedicated public servant should do: as a matter of routine course he "relayed his findings to his supervisors."[6/]

After making his internal disclosures, the *Garcetti v. Ceballos* case took an unfortunate, but familiar path. Instead of welcoming the report, he was "sharply criticized" for his conduct, and later subjected to a retaliatory reassignment by his managers.[7/]

The Court of Appeals determined that Mr. Ceballos' internal report to his supervisors was protected under the First Amendment. A sharply divided Supreme Court disagreed, and held that the "First Amendment does not prohibit managerial discipline

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[4/] *Waters v. Churchill,* 511 U.S. 661, 674 (1994).

[5/] *Garcetti v. Ceballos,* 126 S.Ct. at 1955.

[6/] *Id.*

[7/] *Id.*, 126 S.Ct. at 1956.

based on an employee's expressions made pursuant to official responsibilities."[8/] In other words, under this analysis Mr. Ceballos could be legally disciplined for reporting "serious misrepresentations" contained in a sworn affidavit utilized to obtain a search warrant.

That decision broke with prior Supreme Court precedent[9/] and the precedent followed by nearly every other state and federal court[10/] that previously interpreted the scope of First Amendment protections for government employees.

[8/] *Id.*, 126 S.Ct. at 1961.

[9/] Prior to *Garcetti v. Ceballos* the Court had concluded that public employees could not be compelled to "relinquish their First Amendment rights as a condition of public employment." *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Court upheld a First Amendment cause of action under 42 U.S.C.§ 1983 for a public employee discharged for speech "on matters of public concern." In *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), Chief Justice Rehnquist, writing for a unanimous Court, held that "complaints and opinions" "privately expressed" by a public employee to his or her supervisor were also protected under the First Amendment, so long as those complaints constituted matters of public concern. Based on this line of cases, prior to *Ceballos* the vast majority of courts to address the issue protected the type of speech in which Mr. Ceballos had engaged within the district attorneys office. *See, e.g. Garcetti v. Ceballos*, 126 S.Ct. at 1962, footnote (Stevens dissenting).

[10/] Some of the decisions which discuss the need to protect internal/"official duty" whistleblowing are: *Lambert v. Ackerley*, 180 F.3d 997, 1002-1008 (9th Cir. 1999) (*en banc*) (discussing cases and protected activity under various antiretaliation laws); *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Baker v. Board of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978); *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Phillips v. Board of Mine Operations Appeals*, 500 P.2d 772, 781-782 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1974); *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998); and *Bechtel Construction v. SOL*, 50 F.3d 926, 931-933 (11th Cir. 1995).

Although *Garcetti v. Ceballos* was wrongly decided,[11/] it is unrealistic to expect the Supreme Court to overturn this decision. It is now up to Congress to ensure that whistleblowers are effectively protected and that public employees have the ability to resolve their concerns about serious misconduct with their government employers.

The Majority Opinion Recognized the Importance of Statutorily Protecting Internal/"Official Duty" Whistleblowers

In *Garcetti v. Ceballos,* the Supreme Court punted to Congress. Justice Kennedy, writing for the five member majority, noted that although internal/"official duty" whistleblowers were not protected under a First Amendment analysis, these employees still "should" be protected under state or federal law.[12/] The majority of the Court was under the incorrect impression that such laws already existed.

The five-member majority stated:

> "Exposing governmental inefficiency and misconduct is a matter of considerable significance. . . . [P]ublic employers should, 'as a matter of good judgment,' be receptive to constructive criticism offered by their employees. 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*."[13/]

No such "powerful network" exists.

The majority opinion cited to the Civil Service Reform Act as an example of one of the major laws constituting the "powerful network." The effectiveness of that law has

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[11/] In addition to reversing prior precedent, the majority opinion in *Ceballos* created a standard in 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 of their workplace. As discussed in the dissenting opinion, this holding is "counterintuitive," to say the least. *Garcetti v. Ceballos,* 126 S.Ct. 1951, 1966-67 (Souter dissenting).

[12/] *Id.,* 126 S.Ct. at 1962.

[13/] *Id.,* 126 S.Ct. at 1962 (emphasis added).

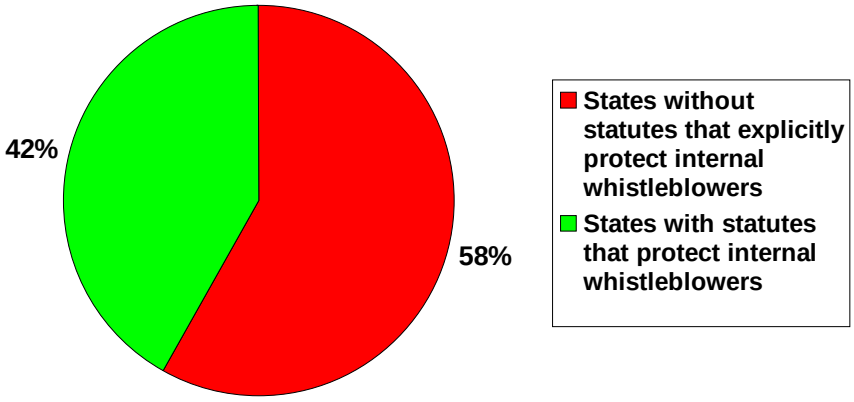
been strongly criticized, and the case law under the CSRA explicitly does not support internal/"official duty" whistleblowing. [14/]

The dissenting opinion reviewed statutes within a small sample of states and explained how the so-called "powerful network" contained numerous loopholes and deficiencies.[15/]

A fifty-state review demonstrates precisely why the "powerful network" does not exist.

First, 58% of state whistleblower laws do not explicitly protect internal/official duty whistleblowers. *See* Table 1 and Chart 1. These statutes do not contain any safety net whatsoever for employees who lost protection under *Garcetti v. Ceballos.*

Chart 1: State Statutes That Do Not Protect Internal Whistleblowers



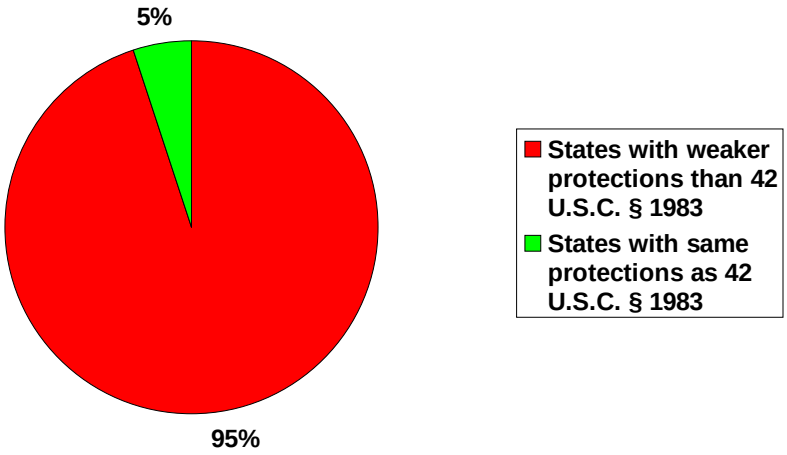
See Table 1

[14/] *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998).

[15/] *Garcetti v. Ceballos*, 126 S.Ct. at 1970-71 (Souter dissenting).

Second, of states which provide some protection for internal/official duty whistleblowers, 95% of these states laws provide whistleblowers with less procedural and/or remedial protection than federal statute 42 U.S.C. § 1983 (the statute which prohibited discharge of public employees under the First Amendment). *See* Chart 2.

Chart 2: Substantive State Law Protection for Internal Whistleblowers vs. Protection Under 42 U.S.C. § 1983

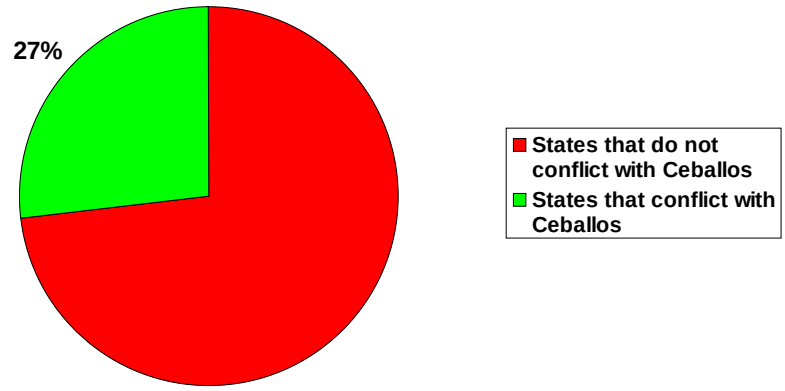


See Table 1

It is no wonder that employees, such as Mr. Ceballos, regularly chose to file claims under section 1983, instead of under state laws.

Finally, of the states which provided some form of protection for internal whistleblowers, six states actually *require* the employees to contact their supervisors as a condition of receiving protection under state law. *See* Chart 3 and Table 2. These statutes not only are inconsistent with the holding of *Garcetti v. Ceballos*, but under *Garcetti*, public employees who follow the state law will lose their First Amendment protections.

Chart 3: Percentage of States with Protection for Internal Whistleblowers whose Statutes Conflict with *Ceballos*



See Table 2

Thus, the "powerful network" alluded to in the majority opinion does not exist.

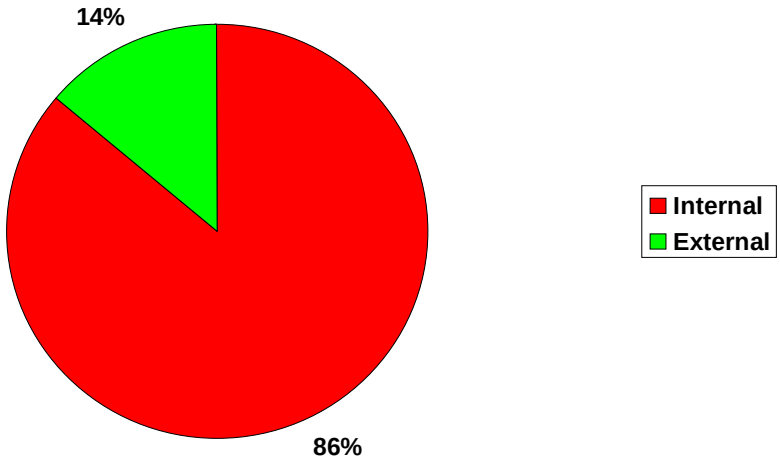
Most Whistleblowers Report Misconduct Internally as Part of their "Official Duty"

The practical impact of the *Garcetti v. Ceballos* cannot be overstated. An analysis of cases decided under both 42 U.S.C. § 1983 (the law utilized by Mr. Ceballos), and under other federal whistleblower laws, demonstrate that the overwhelming majority of whistleblowers initially (and often exclusively) report misconduct to their managers. For all practical purposes, public employees initiate their whistleblowing within their chain-of-command, based on observations made while performing their official duties. Most never having the gumption to go outside of the system.

Table 3 is an analysis of the fifty most recent published cases decided under section 1983 in which the employee whistleblower either won his or her case, or prevailed in a substantive summary judgment decision that was not subsequently overturned. This database demonstrates the following:

86% of all sustained whistleblower claims filed under section 1983 were "internal" complaints. *See* Chart 4 and Table 3.

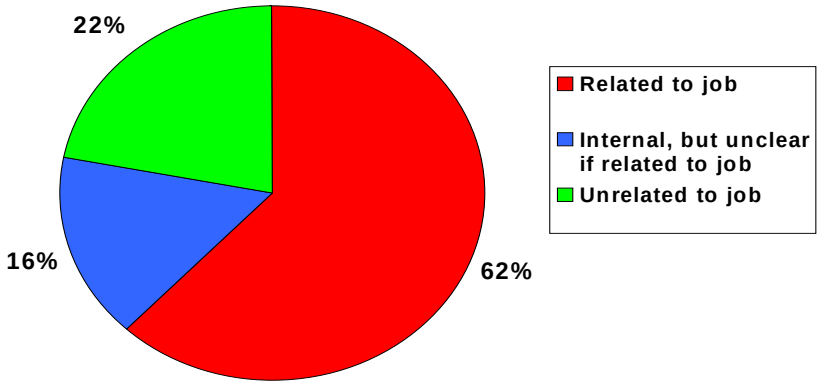
Chart 4: Internal v. External Whistleblowing in 42 U.S.C. § 1983 Cases



See Table 3

Based on a review of the contents of the published decisions, between 62%-78% of all sustained whistleblower cases under section 1983 concerned protected activity directly related to an employee's job duties. *See* Chart 5 and Table 3.

Chart 5: Percent of § 1983 Cases in which Whistleblowing Directly Related to Plaintiff's Job

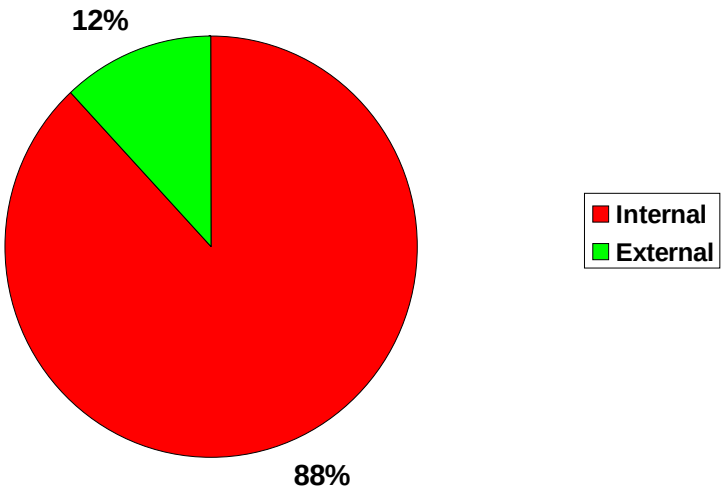


See Table 3

The pattern of protected activities established under 42 U.S.C. § 1983 was, not surprisingly, completely consistent with the patterns identified under other federal whistleblowers statutes.

Table 4 consists of a similar case-by-case analysis of sustained whistleblower cases under twelve other federal whistleblower laws. A review of the 41 most recent decisions in which the employee whistleblower claims were sustained demonstrates that 81% of all whistleblowers were internal/ "official duty." *See* Chart 6.

Chart 6: Internal v. External Whistleblowing in Non- § 1983 Federal Whistleblower Cases



See Table 4

Thus, stripping employees of protection from retaliation for reporting internal/official duty whistleblowing will have a devastating impact on the lives and careers of the vast majority of whistleblowers. The subsequent chilling effect on the most

honest civil servants will result in both public and private sector misconduct going unreported.

Federal Employees

The First Amendment permits federal employees to obtain highly significant pre-enforcement injunctive relief against federal agencies that violate employees' constitutional rights.[16/] The weakening of First Amendment protections under *Garcetti v. Ceballos* is already being felt. For example, within two days of the Court's ruling in that case, a federal employer filed a motion to dismiss based on *Garcetti v. Ceballos* in a First Amendment federal employee case being handled in my office.

The Civil Service Reform Act/Whistleblower Protection Act of 1989 currently does not protect internal/official duty whistleblowers.[17/]

Moreover, the overall framework of procedural and substantive protections afforded employees under the WPA has long been the subject of severe criticism. Even if the law were amended, as currently suggested in a number of pending bills, the majority of federal employee whistleblowers have understandably lost faith in the WPA, and no longer seek protection under its mandates. In fact, the Office of Special Counsel ("OSC"), the main administrative body chartered with protecting employee-whistleblowers, is itself the target of a major law suit by former employees of OSC alleging retaliation.

Although amending the WPA is a positive step, it will not solve the problems created under *Garcetti v. Ceballos* for most public employees - federal or state.

Prior Administrations and Most Judicial Precedents Recognized the Need to Protect Internal/"Official Duty" speech

The *Garcetti v. Ceballos* decision marks a radical departure from the stance taken under the Reagan and George H.W. Bush administrations.

[16/] *See*, *Weaver v. USIA*, 87 F.3d 1429, 1433-1435 (D.C. Cir. 1996).

[17/] Under the Federal Circuit's decisions in *Willis v. Department of Agriculture,* 141 F.3d 1139 (Fed. Cir. 1998) and *Huffman v. Office of Personnel Management,* 263 F.3d 1341 (Fed. 2001), most "internal" whistleblowing is not protected. Specifically, disclosures to an employee's supervisor are generally not protected. Additionally, reports made by an employee in the course of his duty were stripped of protection.

The debate over internal/"official duty" whistleblowing versus external whistleblowing has existed since the inception of whistleblower protection laws. At first blush it would seem counterintuitive that employers would want to force employees to file formal charges with outside agencies (or the press) in order to obtain protection under federal law. However, some unethical employers quickly realized that employee whistleblowers did not fit into the stereotype of a "whistleblower," and that the vast majority of such employees only reported their concerns through the chain-of-command.

Thus, by stripping internal/"official duty" whistleblowers from protection under law, agencies which wanted to cover-up misconduct and create a "chilling effect" on the willingness of employees to disclose serious problems, could utilize an internal/ "official duty" technicality to prevail in court against most employee whistleblowers.

From the start, courts refused to accept this technicality, and blasted attempts by employers to undermine basic common sense. In the first major court decision adjudicating this issue, Judge Malcolm Wilkey, an appeals court judge appointed in 1970 to the U.S. Court of Appeals by Richard Nixon, recognized that protecting internal or "official duty" complaints to supervisors was the "realistically effective channel of communication" for safety complaints, and was deserving of strict protection.[18/]

Prior to the conduct of the Solicitor's office in *Garcetti v. Ceballos*, the executive branch of the United States government regularly recognized the importance of protecting internal/"official duty" whistleblowers under various federal statutes. In a brief filed with the U.S. Supreme Court in May 1986, the Solicitor General of the United States, Mr. Charles Fried, successfully argued against the Supreme Court accepting *certiorari* in an internal whistleblower case. President Reagan's Solicitor General argued that terminating an employee for "internal" complaints violated strong "public policies" and that it was "logical" to protect such disclosures.[19/]

William Brock, Secretary of Labor for President Ronald Reagan expressed the sentiments widely held among employees and employers confronted with this issue:[20/]

[18/] *Phillips v. Board of Mine Operations Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974).

[19/] Brief of the United States filed in *Kansas Gas & Electric Co. v. Brock*, No. 85-1403 U.S. Supreme Court (October Term, 1985), p.7, n. 4 and p. 9.

[20/] *Poulos v. Ambassador Fuel Oil Co., 86-CAA-1 (Sec'y Apr. 27, 1987).*

> Employees who have the courtesy to take their concerns first to their employers . . . to allow the employer a chance to correct . . . violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns.... Employers gain from being given an early opportunity to correct problems without government intervention, and the government is relieved from the need to commit its limited resources investigating and resolving problems that could be informally corrected.
>
> Because the scope of employee protection turns on the need for protection, rather than on vagaries of a selection process that brings some but not other complaints into formal, legal proceedings... I find no principled basis for denying protection to internal employee complaints... Employees who have the courtesy to take their concerns first to their employers... to allow the employer a chance to correct any... violations without the need for governmental intervention, have as much need for protection as do employees who first go to the government with their concerns.

Every subsequent Secretary of Labor (or their designees) continuously and unanimously agreed with Secretary Brock's views of appropriate whistleblower protection in a series of well-reasoned decisions. This includes former Secretaries of Labor Ann D. McLaughlin, Elizabeth H. Dole, Lynn Martin and Robert B. Reich.

On November 13, 2002, an Administrative Review Board appointed by the current Secretary of Labor Elaine Chao discussed internal whistleblowing and how Congress has, in the past, fully supported that concept:

> Congress amended the ERA in 1992 to explicitly cover complaints raised to an employer, in addition to complaints voiced publicly or to a regulatory agency. By expressly extending coverage to internal complaints, Congress effectively ratified the decisions of several United States Courts of Appeals that agreed with the Secretary that the employee protection provision as originally enacted should be interpreted to protect informal complaints raised to an employer. As the court in *Bechtel Const.* explained, coverage of internal complaints "encourages safety concerns to be raised and resolved promptly at the lowest possible level . . . facilitating voluntary compliance with the ERA and avoiding the unnecessary expense and delay of formal investigations and litigation." Stated differently, ERA protection is most effective when it encourages employees to aid their employers

> in complying with nuclear safety guidelines by raising concerns initially within the workplace.[21/]

The decisions of the U.S. Secretary of Labors over the past 20 years also reflects the judicial interpretations given to nearly every federal whistleblower law by the overwhelming majority of courts. These judicial interpretations have been "endorsed" by Congress on numerous occasions. The two most recent whistleblower laws passed by Congress, the Sarbanes-Oxley corporate whistleblower law and the airline safety whistleblower law, both contain specific Congressional endorsements of internal whistleblowing.

In *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474, 478-479 (3rd Cir. 1993), the U.S. Court of Appeals for the 3rd Circuit explained why internal whistleblowing was protected:

> We believe that the statute's purpose and legislative history allow, and even necessitate, extension of the term "proceeding" to intra-corporate complaints. The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Section 507(a)'s protection would be largely hollow if it were restricted to the point of filing a formal complaint with the appropriate external law enforcement agency. Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act. Where perceived corporate oversights are a matter of employee misunderstanding, this would afford management the opportunity to justify or clarify its policies.

[21/] *Williams v. Mason & Hanger Corp.*, 97-ERA-14/18-22 (DOL ARB November 13, 2002) (citations omitted).

The court's holding in Passaic Valley reflects basic "common sense." Discouraging employees from discussing concerns with their immediate supervisors undermines the "prompt and voluntary remediation" of most problems.

LEGISLATIVE ACTION

Prompt and effective legislative action is necessary in order to correct the loss of legal protections facing all employee whistleblowers in light of the *Garcetti v. Ceballos* decision.

In the past, when courts questioned whether internal whistleblowing was protected under other federal employee protection laws, Congress effectively amended the laws in question to close this loophole. This happened under the 1969 Federal Mine Safety Act and under the Energy Reorganization Act. In both cases, the fact that internal whistleblowing was even questioned by a small minority of judges, led Congress to enact legislation explicitly protecting internal whistleblowing.

Congress has never enacted a uniform national whistleblower protection law. Instead, the First Amendment constituted the minimum federal safety net covering all government employees nationwide. Under the First Amendment, those state and local employees who engaged in whistleblowing on matters of "public concern" could always bring a cause of action under 42 U.S.C. § 1983 (the law utilized by Mr. Ceballos which covers most state and local employees). Additionally, federal employees were (and are) permitted to seek pre-enforcement injunctive relief under the First Amendment in order to protect their right to blow the whistle.

Beyond this safety net exist numerous federal and state laws, none of which provide adequate nation-wide protection to all classes of employees. Each of these laws contains their own definition of protected whistleblower speech. Some of the laws, such as the recently enacted Sarbanes-Oxley Act, explicitly protect internal/official duty speech. Others, such as section 1983 and the WPA, are silent on that matter. The result has been confusion within the workplace. On the state level the matter is just as bad. Some states have no whistleblower protection whatsoever, others have very weak administrative reviews, while not enough offer whistleblowers strong legal protections.

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. Those who "speak the truth" and protect the public interest will be at-risk for retaliation. Some will lose their jobs, their careers and their good names simply for disclosing serious misconduct to the wrong person.

Only Congress has the authority to fix this problem. After reviewing every current federal whistleblower law, we strongly recommend the following legislative correction: (1) A uniform federal whistleblower protection law providing a consistent safety net to all public and private sector employees who report violations of federal laws and regulations; (2) utilization of the procedures recently adopted overwhelmingly by Congress for the protection of corporate whistleblowers under the Sarbanes-Oxley Act. This law both explicitly protects internal/official duty whistleblowers and provides for an efficient and effective administrative review of whistleblower claims.[22/]

Enacting a federal safety net for employees who disclose violations of federal law is the only procedure available to close the dangerous loophole now *binding* on every federal court which reviews a constitutionally-based whistleblower case.

A copy of the proposed legislation is attached.

CONCLUSION

On behalf of the National Whistleblower Center and numerous whistleblowers I have the honor of representing, I applaud the Chairman of this Committee for holding this very important hearing. I also strongly support the following statement made by Chairman Tom Davis in his letter inviting me to testify at today's hearing:

> **To ensure the effective and efficient operation of the United States Government, federal employees must feel free to bring examples of waste, fraud, and abuse to the attention of their superiors.**

The only method available to achieve this goal is to swiftly enact legislation which will truly create the "powerful network" of laws referenced by Justice Kennedy in *Garcetti v. Ceballos.* The patchwork nature of federal whistleblower protections do not work. In light of the *Garcetti v. Ceballos* decision, it is now necessary to enact one law which will protect all whistleblowers from the illogical and harmful results of that decision. Congress has already developed the basic framework for the necessary legislative fix. It now must be fully implemented for whistleblowers.

[22/] Significantly, just this term Congress turned to the procedures set forth in the SOX as a new model for federal employee protections. The Energy Policy Act amended federal law and provided federal employees within the Nuclear Regulatory Commission (NRC) and Department of Energy (DOE) with the same rights that private sector employees had under SOX.

Thank you for your time and consideration.

Respectfully submitted by:

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The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, one of the major goals of the Center is to protect the taxpayers by educating the public about the need to protect employees to disclose government abuse, misconduct and corruption. The Center publishes an educational web page at *www.whistleblowers.org*

Table 1: State by State Analysis of Whistleblower Protection Statutes

State	Public Employee Statute	Statute explicitly covers internal whistleblowers?	Statute as strong as 42 USC § 1983?*
Alabama	Ala.Stat.Ann. §§ 36-26A to -27	NO	NO
Alaska	Alaska Stat. §§ 39.90.100 to -150	NO	YES
Arizona	Ariz. Rev. Stat. Ann. § 38-532	NO	NO
Arkansas	Ark. Code. §§ 21-1-601 to -608	YES	NO
California	Cal. Lab. Code §§ 1102.5 – 1107; Cal. Gov't Code § 8547-8548	NO	NO
Colorado	Colo. Rev. Stat. §§ 24-50.5-101 to -107	YES	NO
Conn.	Conn. Gen. Stat. §§ 31-51m	NO	NO
Delaware	None identified	*n/a*	*n/a*
Florida	Fla. Stat. §§ 112.3187 to 112.31895	NO	NO
Georgia	Ga. Code. Ann. § 45-1-4	YES	NO
Hawaii	Haw. Rev. Stat. §§ 378-61 to -69	YES	NO
Idaho	Idaho Code §§ 6-2101-2109	NO	NO
Illinois	Ill. Comp. Stat. tit.§§ 174/15-35	NO	NO
Indiana	Ind. Code. Ann. § 36-1-8-8	YES	NO
Iowa	Iowa Code Ann. §§ 70A.28; 70A.29	NO	NO
Kansas	Kan. Stat. Ann. § 75-2973	NO	NO
Kentucky	Ky. Rev. Stat. Ann. §§ 61.101-103	NO	NO
Louisiana	La. Rev. Stat. Ann. § 42:1169	YES	NO
Maine	Me. Rev. Stat. Ann. Tit. 26, §§ 831-833; 836-839	YES	NO
Maryland	Md. Code Ann., State Pers. & Pens., § 5-301	NO	YES
Mass.	Mass. Gen. Laws Ann. ch. 149, § 185	YES	YES
Michigan	Mich. Comp. Laws Ann. §§ 15.361-368	NO	NO
Minn.	Minn. Stat. Ann. § 181.931-935	YES	NO
Miss.	Miss. Code Ann. §§ 25-9-171 to -177	NO	NO
Missouri	Mo. Rev. Stat. § 105.055	NO	NO
Montana	Mont. Code. Ann. §§ 39-2-901 to -915	NO	NO
Nebraska	Neb. Rev. Stat. §§ 81-2702 to -2711	YES	NO
Nevada	Nev. Rev. Stat. §§ 281.611-671	NO	NO
New Hampshire	N.H. Rev. Stat. Ann. §§ 275.E:1 – E:7	YES	NO
New Jersey	N.J. Stat. Ann. §§ 34:19-1 to -8	YES	NO
New Mexico	None identified	*n/a*	*n/a*
New York	N.Y. Lab. Law. § 740	YES	NO
North Carolina	N.C. Gen. Stat. Ann. §§ 126.84-88	YES	NO

North Dakota	N.D. Cent. Code §§ 34-11.1-04 - 08	YES	Not specified
Ohio	Ohio Rev. Code Ann. §§ 4113.52	YES	NO
Oklahoma	Okla. Stat. Ann. tit. 74, § 840-2.5	YES	Not specified
Oregon	Or. Rev. Stat. Ann. §§ 659A.200-236	NO	Not specified
Pennsylvania	43 Pa. Stat. Ann. §§ 1421-1428	YES	NO
Rhode Island	R.I. Gen. Laws. §§ 28-50-1 to -5	NO	NO
South Carolina	S.C. Code Ann. §§ 8-27-10 to -50	NO	NO
South Dakota	S.D. Codified Laws § 3-6A-52	NO	NO
Tennesee	Tenn. Code Ann. § 4-18-105	NO	Not specified
Texas	Tex. Gov't Code Ann. §§ 554.001 to .010	YES	NO
Utah	Utah Code Ann. §§ 67-21-1 to -9	NO	NO
Vermont	None identified	*n/a*	*n/a*
Virginia	None identified	*n/a*	*n/a*
Washington	Wash. Rev. Code Ann. §§ 42.41.010 to .902	NO	NO
West Virginia	W. Va. Code Ann. §§ 6C-1-1 to -8	YES	NO
Wisconsin	Wis. Stat. Ann. §§ 230.80 to .89	YES	NO
Wyoming	None identified	*n/a*	*n/a*

*Comparing both substantive and procedural protections with 42 U.S.C. § 1983

Table 1 consists of data from: Practising Law Institute; Victoria L. Donati and William J. Tarnow, Whistleblowers and Other Retaliation Claims, 729 PLI/Lit 1095, 1108 (2005); references from Garcetti v. Ceballos, 126 S.Ct. 1951 (2006); Westlaw search of terms "whistleblower," conscientious employee, and employee /10 protect!; Robert G. Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 Admin. L. Rev. 581 (1999).

Table 2: States With Statutes That Protect Internal Whistleblowers, but Conflict with Ceballos.

State	Public Employee Statute*
Colorado	Colo. Rev. Stat. §§ 24-50.5-101 to -107
Maine	Me. Rev. Stat. Ann. Tit. 26, §§ 831-833; 836-839
New Hampshire	N.H. Rev. Stat. Ann. §§ 275.E:1 – E:7
New Jersey	N.J. Stat. Ann. §§ 34:19-1 to -8
New York	N.Y. Lab. Law. § 740
Ohio	Ohio Rev. Code Ann. §§ 4113.52

* Statute requires informing supervisor

Table 2 consists of data from: Practising Law Institute; Victoria L. Donati and William J. Tarnow, Whistleblowers and Other Retaliation Claims, 729 PLI/Lit 1095, 1108 (2005); references from Garcetti v. Ceballos, 126 S.Ct. 1951 (2006); Westlaw search of terms "whistleblower," conscientious employee, and employee /10 protect!; Robert G. Vaughn, State Whistleblower Statutes and the Future of Whistleblower Protection, 51 Admin. L. Rev. 581 (1999).

Table 3: Analysis of Pre - Garcetti v. Ceballos Decisions Under 42 U.S.C. § 1983

Case Cite	Speech Related to Duties? *	Misconduct Internally Reported? **
Slip Copy, 2006 WL 840389 (S.D.Ohio 2006)	No	Yes
411 F.Supp. 2d 1223 (D.Or. 2006)	Yes	Yes
2006 WL 1194206 (D.D.C. 2006)	Yes	Yes
424 F.Supp. 2d 465 (E.D.N.Y. 2006)	Yes	Yes
Slip Copy, 2006 WL 1129382 (E.D.Tenn. 2006)	No	Yes
Slip Copy, 2006 WL 572152 (D.Or. 2006)	Yes	Yes
Slip Copy, 2006 WL 1697009 (N.D.Ill. 2006)	Yes	Yes
444 F.3d 929 (7th Cir. (Wis.) 2006)	Yes	Yes
427 F.Supp. 2d 507 (D.N.J. 2006)	Yes	Yes
Slip Copy, 2006 WL 852066 (D.Puerto Rico 2006)	No	Yes
Slip Copy, 2006 WL 39348 (W.D.Wash. 2006)	No	No
417 F.Supp. 2d 884 (E.D.Mich. 2006)	Yes	Yes
383 N.J.Super. 615 (N.J.Super.A.D. 2006)	No	No
Slip Copy, 2006 WL 278859 (D.Hawai'i 2006)	Yes	Yes
420 F.3d 1293 (11th Cir. (CA) 2005)	Yes	Yes
402 F.3d 225 (1st Cir. (Mass.) 2005)	Yes	Yes
2005 WL 2000716 (D.Vt. 2005)	No	No
2005 WL 1528955 (W.D.Wash. 2005)	Undetermined	Yes
2005 WL 3296268 (W.D.Tex. 2005)	Undetermined	Yes
2005 WL 1586762 (D.Or. 2005)	Undetermined	Yes
414 F.Supp. 2d 834 (N.D.Ill. 2005)	Yes	Yes
2005 WL 2334363 (N.J.Super. 2005)	Undetermined	Yes
2005 WL 2416554 (S.D.Ohio 2005)	Yes	Yes
362 F.Supp. 2d 149 (D.D.C. 2005)	Yes	Yes
2005 WL 3003077 (S.D.Ind. 2005)	Yes	Yes
2005 WL 3455874 (M.D.Ga. 2005)	Yes	Yes
2005 WL 1871115 (W.D.Wash. 2005)	No	No
2005 WL 2562717 (E.D.Cal. 2005)	Yes	Yes
365 F.Supp. 2d 151 (D.Mass. 2005)	Yes	Yes
2005 WL 1253936 (S.D.N.Y. 2005)	Yes	Yes
2005 WL 3276277 (D.D.C. 2005)	Yes	Yes
371 F.Supp. 2d 882 (E.D.Mich. 2005)	No	Yes
2005 WL 1023206 (S.D.N.Y. 2005)	Yes	Yes
124 Fed.Appx. 482 (9th Cir. (OR) 2005)	Undetermined	Yes
404 F.3d 504 (1st Cir. (Mass.) 2005)	No	No
393 F.Supp. 2d 990 (N.D.Cal. 2005)	Undetermined	Yes
2005 WL 736639 (D.D.C. 2005)	Yes	Yes
2004 WL 758299 (S.D.N.Y. 2004)	Yes	Yes
362 F.3d 1 (C.A.1 (Mass.) 2004)	Yes	Yes
2004 WL 1615355 (E.D.Pa. 2004)	Undetermined	Yes
892 So. 2d 800 (Miss 2004)	Yes	Yes
348 F.Supp. 2d 1215 (D. Colo. 2004)	Yes	Yes

367 F.3d 337 (5th Cir. (Tex.) 2004)	Yes	No
2004 WL 2091990 (N.D.Cal. 2004)	Yes	Yes
2004 WL 396608 (Tex. App. 2004)	No	Yes
147 S.W.3d 609 (Tex. App. 2004)	No	No
371 F.3d 503 (9th Cir. (OR) 2004)	Yes	Yes
371 F.3d 928 (7th Cir. (Ind.) 2004)	Yes	Yes
116 Fed.Appx. 80 (9th Cir. (Wash.) 2004)	Undetermined	Yes
2003 WL 22964277 (Tex. App. 2003)	Yes	Yes

* On the basis of the facts in the particular case, the subject of the whistleblowing-related speech reasonably fell within the bounds of what the plaintiff was paid to do.

** On the basis of the facts in the particular case, the misconduct that was the subject of the plaintiff's whistleblowing-related speech was reported to a superior within the organization that employed the plaintiff before being reported to any outside entity.

Table 3 consists of a Westlaw search (using the terms: "42 u.s.c. § 1983" "42 u.s.c.a. § 1983" & whistleblow!) for the 50 most recent state and federal cases decided under § 1983 in which the employee either prevailed on the merits or prevailed in a substantive summary judgment motion that was not subsequently overturned.

Table 4: Analysis of Pre - Garcetti v. Ceballos Decisions Under Federal Whistleblower Statutes

Case Cite	Misconduct Internally Reported? *
438 F.3d 1275 (1st Cir. 2006)	No
434 F.3d 721 (4th 2006)	Yes
423 F.3d 483 (5th Cir. 2005)	Yes
397 F.3d 183 (N.J. 2005)	Yes
364 F.3d 1117 (9th Cir. 2004)	Yes
334 F.Supp.2d 1365 (N.D.Ga., 2004)	Yes
348 F.Supp.2d 1322 (S.D.Fla.2004)	Yes
116 Fed.Appx. 674 (6th Cir. 2004)	Yes
347 F.3d 1086 (9th Cir. 2003)	Yes
59 Fed.Apps. 732 (6th Cir. 2003)	Yes
58 Fed.Appx. 442 (1st Cir. 2003)	Yes
293 F.Supp.2d 1210 (W.D.Wash., 2003)	Yes
298 F.3d 464 (5th Cir. 2002)	Yes
52 Fed.Appx. 490 (1st Cir. 2002)	Yes
234 F.3d 1276 (9th Cir. 2000)	Yes
170 F.3d 83 (1st Cir. 1999)	Yes
63 F.Supp.2d 110 (D.Mass., 1999)	No
995 F.Supp. 889 (N.D.Ill. 1998)	Yes
146 F.3d 12 (1st Cir. 1998)	Yes
152 F.3d 602 (Ill. 1998)	No
113 F.3d 1235 (6th Cir. 1997)	Yes
115 F.3d 1568 (1st Cir. 1997)	Yes
111 F.3d 94 (1st Cir. 1997)	Yes
953 F.Supp. 1085 (E.D.Mo., 1997)	No
132 F.3d 937 (3rd Cir. 1997)	Yes
965 F.Supp.1459 (D.Or., 1997)	Yes
79 F.3d 92 (8th Cir. 1996)	Yes
85 F.3d 89 (2nd Cir. 1996)	Yes
1995 WL 241853 (E.D.La. 1995)	Yes
50 F.3d 926 (11th Cir. 1995)	Yes
89 F.3d 826 (2nd Cir.995)	Yes
26 F.3d 1187 (Mass. 1994)	Yes
38 F.3d 76 (2nd Cir. 1994)	Yes
34 F.3d 1068 (6th Cir. 1994)	Yes
27 F.3d 1133 (6th Cir. 1994)	Yes
983 F.2d 1195 (2nd Cir. 1993)	Yes
8 F.3d 980 (I4th Cir. 1993)	Yes
992 F.2d 474 (3rd Cir. 1993)	Yes
12 F.3d 151 (9th Cir. 1993)	Yes
1993 WL 276787 (N.D.Ill. 1993)	No
987 F.2d 1000 (4th Cir. 1992)	Yes

* On the basis of the facts in the particular case, the misconduct that was the subject of the plaintiff's whistleblowing-related speech was reported to a superior within the organization that employed the plaintiff before being reported to any outside entity.

Table 4 consists of a data gathered from Westlaw searches (using the terms: whistleblow!, "conscientious employee", and/or retaliate!) of cases brought under Federal Whistleblower Statutes, 12 U.S.C. 1831(j), 12 USC 1790(b), 15 USC 2622, 18 USC 1514A, 29 U.S.C. 660(c), 33 U.S.C. 1367, 42 U.S.C. 5851, 49 U.S.C. 2305, 49 U.S.C. 31105, 49 U.S.C. 41713, 49 U.S.C. 42141, of the 41 most recent cases in which employee prevailed on the merits or in which the opinion language supports a finding that employee will prevail on the merits.

PROTECTING HONEST AMERICANS ON THE JOB ACT OF 2006

WHEREAS the First Amendment protects speech on matters of public concern, and

WHEREAS employees are often in the best position to know what ails the agencies for which they work, and

WHEREAS the current patchwork nature of federal and state whistleblower protection laws do not adequately protect employee whistleblowers, and

WHEREAS the Congress of the United States has recently adopted realistic procedures necessary to protect employee whistleblowers, and

WHEREAS to ensure the effective and efficient operation of the United States government, and the effective enforcement of federal laws, employee whistleblowers must be adequately protected

BE IT ENACTED by the Senate and House of Representatives of the United States of America:

SECTION 1. SHORT TITLE.

This Act may be cited as the Protecting Honest Americans on the Job Act.

SECTION 2. WHISTLEBLOWER PROTECTION.

a) IN GENERAL - No employer, including, but not limited to, contractors, public or private corporations, subcontractors or agents of an employer, may discharge, demote, harass, blacklist or discriminate against any employee because that employee disclosed what the employee reasonably believes constitutes a violation any federal law or a federal public health and safety requirement-

(1) To a Federal regulatory or law enforcement agency; to any Member of Congress or any committee of Congress; or to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
(2) has commenced, caused to be commenced, or is about to commence a proceeding, testified or is about to testify at a proceeding, or assisted or participated in or is about to assist or participate in any manner in such a proceeding or in any other action designed to enforce the laws of the United States; or
(3) is refusing to violate or assist in the violation of a federal law, rule, or regulation or engage in any conduct which the covered individual reasonably believes constitutes a violation of any law, or which the employee reasonably believes constitutes a threat to the public health or safety.

(b) PROCEDURES – The process, procedures, and remedies with respect to prohibited acts under subsection (a) shall be governed by sections 1514(b), (c) and (d) of title 18, United States Code. A claim under this Act must be filed within one year of any alleged discriminatory action.

(c) DEFINITIONS.

(1) Employer is defined as an employer under sections 2000e(b) and 2000e-16, of Title 42, United States Code;

(2) Employee shall include any employee, contractor, subcontractor, agent or representative of any employer.