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Thomas A. Schweitzer  
*Touro Law Center*, [tschweitzer@tourolaw.edu](mailto:tschweitzer@tourolaw.edu)

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## **LANE V. FRANKS: THE SUPREME COURT CLARIFIES PUBLIC EMPLOYEES' FREE SPEECH RIGHTS**

*Thomas A. Schweitzer*<sup>\*</sup>

On June 19, 2014, the United States Supreme Court decided an important First Amendment case concerning the free speech rights of government employees.<sup>1</sup> While public employees speaking as citizens on issues of public concern have the same right to freedom of speech as other citizens when they speak on matters of public concern, the Court has held that when they make statements pursuant to their official duties, they must accept certain limitations on their freedom of speech.<sup>2</sup> In *Lane v. Franks*, the Court unanimously rejected the extreme position of the Eleventh Circuit, which had held that a public official had no remedy when he was fired in retaliation for turning in a “no show” office holder who was tried, convicted and imprisoned.<sup>3</sup>

While two other appellate courts had conferred broader protection on public employees' free speech rights in similar cases, there were only a handful of such cases.<sup>4</sup> However, Lane's actions, which presumably led to his termination, manifestly promoted the public interest in combatting government corruption.<sup>5</sup> Thus, the lower courts' position that Lane had suffered no remediable wrong, evidently convinced all the justices that prompt action was required to set the Eleventh Circuit straight.<sup>6</sup>

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<sup>\*</sup> Professor of Law, Jacob D. Fuchsberg Law Center of Touro College. The original version of this article was published as a two part series in the *Suffolk Lawyer*, in November and December of 2014. This version contains footnotes and updated text.

<sup>1</sup> *Lane v. Franks*, 134 S. Ct. 2369, 2374-75 (2014).

<sup>2</sup> *Id.* at 2383.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2377; see *Waters v. Churchill*, 511 U.S. 661, 674 (1994) and *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004).

<sup>5</sup> *Lane*, 134 S. Ct. at 2380 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

<sup>6</sup> *Id.* at 2376-77.

## I. *LANE V. FRANKS IN THE LOWER COURTS*

Edward Lane was the Director of the Community Intensive Training for Youth, (“CITY”), that was located at a public community college in Alabama.<sup>7</sup> Upon discovering that Alabama State Representative Suzanne Schmitz was on CITY’s payroll in what amounted to a “no show” job, Lane confronted Schmitz and ordered her to report for work, but she refused.<sup>8</sup> Lane subsequently fired the recalcitrant Schmitz, despite having been warned by the college president, Steve Franks, that this could have negative repercussions for him and the college.<sup>9</sup> Schmitz told a fellow employee that she intended to “get [Lane] back” for firing her.<sup>10</sup>

After the FBI investigated, Lane testified before a federal grand jury about his reasons for firing Schmitz.<sup>11</sup> Schmitz was indicted and convicted on seven felony counts in a federal trial at which Lane, pursuant to a subpoena, testified against her.<sup>12</sup> She was sentenced to thirty months in prison and ordered to make restitution of over \$177,000.<sup>13</sup> Franks then fired Lane, who sued him under 42 U.S.C. § 1983, claiming that his termination was in retaliation for testifying against Schmitz and violated his First Amendment rights.<sup>14</sup>

The Federal District Court of the Northern District of Alabama granted summary judgment in favor of defendant Franks.<sup>15</sup> The court held that Franks was protected by qualified immunity for the individual claims against him, and the Eleventh Amendment barred the claims against him in his official capacity.<sup>16</sup> The court also concluded that because Lane had learned about Schmitz’s criminal conduct while working as a government official, his testimony that brought Schmitz to justice could be considered “as part of his official job duties and not made as a citizen on a matter of public concern.”<sup>17</sup>

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<sup>7</sup> *Id.* at 2375.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Lane*, 134 S. Ct. at 2375.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2376.

<sup>15</sup> *Lane v. Cent. Ala. Cmty. Coll.*, No. CV-11-BE-0883, 2012 WL 5289412, at \*6 (N.D. Ala. Oct. 18, 2012).

<sup>16</sup> *Id.* at \*12.

<sup>17</sup> *Id.* at \*10.

The Eleventh Circuit Court of Appeals in a per curiam opinion affirmed this decision, concluding that the First Amendment did not protect Lane's statements.<sup>18</sup>

The Supreme Court granted certiorari "to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities."<sup>19</sup>

## II. PRIOR SUPREME COURT CASES ON PUBLIC EMPLOYEES' FREE SPEECH RIGHTS: *PICKERING*, *CONNICK*, AND *GARCETTI*

The Supreme Court has long held that special rules apply to government employees' free speech rights.<sup>20</sup> Public employees do not forfeit their free speech rights when they take government jobs, but efficient operation of the government requires that it maintain a "significant degree of control over [its] employees' words and actions"<sup>21</sup> in the exercise of their official duties. However, "[s]peech by citizens on matters of public concern lies at the heart of the First Amendment . . . ."<sup>22</sup>

In the leading case of *Pickering v. Board of Education*,<sup>23</sup> the Board of Education fired Marvin Pickering, a public high school teacher, after his letter criticizing the Board's handling of proposed bond issues and tax increases was published in a local newspaper.<sup>24</sup> He sued, and the Illinois lower courts and its supreme court rejected his First Amendment arguments.<sup>25</sup> The U.S. Supreme Court reversed, emphasizing that school finance issues were matters of public concern on which the Superintendent of Schools and teachers groups had published a number of articles in the newspaper.<sup>26</sup> The Court stated that if matters of public concern are at issue, then even criti-

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<sup>18</sup> Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x 709, 711 (11th Cir. 2013) (per curiam).

<sup>19</sup> Lane, 134 S. Ct. at 2377.

<sup>20</sup> Id. at 2374; see *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968).

<sup>21</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

<sup>22</sup> Lane, 134 S. Ct. at 2377.

<sup>23</sup> 391 U.S. 563 (1968).

<sup>24</sup> *Pickering*, 391 U.S. at 564.

<sup>25</sup> Id. at 565; see *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 225 N.E.2d 1 (Ill. 1967), *rev'd*, 391 U.S. 563 (1968).

<sup>26</sup> *Pickering*, 391 U.S. at 572, 575.

cism by public employees of their superiors deserves First Amendment protection.<sup>27</sup>

The Supreme Court later cut back on public employees' free speech protection in *Connick v. Myers*<sup>28</sup> and *Garcetti v. Ceballos*.<sup>29</sup> The Court in *Connick* held that the speech of a government employee, which led to her firing, was not constitutionally protected because it involved personnel matters rather than issues of public concern.<sup>30</sup>

Assistant district attorney Myers, who was upset about being transferred to a different department, distributed to her colleagues a questionnaire about office morale and the need for a grievance committee.<sup>31</sup> District Attorney Connick<sup>32</sup> fired her for insubordination,<sup>33</sup> and the Court upheld this 5-4.<sup>34</sup> Reversing the Fifth Circuit and the district court, the Court observed that the district attorney could reasonably believe that the questionnaire would undermine his authority and disrupt close working relationships in the office.<sup>35</sup> It noted that federal court was not the appropriate forum in which to review the wisdom of a personnel action, which was not a matter of public concern.<sup>36</sup>

*Garcetti* involved a similar claim by a deputy district attorney, who alleged in court that he had suffered retaliation for his performance of his duties.<sup>37</sup> As "calendar deputy," Ceballos had to review search warrants when requested to by defense attorneys.<sup>38</sup> In a criminal case, he found that a deputy sheriff's affidavit in support of a search warrant contained allegations which he did not find credible.<sup>39</sup> He wrote a memorandum to his superiors questioning the affidavit.<sup>40</sup> However, neither the affiant nor Ceballos's supervisors agreed with

<sup>27</sup> *Id.* at 574.

<sup>28</sup> 461 U.S. 138 (1983).

<sup>29</sup> 547 U.S. 410 (2006).

<sup>30</sup> *Connick*, 461 U.S. at 148-49.

<sup>31</sup> *Id.* at 141.

<sup>32</sup> Father of the jazz musician, Harry Connick, Jr. See Connick, Harry Jr., ENCYCLOPEDIA.COM, [http://www.encyclopedia.com/topic/Harry\\_Jr.\\_Connick.aspx](http://www.encyclopedia.com/topic/Harry_Jr._Connick.aspx) (last visited Jan. 27, 2015).

<sup>33</sup> *Connick*, 461 U.S. at 141.

<sup>34</sup> *Id.* at 154.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 147.

<sup>37</sup> *Garcetti*, 547 U.S. at 415.

<sup>38</sup> *Id.* at 413.

<sup>39</sup> *Id.* at 414.

<sup>40</sup> *Id.*

him, and they proceeded with the prosecution.<sup>41</sup> Ceballos recounted his observations about the affidavit at a court hearing.<sup>42</sup> He was then reassigned, transferred to another courthouse and denied a promotion, actions which he regarded as retaliatory.<sup>43</sup>

Since Ceballos had written his memorandum questioning the affidavit in the course of his employment duties, the district court granted summary judgment in favor of his adversaries.<sup>44</sup> The Ninth Circuit reversed on the ground that Ceballos's memorandum, which recited what he regarded as government misconduct, was inherently a matter of public concern.<sup>45</sup>

The Supreme Court reversed 5-4 in an opinion by Justice Kennedy.<sup>46</sup> Since Ceballos had written his memorandum as part of his regular duties as a prosecutor, the Court held that he was not protected against discipline because "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>47</sup> To hold otherwise, as the Ninth Circuit had done, would mean the unwarranted displacement of the managerial discretion which supervisors need to do their job, and its replacement by intrusive judicial supervision, which would disrupt official business.<sup>48</sup>

Acknowledging that cases in which government employees sued alleging retaliatory termination were not straightforward, the Court stated that courts must first determine whether the employee spoke on a subject of public concern.<sup>49</sup> If yes, the courts must decide whether the government entity was justified in "treating the employee differently from any other member of the general public."<sup>50</sup> Whether the speech in question was on a matter of public concern depended on whether it occurred in the workplace and whether it was made pursu-

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<sup>41</sup> *Id.*

<sup>42</sup> *Garcetti*, 547 U.S. at 414.

<sup>43</sup> *Id.* at 414-15.

<sup>44</sup> *Id.* at 414; *see Ceballos v. Garcetti*, No. CV0011106AHMAJWX, 2002 WL 34098285, at \*7 (C.D. Cal. Jan. 30, 2002).

<sup>45</sup> *Garcetti*, 547 U.S. at 415-16; *see Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004).

<sup>46</sup> *Garcetti*, 547 U.S. at 426.

<sup>47</sup> *Id.* at 421.

<sup>48</sup> *See id.* at 411.

<sup>49</sup> *Id.* at 418 (citing *Pickering*, 391 U.S. at 568).

<sup>50</sup> *Id.* (citing *Pickering*, 391 U.S. at 568).

ant to the public employee's job duties.<sup>51</sup>

### III. THE SUPREME COURT DECISION IN *LANE V. FRANKS*

Applying the *Garcetti* test, the district court in *Lane* noted that while Lane's testimony against Schmitz at the grand jury and at trial did not occur in the workplace, Lane had learned of its substance while serving in his official capacity as Director at CITY.<sup>52</sup> Thus, the court concluded that Lane's speech was made as part of his official job duties as Director of CITY and not made as a citizen on a matter of public concern.<sup>53</sup> Accordingly, the court granted summary judgment for the defendants.<sup>54</sup> The Eleventh Circuit affirmed in a per curiam opinion, while noting that courts in the Seventh and Third Circuits had reached the opposite conclusion and had conferred First Amendment protection on public employees' deposition testimony.<sup>55</sup>

The Supreme Court, in a unanimous opinion by Justice Sotomayor, reversed the lower courts, both of which had held that the mere fact that Lane had testified pursuant to subpoenas at the Grand Jury and at Schmitz's trial did not necessarily make his speech a matter of public concern.<sup>56</sup> The Court had granted certiorari to consider "whether the First Amendment protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities."<sup>57</sup> The Court's answer: "We hold that it does."<sup>58</sup>

Citing 18 U.S.C. § 1623, which criminalizes false statements under oath in judicial proceedings, the Court noted that the obligation to testify truthfully while under oath "is a quintessential example of speech as a citizen . . ."<sup>59</sup> The Court acknowledged that when testifying under oath pursuant to a subpoena, "a public employee . . . may bear separate obligations to his employer . . . . But any such obligations as an employee are distinct and independent from the obliga-

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<sup>51</sup> *Garcetti*, 547 U.S. at 418-19.

<sup>52</sup> *Lane*, 134 S. Ct. at 2376; *Lane*, 2012 WL 5289412, at \*10.

<sup>53</sup> *See supra* note 51.

<sup>54</sup> *Lane*, 134 S. Ct. at 2376; *Lane*, 2012 WL 5289412, at \*6.

<sup>55</sup> *Lane*, 134 S. Ct. at 2383; *see Lane*, 523 F. App'x at 712 n.3.

<sup>56</sup> *Lane*, 134 S. Ct. at 2383.

<sup>57</sup> *Id.* at 2378.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2379.

tion, as a citizen, to speak the truth.”<sup>60</sup> Thus, “[i]n holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly.”<sup>61</sup>

The Court noted that government policies are of interest to the public at large, and public employees “are uniquely qualified to comment” on such matters because of what they learn on the job.<sup>62</sup> Moreover, employee speech is especially important in the context of a public corruption scandal;<sup>63</sup> there are more than 1000 prosecutions for federal corruption offenses annually, and they often require testimony by other government employees.<sup>64</sup> Obviously, corruption on the part of public officials is a vital matter of public concern, and it would be perverse if public employees, speaking publicly to disclose wrongdoing and thereby serving the public interest, could be fired with impunity, and be without the remedy of a retaliation claim based on violation of their free speech rights. The government defendants in *Lane* were unable to cite any governmental interest that would counter-balance Lane’s free speech rights on “the *Pickering* scale.”<sup>65</sup>

#### IV. COMMENTARY

The Eleventh Circuit in *Lane* had taken a literal, doctrinaire view of *Garcetti*, which led to an outrageous result.<sup>66</sup> The public has

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<sup>60</sup> *Id.*

<sup>61</sup> *Lane*, 134 S. Ct. at 2379.

<sup>62</sup> *Id.* at 2379-80 (quoting *Roe*, 543 U.S. at 80).

<sup>63</sup> *Id.* at 2380. Justice Souter, dissenting in *Garcetti*, disagreed with the majority’s “categorical den[ial] of *Pickering* protection to any speech uttered ‘pursuant to . . . official duties.’” 547 U.S. at 430 (quoting *id.* at 421). He noted that *Pickering* recognized 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. . . .” *Id.* at 433. Seemingly anticipating the very problem later posed by *Lane v. Franks*, he emphasized that “the public’s interest in receiving informed opinion” and “the employee’s own right to disseminate it . . . [are] . . . not a whit less true when an employee’s job duties require him to speak about such things: when for example, a public auditor speaks on his discovery of embezzlement of public funds . . . .” *Id.* (quoting *Roe*, 543 U.S. at 82). And while an auditor may discover such embezzlement in the course of his official duties, the public interest in publicizing it is no less implicated when an official like Lane accidentally stumbles on it while performing an administrative role. If the majority in *Garcetti* had paid heed to this caution by Justice Souter rather than categorically denying *Pickering* protection to speech by public employees performing their official duties, the misapprehension by the Eleventh Circuit of the legal principle involved and the entire litigation of *Lane v. Franks* might have been avoided.

<sup>64</sup> *Lane*, 134 S. Ct at 2380.

<sup>65</sup> *Id.* at 2381.

<sup>66</sup> *Lane*, 134 S. Ct. at 2376-78; *Lane*, 523 F. App’x at 710-12.



an interest in identifying, exposing, and prosecuting criminals; thus, it is not surprising that the Supreme Court unanimously reversed the Eleventh Circuit's decision.<sup>67</sup> The Supreme Court sent a clear message that its jurisprudence limiting the free speech rights of public employees could no longer be used to shield vindictive scoundrels like Schmitz, or to leave those who expose them and are dismissed in reprisal without a legal remedy.<sup>68</sup>

I believe that the unanimous decision in *Lane* is obviously correct. However, the contrary argument is that the entire case was unnecessary, and the Supreme Court in *Garcetti* may have invited the extreme and unacceptable Eleventh Circuit approach, which it unceremoniously uprooted in *Lane*. It left itself open for such an approach when Justice Kennedy stated flatly in *Garcetti*: “We 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>69</sup>

While the precise scope of public employees' “official duties” may be debatable, this rather absolute statement is susceptible of the extreme interpretation placed on it by the Eleventh Circuit.<sup>70</sup> After *Lane*, it is plain that this statement can no longer be taken literally. The Supreme Court apparently has qualified it by implication, but it would have been preferable and more candid if the Court had done so explicitly.

In any event, the jurisprudence of *Garcetti* and *Connick*, both decided by bare majorities, has imposed on federal courts the challenging and unnecessarily complex task of determining whether a particular public employee's utterances were made as part of her official duties or otherwise.<sup>71</sup> I agree with Justices Stevens and Souter who anticipated such difficulties in their dissents in *Garcetti*. As Justice Stevens stated, “[t]he notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong.”<sup>72</sup> He felt it was “senseless” to let constitutional protection for the same words depend on whether they fell

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<sup>67</sup> *Lane*, 134 S. Ct. at 2380-81.

<sup>68</sup> *Id.* at 2380.

<sup>69</sup> *Garcetti*, 547 U.S. at 421.

<sup>70</sup> *Lane*, 134 S. Ct. at 2376-77; *Lane*, 523 F. App'x at 711 n.2.

<sup>71</sup> See *Garcetti*, 547 U.S. at 423-25; *Connick*, 461 U.S. at 150-51.

<sup>72</sup> *Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting).

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within a job description, and that it was “perverse” to adopt a rule that gives employees an incentive to voice their concerns publicly before talking frankly with their superiors.<sup>73</sup> Surely, the convoluted analyses made necessary by the *Garcetti* decision and the resultant legal confusion anticipated by Justices Stevens and Souter should have and would have been avoided if the result in *Garcetti* had been 4-5 instead of 5-4.

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<sup>73</sup> *Id.*