

Failing to Protect Democracy by Failing to Protect Government Employee Whistleblower Speech

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Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 **Ind. L.J.** 267 (2018).

In Professor Ronald J. Krotoszynski, Jr.'s article, [Whistleblowing Speech and the First Amendment](#), he considers how the First Amendment fails to protect the whistleblower speech of government employees and argues the insufficient protection may weaken our democracy. He claims the Supreme Court's inadequate protection of government employee speech discourages the disclosure of important information that could help voters hold government and its officials accountable. The paucity of speech protection leads to a lack of information which leaves the public underinformed and unable to make intelligent electoral decisions about matters of public importance.

The article is worth the read for its analysis of First Amendment doctrine regarding the speech of government employees, but its focus on the harm to our democracy that flows from that doctrine makes the article particularly fresh and vital. Prof. Krotoszynski's insights are doubly important in the wake of the whistleblowing allegations that have fueled Congress' impeachment inquiry regarding President Trump. For all of those reasons, Prof. Krotoszynski's article is a Thing I Like Lots.

Prof. Krotoszynski's analysis centers on the Supreme Court's *Pickering/Connick* line of cases and how poorly they protect government employee whistleblower speech. The cases afford First Amendment protection for speech related to matters of public concern, but not to speech related to matters of private concern. That narrows First Amendment protection significantly because the Court excludes "internal workplace management disputes" from matters of public concern. (P. 280.) Even attempts "to call attention to misconduct or inefficiency in government operations" may not be protected from firing if such speech causes workplace disruption. (P. 286.)

That can place the fate of a whistleblowing worker in the hands of disgruntled coworkers because "coworkers who behave badly in the wake of whistleblowing activity provide the government employer with a constitutionally acceptable predicate for firing the worker who called problems within the government agency to the attention of the body politic." (P. 292.) That in turn significantly narrows the constitutional protection for important speech, making it less likely to be disclosed. The narrow protection is ironic given that government employees tend to be citizens who arguably have a civic duty to speak out about government mismanagement. As Prof. Krotoszynski notes, "[G]overnment employees should not be required to relinquish their right to speak more generally as citizens regarding matters of public concern as a consequence of working for a government employer." (P. 275.)

Prof. Krotoszynski suggests the Court's doctrine misses the point of protecting government whistleblower speech by focusing on the employee's speech rights rather than on the value of the speech to the community. Whistleblower speech should be protected from retaliation because it "is not merely a private good, but also constitutes a public good, and First Amendment doctrine should reflect this fact." (P. 298.) If the Court focused on the value of government employee whistleblower speech to the people, it likely would protect that speech more fulsomely.

To be clear, government employee whistleblower speech is not always unprotected, but those protections can be relatively weak. However, the uncertainty of the protection is problematic. The scope of whistleblower protection is unclear. Consequently, a whistleblower may not be able to discern whether her conduct is protected. As important, an employee who does not follow internal reporting processes and procedures when complaining will often be fired. (P. 298-99). Lastly, even if the conduct is protected, the whistleblower may not be fully protected from workplace

retaliation. Unfortunately, the protection for whistleblower speech is insufficiently robust to encourage its full disclosure in every situation in which disclosure would be valuable.

Prof. Krotoszynski suggests that recognizing how public employee speech, the public's need for information, and democratic accountability intersect is key. He argues the Court should recognize "an important First Amendment value in the context of government employee speech: the clear relationship of government employee speech to holding government accountable through the democratic process." (P. 302.) If elections are to guarantee that proper officials are elected, voters must know how officials are performing in office. The most salient information about those issues may come from current government employees who have accurate information regarding "the areas in which the government's efforts are falling short of the relevant mark." (P. 300.) Those employees may also have information regarding which government officials are responsible for those shortcomings. Insufficient protection for the dissemination of that information will inhibit its disclosure. That will lessen the opportunity for elections to ensure government functions properly.

Prof. Krotoszynski's article makes the fairly simple, but powerful, point that the lack of First Amendment protection for important information about how government works will lead to less of that information being released to the public and to a less informed electorate. That point triggers another issue that is unexplored in the article. The type of information about government officials and the workings of government that the electorate needs to have to make good electoral decisions may also be known to non-governmental entities, such as government contractors, that work with government officials. Indeed, Prof. Krotoszynski notes that Edward Snowden's disclosure of information was quite important to the public discourse about governmental actions. Nonetheless, for various reasons, Snowden has not been treated as or protected like a whistleblower.

The disclosure of some information similar to what Snowden disclosed may be protected by whistleblower laws or general employment laws that limit terminations against public policy, but the information's disclosure may often not be protected by the First Amendment or against retaliation. When its disclosure is unprotected, information is not likely to be disclosed. That raises the same issues that the lack of disclosure by government employees raises. That may not strictly be a First Amendment issue, but it is nearly as troublesome as the issues this article raises.

Given the issues this article raises directly and those at which it merely hints, this article is a Thing I Like Lots.

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