

Government Efficiency, Fair Trial, and Duty of Confidentiality: Free Speech Rights of Prosecutors and the Limitations

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Abstract

Traditional studies on the free speech rights of prosecutors are mainly emphasized on the secrecy of investigation, yet this approach has the inherent restrictions such as its focal points are inseparable from criminal investigation and confidential items and thus has nothing to do with prosecutors' statements in other proceedings or their non-confidential statements. This article starts out by setting forth the three leading principles regarding the management of prosecutors' free speech rights: government efficiency, fair trial, and duty of confidentiality and attempts to strike a balance between the do's and don'ts of prosecutors' freedom of speech in terms of American jurisprudence. As to government efficiency, a balancing test can be exerted to examine if the speech is made as a citizen on public concern issues; the more public concerned the issues of a citizen statement are, the lower the legitimacy of government control of the statement is. For a statement on whistleblowing, the government has little legitimacy to prohibit it even if it is made in prosecutors' duties. With respect to fair trial, this article suggests to add a restriction on prosecutors' extrajudicial statements which will have a substantial likelihood of materially prejudicing an adjudicative proceeding, to allow prosecutors to make a fair response to maintain the fair trial requirement, and to expand the scope of current laws and regulations about the secrecy of investigation to other adjudicative proceedings so as to keep a fair environment in other kinds of cases. For the duty of confidentiality, in addition to the non-disclosure requirement during investigation process, it is recommended to invoke the attorney-client privilege

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to impose a duty of confidentiality on prosecutors when they are dealing with non-criminal cases. If a prosecutor plans to publish the work experience afterwards, it is needed to secure an approval from the chief attorney; a chief attorney shall take into consideration the necessity of secrecy, its historical values, and the public's right to know and monitor the operation of criminal justice when contemplating on whether to grant an approval.

Keywords: free speech rights, unconstitutional conditions, balancing test, extrajudicial statement, fair trial, duty of confidentiality, non-disclosure of investigation, attorney-client privilege, deliberative process privilege, conflict of interests