

RUNNING HEAD: Judicial Voting in U.S. District courts

**JUDICIAL VOTING IN U.S. DISTRICT COURTS LOCATED IN THE SECOND AND  
FIFTH CIRCUITS IN FIRST AMENDMENT RETALIATION CASES INVOLVING  
LAW ENFORCEMENT OFFICERS**

THESIS

Submitted in partial fulfillment of the requirements for the degree of  
Master of Arts in Criminal Justice

By

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December 2020

### Abstract

This study examined the influence of party affiliation, as measured by the party of the appointing president; legal precedent; judicial circuit (Second or Fifth); race; gender; and prior prosecutorial experience on voting by U.S. District Court judges in First Amendment retaliation cases brought law enforcement officials against their employers. Applying binary logistic regression analyses to a data set comprised of 163 judicial votes with pro-plaintiff and pro-defendant voting serving as the dependent measure, the results indicated that only judges' party affiliation had a significant effect on voting (Wald= 4.469, 1 df.,  $p = .035$ ) president. There was a .437 decrease in the odds of pro-plaintiff voting for Republican appointees compared to Democratic appointees with all other variables held constant. Thus, Republican appointees showed a greater tendency than Democratic appointees to favor the police department's decision making when First Amendment challenges were brought by their employees. This deference to institutional judgments may reflect core philosophical differences in balancing individual Free Speech rights as against institutional stability and law and order. The paper discusses the implications of these findings for a more just and equitable society.

### **Dedication and Acknowledgments**

Firstly, I am thankful to God for providing me with the strength, patience, and blessing me with support from family, professors, and newly found friends. Completing this project would not have been possible without them. This is dedicated to my husband Luis Aguirre who believed that I could do this despite all the times I wanted to give up; he always knew what to say to get me through it and for taking care of our three wonderful children while I studied or went to school in the evening multiple times a week/weekends. My three children are the main reason I never quit. I have these three little blessings looking up to me and I could not think of even the slight possibility of letting them down.

I would also like to give Dr. Lewis Wasserman a huge thank you for following me through this every step of the way. I appreciate your patience and time you put into helping me reach this very big accomplishment. I enjoyed every moment we worked to together, I have learned so much from you, and truly this would not have been possible without your guidance and support.

I would like to also thank my committee members. Dr. John Rodriguez thank you for coming through for me when I needed you. Dr. Seokjin Jeong I appreciate your golden advice. I just loved our conversations I could not imagine doing this thesis without you.

Special thanks to Mrs. Mary Boyd: You are the most wonderful blessing I got out of the entire master's program. You are truly an angel on earth and pray that God blesses you 100 times for what you have done for me. I never thought I would come out of this with a master's degree and a friend for life, but here I am. You are really appreciated by me and my family and thank you from the bottom of my heart.

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The **First Amendment** to the U.S. Constitution protects the freedom of speech, religion, and the press. It also protects the right to peaceful protest and to petition the government. The **meaning** of the **First Amendment** has been the subject of continuing **interpretation** and dispute over the years. The key to the First Amendment is that it protects expressive activities without government interference for citizens (Era & Kleinbrodt, 2013) and usually for foreign nationals as well (Cole, 2003). These rights extend to public employees including law enforcement officials employed by government agencies. In this study I investigate empirically how courts have treated First Amendment claims by law enforcement officials who assert they have suffered retaliation from their employer for reporting misconduct by fellow officers or superiors.

Although the First Amendment might appear to give unfettered expressive rights to speakers reporting official misconduct, the U.S. Supreme Court has made First Amendment Freedom of Speech retaliation decisions that have limited protection for free speech by public employees (Roberts, 2015). An important effect of these decisions could be to decrease whistleblowing activities by police officers and other law enforcement officials who report corruption, excessive force, cover-ups due to misconduct, and overall maintaining a blue wall of silence in efforts to support other fellow law enforcement officials who have been involved in violations of policies including officers' criminal activities.

Earlier studies and current literature examine federal judicial voting and factors that influence how judges vote. McKenzie (2012) found that judges were, "susceptible to producing a partisan judgment" when laws were not clear or were ambiguous. He also stated that when "legal precedents were clear and unambiguous" judges followed the legal precedent regardless of their personal convictions (McKenzie, M., 2010, p. 802). Previous and current literature strongly

supports the assertion that in many cases judges' personal attributes, as well as judicial precedents, influence voting decisions (Johnson et al., 2008). However, there is little research regarding how judges vote in police officer whistle blower retaliation cases.

This study focuses on First Amendment retaliation cases that arise in the district court level in the Second and Fifth Circuits. These claims are brought by law enforcement officers who claim their supervisors or departments have retaliated against them for reporting police misconduct such as corruption, use of excessive force, and even officers who help cover up misconduct.

This study also analyses how a Supreme Court decision, *Lane v. Franks*, 134 S. Ct. 2369 (2014) impacted First Amendment retaliation cases in the Second and Fifth Circuit.

Additionally, it investigated how judges' votes were influenced by factors such as gender, race, party of appointing president, and prior prosecutorial experience.

To answer these questions I set up a logistic regression model with party affiliation, circuit [Second or Fifth], legal precedent [before and after *Lane v. Franks*], prosecutorial experience, gender and race as the independent predictors and pro-plaintiff-pro-defendant voting as the dependent measure.

My predictions included the following:

1. Republican appointees will vote more often for the defendant (the department being sued) than will Democratic appointees. (Wasserman, L. M., & Connolly, J.P., 2017).

2. Judges in district courts located in the Fifth Circuit will vote more often for the defendant than district court judges located in the Second Circuit. The Second Circuit includes New York, Connecticut, and Vermont which tend to be more liberal and the Fifth Circuit includes Texas, Louisiana, and Mississippi which tend to be more conservative. Because of the

widely disparate results in prior investigations I made no predictions for the prosecutorial experience, gender, and race predictors and used them principally as control variable keeping in mind the focus of this study was on party affiliation, and circuit.

Many judges referenced *Lane v Franks* and *Garcetti v Ceballos* when deciding First Amendment right to Free Speech claims. While *Garcetti* narrowed down public employees' rights to free speech, *Lane* widened the right to free speech for public employees. Because *Lane* is based on the *Garcetti* precedent it was not obvious that voting after *Lane* would vary much from decisions made pre-*Lane*. Therefore, I made no predictions with respect to that variable affiliation.

## II

### REVIEW OF LITERATURE

The focus of this study is law enforcement officers and their First Amendment right when speaking up against corruption or illicit activity within their departments. This is also known as whistle blowing. The officer is described as a rat, traitor, or snitch and could possibly suffer adverse treatment and retaliation for reporting unethical or illegal activities. Often those individuals experience retaliatory consequences such as hostile workplace, termination, demotion, prevention in promotion due to poor evaluation or hazing.

One example Huq & McAdams (2017) wrote about an officer name Joe Crystal from Baltimore, who reported two officers he witnessed assault a drug suspect in 2012. Officer Crystal was warned not to report these events by his Sergeant however, Crystal still reported it to the State's Attorney. This resulted in Crystal being taunted, harassed while on the job, fellow officers failed to respond to calls as backup, and a dead rat was left on his vehicles windshield. Prior to Crystal's whistleblowing activity about the two officers assaulting the drug suspect,



Crystal was commended for his leadership and was promoted quickly; however, two years following the whistleblowing Crystal resigned from the force because of the hazing and adverse treatment he suffered (Huq & McAdams, 2017).

Officers fear retaliation or fear of the possibility of being retaliated against because of their whistle blowing activities which often leads them into wanting to remain silent when witnessing corruption and unethical conduct. Another example from Huq & McAdams (2016) was about officers in the Chicago Police Department. In December 2014, an officer shot and killed a 17-year-old African American named Laquan McDonald, claiming the young man lunged at the officers with a knife in his hand. Officer Van Dyke shot him sixteen times killing McDonalds, in this incident many officers were present at the scene; one claimed self-defense, collaborating with Dyke's self-defense claim while other officers instructed witnesses to leave the area without statements and had deleted surveillance videos of the incident. In this incident there was an anonymous whistle blower who remains anonymous because s/he was in fear of retaliation. Van Dyke was charged with murder in November 2015 almost a year after the incident (Huq & McAdams, 2017).

The incident discussed in the previous paragraph illustrates how police officers may cover up misconduct or unethical behaviors by fellow police officers and how whistleblowers are treated with in some departments. This is known as the "Blue Wall of Silence" (Nolan, 2009, pp.254-254). The Blue Wall of Silence is described in (Nolan, 2009) as a "brotherhood". Metaphors such as "impenetrable," or "inviolable" are used in the police force to depict their dogmatic rigidity, and staunch loyalty within the police brotherhood (Nolan, 2009, p. 255). This "Blue Wall of Silence" acts a barrier preventing officers from speaking up against corruption, because of the brotherhood within the police department. However, if there were officers willing

to break this code of silence and be a whistleblower or a rat for reporting a fellow officer and their unethical behavior it would be standing against the brotherhood within the police force (Huq & McAdams, 2017; Nolan, 2009).

Many officers who stand up against corruption have no protection they have a possibility of suffering adverse treatment by being taunted and hazed to name a few and have nowhere or no one to turn too. Officers have tried suing their departments because they feel that their First Amendment rights were violated but they are not always successful. This is because many Supreme court cases have made loops for officers to jump through when exercising their free speech in the next few paragraphs, I will expand on some key court cases.

The Supreme Court created the First Amendment doctrine that protects public employees from retaliation by their employers due to the employees' speech. There are many cases that the U.S. Supreme Court has made decisions regarding public employees' right to a protected free speech under the First Amendment (Flynn, 2020). There are many cases that had a significant effect on the First Amendment freedom of speech. In the sphere of public employment, the most important cases decided by the U.S. Supreme Court are *Pickering v. Board of Education* (1968), *Connick v. Myers* (1983), *Garcetti v. Ceballos* (2006) and *Lane v. Franks* (2014). Each of these decisions are discussed throughout this paper.

### ***Pickering v Board of Education***

The *Pickering* case involved a public-school teacher who wrote a letter to a newspaper about how the funds were used within the school system. The teacher was ultimately terminated because the school officials stated the letter was harmful to the day-to-day operations and damaged the administrators' reputations (*Pickering v. Bd. of Educ.*, 1968). The Illinois Supreme Court held that because Marvin Pickering took a position as a public-school teacher, he was

obligated to withhold statements that could damage the school or administration. In other words, because he was a public-school teacher, he was restricted from discussing school operations (Era & Kleinbrodt, 2013).

Later, on appeal, in the U.S. Supreme Court overturned the State's decision, holding that it was a free and independent statement of facts and is necessary to acknowledge that the teacher is a member of the public. The U.S. Supreme Court also held that because he was dismissed as a public employee due to statements he made to the public on issues of public importance, the school district violated his rights to freedom of speech under the First Amendment (*Pickering v. Bd. of Educ.*, 1968). The *Pickering* principal held that the employee has the right to speak as a citizen on an issue of public concern without fear of retaliation, if the speech does not interfere with the employers' ability to provide public service (Flynn, 2020).

*Pickering* gave rise to a balancing test so when a First Amendment free speech claim is filed with the courts involving a public employee, the court is required to balance the importance of the employee's free speech on matters of public concerns and the employers ability to provide a public service efficiently. Therefore, when the balancing test is being viewed in the courts they will look to see if the employee is addressing a matter of public concern and if the speech interferes with fulfillment of their job duties (Connolly & Wasserman, 2019; Era & Kleinbrodt, 2013; Gifford & Fedas, 2011; Roberts, 2015). *Pickering* requires the protection of public employees' right to free expression in the workplace for not only teachers but other public employees which includes law enforcement officers. *Pickering* did not seem to be good nor bad when applying to police whistleblowing. If there is police corruption that is a public concern however that could also disrupt day to day activity within the department.

***Connick v Myers***

After *Pickering* came *Connick v. Myers* (1983) which held if public employee's speech does not involve matters of public concern but instead a private interest it was not protected under the First Amendment Free Speech Clause and in the end limiting public employee protection for free speech (Hilton, 2017). Unlike *Pickering* which applied a balancing test, *Connick* focused more on what was being said. *Connick* made the distinction between speech involving public or private interests with only the public speech being protected by the First Amendment. Judges would examine the content of the statements given and determine if it is public or private matter (Connolly & Wasserman, 2019).

An example of determining if it is private or public speech is whether it relates to social or political concern to the community. Generally, employers' policies or employees' work assignments would be considered a personal matter and not an issue of public concern. In other words, public speech on racial discrimination in public schools or a misconduct by police officials are matters of public concern and therefore are protected under the First Amendment free speech (Era & Kleinbrodt, 2013). Whereas the cleanliness of the police station or the quality of the food in vending machines would be considered a private concern. Although *Connick v. Myers* (1983) limited public employees' free speech under the First Amendment, *Garcetti v. Ceballos* (2006) added even more restrictions to free speech for public employees (Flynn, 2020). *Connick v. Myers* (1983) narrowed free speech for public employees it did not have a negative effect on whistleblowing activities because whistleblowers would be protected because that is a public concern.

### ***Garcetti v Ceballos***

*Garcetti v. Ceballos* (2006) requires that employees speak entirely as a citizen and not as an employee. In *Garcetti v. Ceballos* (2006) the court denied First Amendment protection to any

public employee who spoke about their ordinary job duties. Under *Garcetti*, if a public employee wants protection under First Amendment retaliation claim they must speak as a citizen and not as an employee. *Garcetti* (2006) added a significant restriction to public employees First Amendment free speech rights. Under *Garcetti* (2006) if the public employee speech is made pursuant to their ordinary job duties it is *categorically unprotected by the First Amendment* (Flynn, 2020). This placed a huge bind on police whistleblowing because whistleblowing is within their job duties, therefore it is not protected.

This also placed public employees at a disadvantage giving much more power to the employers when it comes to controlling the speech of their employees (Gifford & Fedra, 2011). While *Connick* (1983) left unprotected employees' speech where it involved purely private matters (Era & Kleinbrodt, 2013). *Garcetti* (2006) eliminated the protection of free speech for public employees even when it involved a matter of public concern *if it is part of their job duties to make such speech* (Hilton, 2017). *Garcetti* has made it hard for public employees such as police officers to report misconduct because they are not protected if the expressive activity involves their required job duties whether or not they are included in their official job description (Roberts, 2015). Since *Garcetti* in 2006, the courts have ruled more frequently in favor of employers in First Amendment retaliation claims brought by public employees (Connolly & Wasserman, 2019).

### ***Lane v Franks***

After *Garcetti* (2006), the U.S. Supreme Court issued a pro-plaintiff decision, *Lane v. Franks* (2014) that might have changed the course of how judges typically vote on retaliation claims by public employees. The *Lane v. Franks* case involved an auditor for a community college (Lane) and the president (Franks) the employer. *Lane* was a director of a city and

statewide program, the program was suffering many shortfalls in the payroll, mail fraud, and concerns regarding the federal funding so he conducted an audit and found that an employee named Schmitz who was terminated due to the findings from the audit. Eventually, federal authorities got involved and Lane was subpoenaed to court which he testified about what transpired prior to Schmitz termination. Afterward, Franks terminated Lane and twenty-eight other employees claiming he was addressing the terminations resulted from financial necessity. However, days later Franks gave all the employees their jobs back except two, Lane was one of the two.

Lane followed up with a lawsuit claiming he was retaliated against because of his testimony in court. The court granted Frank's motion for summary judgment holding that Lane was not entitled to the First Amendment protection because Lane spoke as an employee and not a citizen because his speech was made pursuant to his official job duties under *Garcetti*. The Eleventh Circuit affirmed the district court and relied on *Garcetti (Lane v. Franks, 2014)*.

However, after appeal *Lane v Franks* was heard in the Supreme Court and the U.S. Supreme Court reached a unanimous decision that Lane's First Amendment right for free speech was violated. Lane's First Amendment was violated for the following reasons: (1) Lane's testimony was subpoenaed; (2) his in-court speech fell *outside* of his official job duties under the *Garcetti v Ceballos* parameters; (3) Lanes' speech was a matter of public concern. *Lane v Franks* has opened the doors a little wider for public employees' First Amendment protection. At bottom, Lane's essential holding is that because the content of Lane's speech involved a matter of public concern and his in-court testimony was not made pursuant to his ordinary job duties it was protected from retaliation.

Based on the Supreme Court decisions reviewed in the previous paragraphs most courts will ask the following questions when deciding the viability of First Amendment retaliation claims:

1. Did the speech involve a matter of public concern as opposed to a private concern? If yes, then,
2. Was the speech made pursuant to the speaker's required or ordinary duties? If yes, then the claim will be dismissed. If the speech was not part of the speaker's ordinary duties, then
3. Was the speech protected under a *Pickering* balancing analysis which weighs the importance of the speech against the disruption to the employer's public mission which might be caused?

The next chapter describes the Methods applied in conducting this research.

### III

#### METHODOLOGICAL APPROACH

This study examined the impact of party affiliation (Democratic v Republican presidential appointee), federal circuit (Second or Fifth), legal precedent (pre- versus post-Lane v. Franks, and judges' race, gender and prior prosecutorial experience on individual voting by district court judges in First Amendment Free Speech retaliation claims brought by law enforcement officers against their departments. This study only examined cases from the Second and Fifth Circuits. The selection of the Second and Fifth Circuits allowed a comparison between voting patterns in a conservative circuit (Fifth) and a liberal circuit (Second).

This study used multiple law databases to obtain information concerning the 163 First Amendment retaliation cases included in the data set. Each of these cases met specific criteria

required for this research. The primary source for much of the information concerning the cases was obtained from, Nexis Uni (2020), an academic legal research database.

Data concerning some of the district court cases was accessed using the Public Access to Court Electronic Records system (PACER). PACER is an online national index providing information and Federal documents regarding U.S. Courts of Appeals cases and district court cases from across the United States (PACER, 2020). These cases were screened to ensure that they met the specific parameters set forth in this study.

Each case included in the data base involved claims brought in district courts by police officers or other law enforcement officials asserting that their First Amendment right to Free Speech had been violated and they had experienced retaliation from superiors or others within their department organization. Additionally, the speech in question involved some type of whistleblowing activity alleging corruption or other unethical behaviors. Data used to conduct the statistical analyses for this study was independently validated for accuracy by me and a colleague. The data was assembled into an Excel spreadsheet and imported into a Statistical Program for Social Sciences (SPSS) for analysis.

Demographic and personal information concerning the district court judges was accessed online through the Federal Judicial Center (FJC, 2020).

The voting patterns were initially examined based on results from Chi-square analyses. This was followed by Logistic Regression analyses of the data set.

### **2 x 2 Independent Chi Squared Analyses**

To get a preliminary understanding of the data, three 2 x 2 Independent Chi-Squared analyses were performed. These are displayed in Table 3.1.

Table 3.1 Independent Chi-Squared Analyses



Independent Variable	Dependent Variable District Court Judges' Votes Pro-Plaintiff Pro- Defendant	Number of votes	Results Chapter
Party Affiliation (Rep. or Dem)	District court Judges' Votes Pro-Plaintiff Pro- Defendant	163	Table 4.1
Second & Fifth Circuit	District court Judges' Votes Pro-Plaintiff Pro- Defendant	163	Table 4.2
Pre – Post Lane v. Franks	District court Judges' Votes Pro-Plaintiff Pro- Defendant	163	Table 4.3

The results from each Chi-Square calculation were examined and the results were interpreted based on the significance level of each variable. Analyses conducted for party affiliation, cases in the Fifth and Second Circuit and for those examining the effects of the *Lane v. Franks* (2014) Supreme Court decision were predicted to have a significant association with how they voted.

### **Binary Logistic Regression Analyses**

Logistic regression was selected as the inferential statistic of choice because the dependent measure [pro-plaintiff-pro-defendant voting] was dichotomous and it permits the independent variables to be continuous or binary without violating the requirements to use this statistic.

Two Logistic Regression analyses were conducted examining the effects of the predictors on the dependent variable. The first analysis included a full model examining the significance of all independent (predictor) variables on the dependent variable (DV). This model is shown in

table 4.4. The second analysis is shown in table 4.5. This analysis removed all nonsignificant variables and left only the party affiliation predictor for analysis.

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Independent Variables	B	S.E.	Wald	df	P	Exp(B)
Political_Affiliation_D_1_R_2(1)						
Race W_0 Other Races_1(1)						
Gender M_1 F_2(1)						
Prosecutor_Y_1_N_2(1)						
Pre_Lane_0_Post_Lane_1(1)						
Second Circuit-0 Fifth Circuit-1(1)						
Constant						

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The independent variables (predictors) used in the database were coded as: “1” for Democrat and “2” for Republican, judges’ race “0” for white and “1” for all other races, gender “1” for males and “2” for females, prior prosecutorial experience “2” for No and “1” for Yes, the Circuit where case occurred as “0” for Second Circuit and “1” for Fifth Circuit, and pre and post *Lane* rulings were coded as “0” for pre and “1” for post. The dependent variable was coded as “0” for a pro-plaintiff (employee) vote and “1” for pro-defendant (employer) vote.

Results from the three Chi Square analyses and two Binary Logistic Regression models are shown in the next chapter.

## IV

### RESULTS

This chapter examines the relationship among, party affiliation (Democrat, Republican), race (white, other), gender (male, female), previous prosecutorial experience (yes, no), pre-*Lane*

or post-*Lane v. Franks*, Second or Fifth circuit, (the independent variables) and U.S. District court judicial voting (pro-plaintiff, pro-defendant), the dichotomous dependent measure.

To gain an initial understanding of the data set, a series of crosstabs were performed to examine the association between each independent variable and the dependent measure, using the Chi Square Test of Independence. In the second section I analyze the data set employing logistic regression modeling to determine the impact of the independent measures on judicial voting.

### Crosstabs

This section reports on the association between the principal variables under study and district court judges' voting in First Amendment claims brought by law enforcement officers against their employers.

**Table 4.1** revealed that of the 80 votes by Republican appointees, 17 were pro-plaintiff (21.3%) and 63 were pro-defendant (78.8%). For the Democratic appointees, of the 83 total votes, 31 were pro-plaintiff (37.3%) and 52 were pro-defendant (62.7%). This showed that Democrat judges voted pro-plaintiff 16% more often than Republican appointees.

Table 4.1 Frequency distribution of pro-plaintiff and pro-defendant voting by District court judges' party affiliation

Party Affiliation	Pro-Plaintiff	Pro-Defendant	Total
Republicans	17 (21.3%)	63 (78.8%)	80 (100%)
Democrats	31 (37.3%)	52 (62.7%)	83 (100%)
Totals	48	115	163 (100%)

To determine whether there was a significant association between party affiliation and judges' voting a Chi Square Test of Independence was performed. The results indicated there was a

significant association between party affiliation and voting. Democrats tended to vote pro-plaintiff significantly more often than their Republican colleagues. [ $\chi^2(1, N=163) = 5.082, p = .024$ ].

**Table 4.2** revealed that of the 109 votes in the Second Circuit, 37 were pro-plaintiff (33.9%) and 72 (66.1%) were pro-defendant. Of the 54 votes in the Fifth Circuit, 11 were pro-plaintiff (20.4%) and 43 were pro-defendant (79.6%). Thus, there was a difference in pro-plaintiff voting of 13.5% in district courts located in the Second and Fifth Circuit with the Second Circuit district court judges voting more often in favor of the plaintiffs.

Table 4.2 Frequency distribution of pro-plaintiff and pro-defendant voting by district court judges' in the Second and Fifth Circuit.

	Second Circuit	Fifth Circuit	Total
Pro Plaintiff	37 (33.9%)	11 (20.4%)	48
Pro Defendant	72 (66.1%)	43 (79.6%)	115
Totals	109 (100%)	54 (100%)	163(100%)

This difference in voting was not statistically significant when subjected to a Chi square analysis [ $\chi^2(1, N=163) = 3.203, p=.074$ ].

**Table 4.3** reveals that of the 101 votes pre-*Lane*, 28 were pro-plaintiff (27.7%) and 73 were pro-defendant (72.3%). Of the 62 votes post *Lane*, 20 were pro-plaintiff (32.3%) and 42 were pro-defendant (67.7%). This analysis showed a 4.6% difference in pro-plaintiff voting between the pre- and post-*Lane* periods with pro-plaintiff voting occurring more frequently in the post-*Lane* period.

Table 4.3 Frequency distribution of pro-plaintiff and pro-defendant voting by district court judges' pre and post *Lane*.

	Pre Lane	Post Lane	Total
Pro Plaintiff	28 (27.7%)	20 (32.3%)	48
Pro Defendant	73 (72.3%)	42 (67.7%)	115
Totals	101 (100%)	62 (100%)	163 (100%)

To determine if there was a significant association in pro plaintiff and pro defendant voting during the pre and post *Lane* periods, a Chi Square Test of Independence was performed. The results indicated there was not a significant statistical association between pre and post *Lane* voting. [ $X^2(1, N=163) = .380, p = .537$ ].

### Binary Logistic Regression Analyses

This study relied on logistic regression analyses to determine the impact of the independent (predictor) variables being studied on judicial voting in the district courts. Judicial voting was categorized dichotomous as pro plaintiff or pro defendant. The independent variables entered into the equation were party affiliation [party of the appointing president], race [white or other], gender, prior prosecutorial experience [yes or no], pre or post *Lane*, and the circuit where the case was decided [Second or Fifth]. The result of this analysis is reported in Table 4.4.

As shown in Table 4.4, a total of 163 votes were analyzed and a test of the full model against the constant only model was not found to be statistically significant (omnibus chi square = 9.539, df = 6, p = .145) at the alpha .05. The predictors were not found to have a statistically significant effect on how district court judges voted. The results for the pseudo-R square

analysis for model fit were .057 for the Cox & Snell and .081 for the Nagelkerke statistics, with 95.7% of the pro-defendant votes successfully predicted. Only 10.4% of pro-plaintiff votes were successfully predicted bringing the overall prediction accuracy to 70.6%.

Table 4.4 gives the coefficients, the Wald statistic, the associated degrees of freedom, and the odds of each independent variable influencing the judges' voting. The Wald statistic shows that only party affiliation as determined by party of the appointing president had a statistically significant effect on district court judges' voting at the alpha .05 level. A judge appointed by a Republican president resulted in a .437 decrease in the odds of pro-plaintiff voting when compared to judges appointed by a Democrat president. All other variables [ race, gender, prosecutorial experience, the *Lane* case or the circuit where the case was decided (Second or Fifth)] showed no significant effect on how district court judges voted in the cases included in the dataset.

**Table 4.4** Summary of Logistic Regression Analysis for variables predicting judicial voting in First Amendment retaliation cases involving law enforcement officials at the District Court level

Independent Variables	B	S.E.	Wald	df	P	Exp(B)
Political_Affiliation_D_1_R_2(1)	-.829	.392	4.469	1	.035	.437
Race W_0 Other Races_1(1)	-.219	.584	.140	1	.708	.804
Gender M_1 F_2(1)	-.480	.406	1.398	1	.237	.619
Prosecutor_Y_1_N_2(1)	-.325	.616	.278	1	.598	.723
Pre_Lane_0_Post_Lane_1(1)	.324	.371	.762	1	.383	1.383
Second Circuit-0 Fifth Circuit-1(1)	-.597	.432	1.912	1	.167	.551
Constant	2.103	.710	8.782	1	.003	8.194

Table 4.5 shows the results of a logistical regression analysis when all predictors except party affiliation were removed from the equation. A total of 163 individual votes were analyzed and the model was reliable (omnibus chi square = 4.979, df = 1, p = .026) The R square statistic for model fit was .031 for the Cox & Snell and .044 for the Nagelkerke statistic. Overall, 70.6% of predictions were accurate. Table 4.5 gives coefficients, the Wald statistic, the associated degrees of freedom, and the probability value for the party affiliation predictor.

The odds ratio, as revealed by the Exp. (B) column indicates that Republican appointed were .453 less likely to vote pro-plaintiff than judges appointed by Democrat presidents. The statistical significance of party affiliation when all independent variables were included in the model (p=.035) varied very little compared to the model which included only party affiliation with all other variables removed (p=.026). Moreover, the variance accounted for between the model including all variables (.057 for the Cox & Snell and .081 for the Nagelkerke statistics) and party affiliation only (.031 for the Cox & Snell and .044 for the Nagelkerke statistic) differed little and accounted for only a small proportion of the variance in the dependent measure. This suggest that the variables other than party affiliation played only a minor role in accounting for variation in voting.

**Table 4.5** Summary of Logistic Regression Analysis including only the Party affiliation predictor in First Amendment retaliation cases in the district courts within the Second and Fifth circuits.

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<u>Independent Variables</u>	<u>B</u>	<u>S.E.</u>	<u>Wald</u>	<u>df</u>	<u>P</u>	<u>Exp(B)</u>
Political_Affiliation_D_1_R_2(1)	-.793	.355	4.979	1	.026	.453
Constant	1.310	.273	22.972	1	.000	3.706

The results of these and other results are interpreted in the next chapter.

## V

### DISCUSSION

The purpose of this section is to discuss the results of the analyses found in the previous chapter.

This study examined the influence of party affiliation, as measured by party of the appointing president; legal precedent; judicial circuit (Second or Fifth); race; gender; and prior prosecutorial experience on voting by U.S. District court judges in First Amendment retaliation cases brought law enforcement officials against their employers. Applying binary logistic regression analyses to the data set comprised of 163 judicial votes with pro-plaintiff and pro-defendant voting serving as the dependent measure, the results indicated that only judges' party affiliation had a significant effect on voting (Wald= 4.469, 1 df.,  $p = .035$ ). The analysis revealed that judges appointed by Republican presidents resulted in a .437 decrease in the odds of pro-plaintiff voting compared to Democratic appointees with all other variables held constant. Thus, Republican appointees showed a greater tendency than Democratic appointees to favor police department's decision making over challenges brought by their employees. This deference to institutional judgments may reflect core philosophical differences in balancing individual Free Speech rights as against institutional stability and law and order.

The discussion below examines the results of the logit analysis for each of the predictors analyzed above and draws implications for future research.

#### **Party Affiliation Effects**

**Table 4.1** Summary of Logistic Regression revealed that judges' party affiliation had a significant effect on judges' voting (Wald=4.469, df=1,  $p = .035$ ,  $\text{Exp}(B) = .437$ ). The odds of a



pro-plaintiff vote by Republican appointees decreased by a factor of .437 as compared to Democratic appointees. Overall, Democrat appointees voted pro-plaintiff 16% more often than Republican appointees (see Table 4.1). Previous studies have shown party affiliation had similar effects on how judges voted. A recent study showed that Democratic appointees in Courts of Appeal cases indicated that the odds of pro-plaintiff voting increased by a factor of 1.87 for Democratic appointees compared to Republican appointees (Boyd, 2020). This is consistent with current literature on judicial voting when examining the effects of judges' party affiliation when making decisions on First Amendment retaliation claims (Connolly & Wasserman, 2019; Wasserman & Connolly, 2016).

This suggests that party affiliation plays an important role in how judges vote when deciding a First Amendment retaliation claims brought by law enforcement officials. This is consistent with what Johnson & Songer, (2009) stated in their study which is that Democrat judges were more likely than Republican appointees to support liberal outcomes. According to Robinson (2011) conservatives are more likely to side with the government in the court room and Shepherd (2009) stated that Republicans tend to vote for businesses over individuals, or employers over employees, and against criminals which is all consistent with the results that arose from this study.

### **Influence of *Lane v Franks***

In **Table 4.3** showed that a there was no meaningful difference in pro-plaintiff-pro-defendant voting during the pre and post Lane periods (Wald=.762, 1 df., p=.383). *Lane v Franks* (2014) is merely an extension of *Garcetti v Ceballos* (2004). That said, there was a 4.6% difference in pro-plaintiff voting between the pre- and post-*Lane* periods with pro-plaintiff voting accruing more frequently in the post-*Lane* period. This suggests that even though the

*Lane* case did not have a statistically significant effect at the time of this study, judges voting may be moving in a pro-plaintiff direction.

### **Influence of Gender, Race, and Prosecutorial Experience**

**The logistic regression results shown in Table 4.4** revealed that neither gender, race, nor prosecutorial experience had a meaningful influence on judges' voting with all variables held constant. These variables were included in the model to rule out possible effects of these characteristics in the present study. When comparing minority judicial voting with white judicial voting in employment discrimination cases Morin (2013) found that African American judges are more likely to than white judges to rule in favor of the claimant. However, the Latino judges are less likely than white judges to rule in favor of the claimant. Because this study did not distinguish between minority groups Morin's results are not easily applied to the outcome of this study. Future researchers may wish to distinguish among different minority groups when setting up the minority voting predictors.

Earlier studies stated that gender plays a significant role in judges' decision making because "women view the world differently". However, in an earlier study investigator found that gender had no statistically significant effect on judicial voting (Johnson & Songer, 2009). Johnson & Songer's results are consistent with findings here and extends those results to First Amendment retaliation cases.

Prosecutorial experience was included as a predictor in this study because judges who were prosecutors prior to coming on the bench tend to side more often with the government when deciding cases (Robinson, 2011). However, such differences did not attain significance in this study. It is possible that a larger sample of decisions might have shown differences in voting tendencies which were not revealed here.

In sum, no significance in judges' voting was revealed for the gender, race, or prosecutorial experience variables.

### **Second and Fifth Circuit Voting**

**Table 4.2** summary of Logistic Regression analysis examining pro-plaintiff and pro-defendant voting in the Second and Fifth Circuit. The results indicated there was no difference in voting that was statistically significant in the Logistic Regression analysis (Wald=1.912, df. - 1, p=.167). However, there was a 13.5% difference in pro-plaintiff voting in district courts located in the Second and Fifth Circuit, the difference being that the Second Circuit voted in favor of pro-plaintiff. Although this difference was not statistically significant there was some evidence to believe that when a larger sample becomes available an analysis such as this one will show significant differences between these circuits. It may be because there are more Democratic appointees serving in the Second Circuit than the Fifth it will be difficult to separate party affiliation from circuit effects in subsequent statistical analyses of voting in these circuits. Certainly, in this study more of the variance in voting is accounted for by party affiliation than the location of the district court. If similar outcomes to this one is revealed in subsequent studies, it may simply be that circuit effects which appear may be masking core party affiliation differences.

### **Summary**

This study examined the influence of party affiliation, as measured by party of the appointing president; legal precedent; judicial circuit (Second or Fifth); race; gender; and prior prosecutorial experience on voting by U.S. District court judges in First Amendment retaliation cases brought law enforcement officials against their employers. Applying binary logistic regression analyses to a data set comprised of 163 judicial votes with pro-plaintiff and

pro-defendant voting serving as the dependent measure, the results indicated that only judges' party affiliation had a significant effect on voting (Wald= 4.469, 1 df., p= .035). There was a .437 decrease in the odds of pro-plaintiff voting for Republican appointees compared to Democratic appointees with all other variables held constant. Thus, Republican appointees showed a greater tendency than Democratic appointees to favor police department's decision making when First Amendment challenges were brought by their employees. This deference to institutional judgments may reflect core philosophical differences in balancing individual Free Speech rights as against institutional stability and law and order.

This research should be extended to judicial voting in other circuits to determine if findings there are consistent with the patterns revealed in this study.

The political divisions between the parties in our society appear to extend to judicial decision making in the U.S. District courts. We need law enforcement officers to be able to speak up without free of retaliation from their employer. Unfortunately, based on the statistics if an officer reports corruption or becomes a whistleblower there is a chance s/he will suffer adverse treatment and if s/he was to sue because the department violated their First Amendment to free speech there is a good chance he will lose that claim in court. This problem may require a legislative remedy strengthening the Free Speech rights of law enforcement officials who report misconduct by their fellow officers because the courts have not fully extended such protections to law enforcement whistleblowers.

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