An Empirical Examination of Courts of Appeals Judges' Voting in First Amendment Retaliation Cases Involving Police Officers

THESIS
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By

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Abstract

The impact of judicial ideology on voting in First Amendment decisions has been the subject of many empirical investigations in U.S. Courts of Appeals and District Courts. However, little attention has been devoted to studying how ideology impacts voting in First Amendment retaliation claims brought by law enforcement officers against their departments. This study is designed to fill this gap in the literature.

Judges must consider and balance the right of public employees to exercise individual self-expression and autonomy while also safeguarding the rights of public institutions that provide necessary services to the public (Tsesis, 2015). Often the lines can become blurred when a public employees' right to free speech causes disruption to the public employer's mission, impeding its ability to provide services. Police officers take an oath to uphold the law yet when faced with having to report a superior or fellow officer for misconduct, these "whistleblowers" are often the ones who are ostracized and or punished. In 2006 the Supreme Court in *Garcetti v. Ceballos* appeared to cut back on plaintiffs' First Amendment expressive rights growing out of their employment.

To investigate the impact of judicial ideology, as measured by party-of-the appointing president and the Garcetti decision on judicial voting in claims brought by law enforcement officers against their departments 109 U.S. Courts of Appeals decisions were studied involving a total of 327 judicial votes. Because the dependent measure selected was dichotomous [pro-plaintiff or pro-defendant vote] binary logistic modeling was applied to the data set. The principal independent variables under study were judicial ideology (whether the judge was appointed by a Republican or Democratic president) and legal precedent (whether the decision

was made pre or post *Garcetti).* Other variables included in the equation were judges' gender, prior prosecutorial experience, years on the bench, judges' age, and judges' race.

The logistic regression analyses revealed as predicted that judges' ideology had a significant impact on Courts of Appeals judges' voting (Wald=6.399, df=1, p=.011). Democratic judges were 1.871 times more likely to vote in favor of the First Amendment plaintiff than the Republican judges. Unexpectedly, judicial voting during the pre and post *Garcetti* time frames did not differ significantly from one another. The latter result was discussed in terms of why overall, judges might be more deferential to decisions made by law enforcement agencies in their application of the Garcetti decision. These reasons included the quasi-military organization of law enforcement agencies, concerns about public safety and the disruptive effect judges might anticipate occurring if they intervened in employment decisions made by police departments.

Keywords: First Amendment, retaliation, whistleblower, public employees, police officers, Courts of Appeals

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The centrality of free speech in a democratic society is undebatable (Oxford University Press, 2019). Presently, there are state and federal statutory prohibitions in place to protect "whistleblowers" in the public sector. These laws were designed to protect public employees who risked their job security to report misconduct, however, many are ineffective and do little to protect the employee. According to the Americans for Effective Law Enforcement, or AELE (2016), state laws regarding "whistleblower protections" are confusing, difficult to enforce, and vary from state to state. In 1968, the U.S. Supreme Court opened a new avenue of protection for whistleblower retaliation claims under the First Amendment (Modesitt, 2011, p.5). The Court recognized the employees' First Amendment right to speak on "matters of public concern" (*Pickering v. Board of Education, 391 U.S. 563, 1968).* Subsequently, U.S. Supreme Court decisions in *Connick v. Myers, (*1983) and *Garcetti v. Ceballos (*2006), "reduced the scope of protection for public employees" (Flynn, 2013, p.763).

In *Connick v. Myers* (1983), the Court held that when public employee expression cannot be fairly considered as relating to any matter of *political, social, or other concern to the community,* government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment of the Constitution. Thus, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, [absent the most unusual circumstances], a federal court is not the appropriate forum to review the personnel decision taken by a public agency allegedly in reaction to that employee's behavior. Under *Connick,* no First Amendment protection exists for expressing purely personal concerns. The Court held that: When public

employees make statements, *pursuant to their official duties*, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline (*Connick v. Myers,* 461 U.S.138, 1983). Therefore, First Amendment protections extend to public employees only when their expressive activities involve matters of public concern and the utterance is not made pursuant to their ordinary job duties.

Garcetti v. Ceballos (2006) added yet another requirement/restriction to the First Amendment analytic framework. In Garcetti, the Court categorically denied protection under the First Amendment's Free Speech clause for any speech by public employees made, "…pursuant to their official duties (*Garcetti v. Ceballos,* 547 U.S. 410, 2006). Decisions in both the Connick and Garcetti cases dramatically favored the interests of the government employer. One important effect of Connick and Garcetti may be to curtail whistleblowing activities by law enforcement officials who report wrongdoing such as corruption, mismanagement, abuse of power, and other criminal activity within their organization (Huq & McAdams, 2016).

In June 2014, the Supreme Court applied the Garcetti test in *Lane v. Franks* (2014). This case was significant because the court's decision was based on an interpretation and application of the language used in the Garcetti ruling (Schweitzer, 2015). The justices debated the scope of the "official duties" stipulation and concluded, "the Eleventh Circuit read the Garcetti exclusion far too broadly" (Schweitzer, 2015, p.339). This Court unanimously decided that the employee's speech was protected under the First Amendment, holding that the First Amendment protects a public employee who provides truthful sworn testimony *compelled by a subpoena, outside the course of his or her ordinary responsibilities (Lane v. Franks,* 134 S. Ct 2369, 2014).

There has been extensive empirical research on this topic regarding public education and other public institutions. However, there has been little research examining the way judges vote

regarding cases involving police officers and other law enforcement employees in whistleblower retaliation cases. This study intends to provide extensive substantive data that will expand the knowledge base in the literature by examining the factors and legal precedents that may influence how judges vote in First Amendment Retaliation cases brought by police officers and other law enforcement employees.

In pursuance of this objective, this study examines the votes of 327 U.S. Courts of Appeals judges in 109 First Amendment retaliation cases involving claims asserted by law enforcement officials. The predictor variables in this investigation include both judges' personal characteristics as well as legal precedent derived from the U.S. Supreme Court decisions referred to above.

I predict there will be a significant association between Courts of Appeals judges' political ideology and how they voted. Prior research has shown that while certain types of cases do not reveal an association between party affiliation and voting, other studies found a strong relationship between judges' "policy preferences" and their voting record (Lim, 2000; Wasserman & Connolly, 2017). Lim (2000) conducted an Empirical analysis of Supreme Court Justices' voting concerning First Amendment protections for public employees. His research revealed that Democratic Judges typically took a liberal view supporting the employee, while Republican Judges were more conservative.

Several Supreme Court decisions were routinely cited in subsequent Courts of Appeals cases, as precedent, justifying the reasons for the Courts of Appeals judges' vote. Appellate Court Justices' opinions often referred to *Pickering (1968),* when discussing how they balanced employees' First Amendment right to Free Speech and the employer's right to maintain order within their departments. Appellate opinions also cited *Connick (1983),* when considering

whether the employee's speech was of a "public or private" concern. The decision in *Garcetti, (2006),* seemed to change the playing field in favor of the employer when it added the exclusion for employee speech made pursuant to, "one's official duties". The Court did not clearly define "official duties", therefore Appellate court judges often interpreted this rule very broadly including speech or expression about all facets of the employees' workplace. A careful review of judges' decisions in U.S. Courts of Appeals cases regarding First Amendment free speech protection for police and other law enforcement whistleblowers The Supreme Court decision in *Lane* (2014), seemed to acknowledge the ambiguous language in *Garcetti* concerning the definition of employees' "official duties." The Court ruled that employees' speech only applied to speech that was made pursuant to ordinary employee duties (*Lane,* 2014). This decision narrowed the scope of Garcetti, giving U.S. Appellate court judges more latitude in defining employees' official job duties.

Because the U.S. Courts of Appeals judges routinely cited the Supreme Court cases outlined above, when discussing the justifications for their decisions, I predicted that the legal precedents from these cases would have a significant impact on judicial voting in subsequent cases at the Appellate level.

This study examined demographic and personal characteristics of both Courts of Appeals judges' and District court judges' in prior cases. Independent (predictor) variables in the database include judges' age, political ideology (determined by the political ideology of nominating President), gender, race, prosecutorial experience and time in years on the bench.

The legal precedent variables studied were set-up as binary predictors: before or after Garcetti and before or after Lane. The judge characteristics studied were the party of the president nominating the judge; judges experience on the bench; judges' gender; race; and

previous experience as a prosecutor. The dependent measure is whether the court ruled in favor of the plaintiff or defendant, a dichotomous variable, therefore, logistic regression was the principal statistical tool selected to analyze the data set.

This study is broken down into five parts or Chapters. Chapter I, this Introduction, opens for Chapter II which contains the Literature Review providing historical and legal background of whistleblowing protections for public employees in the United States. Chapter III, the Methods section, gives the procedures employed to collect the data, the organization of the database, the statistical tools employed to analyze the data, and the rationale for the selection of such tools. In Chapter IV the Results of the data analysis are given. Chapter V, the Discussion section, discusses the implications drawn from those results and presents recommendations supporting further research and legislative acts that will offer added protections for public employees, and more specifically police officers, regarding free speech and expression.

II
Review of Literature

A whistleblower is defined as, “a person who informs on a person or organization engaged in an illicit activity” (Oxford Online Dictionary, 2019). Employees, both public and private, who disclose unethical or illegal activities in a workplace often experience retaliatory consequences such as termination, reprimands, or hostile work environments. Fear of retaliation may lead employees to remain silent creating an atmosphere where corruption, and unethical conduct may thrive (Still, S., 2020). This is especially true in law enforcement where a strong culture of brotherhood and loyalty to fellow officers has led many organizations to create an unwritten code known as the “Blue Wall of Silence” (Hopson, 2011). Whistleblowers within law enforcement have often faced severe consequences at the hands of their fellow officers.

Frank Serpico was an idealistic police officer in New York City during the late 1960's and 1970's who refused to be corrupted and would not take bribes. When he reported bribery and corruption within the department, he faced retaliation that nearly cost him his life (Glazer, 1983). Despite internal investigations, "no higher-ups" were ever prosecuted (Glazer, 1983, p. 34). However, Serpico's actions led the mayor of New York to appoint the Knapp Commission to investigate allegations of corruption and bribery. They independently verified widespread corruption in the New York City Police department and recommended sweeping changes that would help ensure oversight, organizational compliance, and address the problem of "police corruption" (Glazer, 1983; Hodges & Pugh, 2019, p. 9). Three weeks after the report from the Knapp Commission, Serpico was set up by fellow officers in a drug raid where he was shot in the face. He nearly died waiting for an ambulance while fellow officers did nothing to help. Officer Serpico paid dearly for being an honest cop and "whistleblower" (Glazer, 1983).

Legislatures and courts have long recognized the need for statutes protecting whistleblowers from employer retaliatory actions (Modesitt, 2011). Common law protections and statutes were enacted in some states to offer whistleblower protections for employees in the private sector. However, the laws vary widely from state to state, making them topic specific and often they are not effective (AELE, 2016; Modesitt, 2011). Most common law statutes only apply to employees in private industry leaving public employees unprotected (Ibid, p. 5). Wynne and Vaughn (2017) conducted a study comparing whistleblower protection statutes in all 50 states, measuring the scope of protections offered to whistleblowers. They reported that most state's protections varied widely depending on the state and, "…many were very weak and did little to encourage reports of wrongdoing or discourage retaliatory actions" (Wynne & Vaughn, 2017, p.3). In 1968, The U.S Supreme Court opened a new avenue protecting public employees' First

Amendment Right to Free Speech in *Pickering v. Board of Education*. Many Free Speech experts consider the *Pickering* case to be the first pivotal move towards the protection of public employee' expressive rights (Dallago, 2016; Modesitt, 2011; and Wasserman & Connolly, 2017). However, over the next 50 years, the Supreme Court made several key decisions greatly limiting the scope of this protection. Legal scholars have asserted that the Supreme Court's decision in *Garcetti* in 2006 began the erosion of Free Speech rights for public employees and, "…effectively discouraged federal and state employees from blowing the whistle on governmental wrongdoing…" (Modesitt, 2011, p.143; Wasserman & Connolly, 2017). This section will examine each pivotal case, with special emphasis on *Garcetti v. Ceballos*, (2006) and *Lane v. Franks* (2014).

***Pickering v. Board of Education*, 391 U.S. 563 (1968)**

The landmark decision in *Pickering v. Board of Education*, (1968) addressed the public employee's right to free and protected speech under the Free Speech clause of the First Amendment. Marvin Pickering, a teacher at a public high school, sent a letter to a newspaper criticizing the way in which funds were allocated within the school system. He was subsequently fired because school officials claimed the letter was, "detrimental to the efficient operation and administration of the school district" (*Pickering v. Board of Education,* 391 U.S. 563, 1968).

The Supreme Court of Illinois ruled in favor of the school district upholding the District court's decision and supported Mr. Pickering's termination. This Court took the position that when Mr. Pickering took the job as a teacher at a public school, he was obligated to abstain from any conduct or expression that might be unfavorable to the school or the administration. As a teacher, his speech was restricted concerning comments about the operation of the school (*Pickering v. Board of Education*, 36 Ill.2d 568, 1967).

The U.S. Supreme Court reversed the decision and found that statements made by an employee, as a citizen, on matters of public concern must be afforded First Amendment protection so long as this speech did not interfere or impact the employer in such a way as to impede its ability to provide services (*Pickering v. Board of Education,* 391 U.S. 563 (1968). The unanimous decision of this Court gave, for the first time, First Amendment protections to public employee speech (Wynne & Vaughn, 2017, p. 3).

This became known as *Pickering* balancing. This required a court to consider the case based on its own circumstances and merits. Balancing the importance of the employee's speech on a matter of public concern against the disruption to the public employer's mission caused by, or which might be caused by, the expressive activity (Ibid). The Court further asserted that public employees should be allowed to "comment on matters of public interest" without fear of retaliation (Ibid). Although *Pickering* involved a schoolteacher, the ruling extends to all public employees, including police officers and other law enforcement officials.

In *Pickering,* the Court also observed: that while, "..public employees have a duty to support superiors in generally accepted goals, "these employees may have informed and essential knowledge that would be relevant and important in a free and open debate concerning issues of public concern" (*Pickering v. Board of Education,* 391 U.S. 563, (1968). The Court took the position that sometimes an employees' right to free speech may take precedence over the institution.

Often whistleblowers were put in impossible situations, facing dire employer consequences and retaliation (Still, 2020, p. 3). The Justices in this case noted that, "…the threat of dismissal from public employment is …a potent means of inhibiting speech" (Pickering, 391, U.S. 574, (1968). Justice Thurgood Marshall opined in the *Pickering* decision that, "…statements by public

officials on matters of public concern must be accorded First Amendment protection…" (*Pickering,* 391, U.S. 563, (1968).

Most scholars recognize that the *Pickering* decision was the first step in recognizing the public employees' right to free speech. Although the court failed to set a "general standard" regarding what employee speech would garner protection, it did present a "balancing test" that would allow the courts to consider both sides when deciding similar cases (Dallago, 2016;).

***Connick v. Myers,* 461 U.S. 138 (1983)**

In *Connick v. Myers* (1983), a sharply divided Court held that where a public employee's speech does not involve matters of public concern but rather private interests, it is categorically unprotected by the First Amendment's speech clause. Thus, determining whether speech is on a matter of public concern is a threshold issue which must be decided before applying balancing under the Pickering precedent (*Connick v. Myers,* 461 U.S. 138, (1983).

Sheila Myers was an employee with the Orleans Parish District Attorney's office in Louisiana when she received notice that she would be transferred. In response, she distributed a questionnaire to other assistant district attorneys in the office asking questions concerning their opinion about transfers. She was subsequently fired for having refused the transfer and her supervisor asserted that the questionnaire had, "disrupted the office, undermined authority and destroyed close working relationships" (*Myers v. Connick,* 507 F. Supp 75 (1981).

Connick focused on the content, form, and context of a statement [the questionnaire] when determining if the speech was constitutionally protected (Wasserman & Connolly, 2017). It was up to the judiciary to determine if the speech involved matters of public concern (Ibid). If the content of the speech was determined to be purely personal, then the speech would not be protected.

The resulting *Pickering-Connick* framework led to a two-pronged threshold that must be met for the employee's speech to be First Amendment protected (Flynn, 2013). First, the employee must be speaking on a matter of public concern [and not a purely private one]. In *Connick (*1983), the justices were fiercely divided on this point. Four justices dissented from the final opinion of the Court. Justice Brennan, in his dissent, stated, "We have long recognized that one of the central purposes of the First Amendment guarantee of freedom of expression is to protect dissemination of information on the basis for which members of our society make reasoned decisions about government" (*Connick v. Myers*, 461 U.S. 138 (1983). Secondly, if the speech were on a matter of public concern then Pickering balancing would occur. Under *Pickering*, if the employee's right to speak outweighs the employer's interest in efficiently maintaining the public services it performs, any retaliation because of the speech would be constitutionally protected (Flynn, 2013, pp 760-761). Ultimately, the *Connick* Court found that a "questionnaire" which covered internal office policies involved personal rather than public interests and therefore could not trigger the first amendment protections (*Connick v. Myers*, 461 U.S. 138 (1983).

Much of the current literature supports the contention that the Court's decision in *Connick* was a blow to public employees' Constitutional right to free speech, as it limited the scope of protection established in Pickering (Dallago, 2016; Wasserman & Connolly, 2017).

***Garcetti v. Ceballos*, 547 U.S. 410 (2006)**

Garcetti v. Ceballos was a highly controversial case that was narrowly decided in a 5-4 Supreme Court decision. Richard Ceballos, a deputy district attorney with the Los Angeles District Attorney's office, alleged that a deputy sheriff included false statements in a search warrant affidavit (*Ceballos v. Garcetti* 361 F.3d 1168, (2004)). Ceballos sent a memorandum to the Head Deputy District Attorney, Sundstedt, reporting the sheriff's actions (Ibid). Sundstedt

agreed that the validity of the warrant was questionable but decided to proceed with the prosecution of the defendant. Ceballos informed the defense about the false statements and was subpoenaed by the court to testify truthfully about the search warrant. Later, Ceballos alleged that because of his testimony he was subjected to multiple retaliatory employment actions including a demotion, threats, hostile treatment, and removal from the cases he was currently handling (Ceballos v. Garcetti, 361 F. 3d 1168, (2004)). He subsequently filed a federal action alleging that his First Amendment right to free speech had been violated (Ceballos v. Garcetti, 361 F.3d 1168, (2004); Wasserman & Connolly, 2017).

Ultimately, the U.S. Supreme Court drew a distinction that dramatically favored the interests of the government employer. The Court held that because Ceballos' memorandum was written, "pursuant to his official job duties" rather than as a private citizen, the speech contained in this memorandum was not protected by the First Amendment (Garcetti v. Ceballos, 547 U.S. 410, 2006).

The *Garcetti* decision essentially barred, "…all First Amendment claims based on speech that arises out of a public employees' official duties" (Flynn, 2013, p.769). Justice Kennedy opined for the majority that Ceballos memorandum was written as part of his employment duties and thus gave his, "…supervisors authority to take corrective action" (Garcetti v. Ceballos, 547 U.S. 410, 2006). He agreed that exposing government misconduct was of great importance, however, he noted that there were, "…legislative enactments such as whistleblower protection laws and labor codes available to those who seek to expose wrongdoing" (Ibid).

The Whistleblower Protection Act of 1989 (WPA) expanded general whistleblowing protections provided by the Civil Service Reform Act of 1978 (Modesitt, 2011). The WPA encouraged greater protections for federal employees against retaliation for whistleblowing,

however, judges were often reluctant to rule against employers. In *Willis v. Dept. of Agriculture, (*1998) an employee in the Department of Agriculture brought a suit against his supervisor alleging retaliation because he had complained about the supervisor's improper actions concerning a government soil protection program. The Federal Circuit court ruled in favor of the employer after determining the employees' speech was not protected by the WPA because it was part of his normal job duties and only amounted to a disagreement between the employee and the supervisor (*Willis v. Dep. Of Agriculture*, 1998). Justice Gajarsa of the Federal Circuit opined that the court was concerned that if the WPA applied in this situation, it would open the door to far too many WPA claims concerning typical disagreements (Modesitt, 2011 & *Willis v. Dept. of Agriculture,* 1998).). This was significant because it showed that judges were relying on personal ideologies and experience when determining if employees' speech concerned real questions of misconduct or if it was simply a difference of opinion between an employee and his employer. Case outcomes in these situations may be causally linked to individual judges' perception of the employees' normal job duties, limiting the WPA's ability to protect employees. Modesitt, (2011) pointed out that the judges in *Willis,* "…failed to consider the language of the statute or its legislative history" when they decided the employee's speech was not protected. (p.153). This raises the question as to whether whistleblower protection laws were really that effective.

The dissenting justices argued that the *Garcetti* majority did not fully recognize or appreciate the importance of the dual role of a citizen and a public employee. They argued that justices in the majority did not fully consider that the employee may have special knowledge or expertise concerning specific issues based in part on that employees' position/job (Garcetti v. Ceballos, 2006). Under *Garcetti,* employees who alleged their First Amendment rights were violated, had

to first convince the court that their speech was not within the scope of the employees' ordinary and usual duties. However, the justices in the *Garcetti* decision failed to clearly explain the rationale for determining if the employees' speech was, "pursuant to official duties" (Dallago, 2016; McKenzie, 2012; Modesitt, 2011). The lack of clarity in the language within the *Garcetti* decision led to legal confusion and resulted in judges having to rely on their own personal opinions and proclivities when determining what duties fell within the employees' official duties (Dallago, 2016; McKenzie 2012).

Mckenzie, (2012) asserted that a, "… federal trial court judge will tend to follow the law when…. the precedent is clear, even at the expense of the judges' party in the case" (p. 802). However, when the language within laws and legal precedents was ambiguous, judges were, "…more susceptible to producing a partisan judgement" (pp. 801).

The official duties clause in *Garcetti* required the court to examine the employee's actual job responsibilities in each case in order to determine if the subject matter of the speech or expression fell within the employees' routine responsibilities (Roberts, 2014, p.394). Where the court found that it did, the speech was categorically excluded from First Amendment protection. Where the court concluded that the expressive activity fell outside of the employee's ordinary duties, it must next decide if the employee was speaking as a citizen or merely about private concerns (Ibid). Only if these obstacles were overcome could the court apply *Pickering* balancing. In the view of the dissenters, this decision greatly eroded the ability of government employees to speak out against corruption, retaliation, and other matters of public concern (Dallago, 2016; Garcetti & Ceballos, 2006; Modesitt, 2011; Wasserman & Connolly, 2017).

***Lane v. Franks* 573 U.S. 228, (2014)**

The Supreme Court decision in *Garcetti* (2006) held that when citizens accept public employment, they must accept certain limitations on their freedom of speech regarding issues pertaining to their official duties (Schweitzer, 2015*). Lane v. Franks*, (2014) was a straightforward application of *Garcetti.* It applied the *Garcetti* test to determine if an employee was wrongfully fired for testifying in court on matters unrelated to his official job duties. Justices in the district and appellate courts ruled that it was not protected speech because the information Lane had provided in his testimony was discovered through his job (Wynne & Vaughn, 2017, p.7). Lane argued that even though he discovered the misconduct through his job, it was not a part of his "official duties" at the workplace (*Lane v. Franks*, 2014). *Lane* was unique because it addressed the question of, "truthful, subpoenaed testimony outside the course of a public employee's ordinary job responsibilities" (Wynne & Vaughn, 2017, p. 8). The court held that speech given as sworn testimony was, "… a quintessential example of speech as a citizen" and was protected by the First Amendment (Schweitzer, 2015, p.338).

Edward Lane was the Director of a Youth Center at a Community College in Alabama. During an audit of the center's finances he discovered that Suzanne Schmitz, also an Alabama State Representative, had been receiving pay from the center but had never actually reported to work (Wynne & Vaughn, 2017). Lane fired Schmitz after numerous attempts to get her to report to work proved futile. The U.S. Attorney subpoenaed Lane to testify at a Grand Jury as to the reason he had fired Schmitz (Ibid). Schmitz was convicted of mail fraud and theft and spent 30 months in prison. After the trial, Lane alleged he was fired from his position in retaliation for testifying in court against Schmitz (Ibid).

District and appellate courts applied the *Garcetti* rule and determined that Lane did not speak as a citizen when he testified in court and therefore his speech was not protected (Schweitzer,

2015, 338-339). They concluded that because Lane's speech pertained to information he discovered at his job; it fell within his official job duties (Ibid). The U.S. Supreme Court, unanimously, reversed the lower court explaining that, "a public employee is…obligated to speak the truth" in court and any employer obligations were distinct and independent from this testimony (Schweitzer, 2015, p. 338). It was also clear to the Court that not only was Lane's testimony concerning fraud and misuse of federal funds a matter of public interest, but that his subpoenaed testimony did not fall within the description of his official duties even though his speech pertained to information he discovered at his place of employment (*Lane v. Franks*, 2014). The Court further asserted that because his speech did not cause any disruption to the efficient operation within the workplace, it was protected speech under the First Amendment. (Ibid).

Although *Lane v. Franks* was a straightforward application of *Garcetti* (in its finding that the in-court testimony was First Amendment protected). The Court's decision held out hope to First Amendment advocates that the Court might be leaning in a more expansive view of First Amendment protections, retreating from its holding in *Garcetti* (Schweitzer, 2015, p.340).

According to the United States Labor Statistics (2019), there are more than twenty-two million governmental employees in the U.S. comprising roughly 14% of the entire U.S. workforce. Thus, the effects of these Supreme Court decisions may have a profound impact on not only the rights of public employees but on the rights of the public to know what government employees are doing.

There has been much debate among judges, scholars, and First Amendment advocates regarding the protections offered whistleblowers. Some, such as Justice Kennedy in the *Garcetti* case, believe that "whistleblower" cases are best handled through existing "whistleblower"

statutes and labor codes. Justice Kennedy asserted that there was, "…no need for permanent judicial intervention in the conduct of government operations" (*Garcetti v Ceballos*, 2014). Others such as Justice Steven and Souter in Garcetti, criticize this assertion noting the wide variance in these statutes from state to state (Wasserman & Connolly, 2017). Souter further asserted that public employees should, "enjoy presumptive First Amendment protection" on matters of public concern and important matters because these employees are "…often in the best position to know what ails the agencies for which they work" (Waters and Churchill, 1964, p.661; Wasserman & Connolly, 2017).

Current literature suggests that most legal scholars and First Amendment advocates recognize that judges' decisions are often influenced by a range of factors. Most agree that when the laws and precedents are clear and unambiguous, that Courts of Appeals judges follow legal precedent. However, when the language is not as clear, it opens the door for judicial interpretation.

The next chapter explains how I proceeded in investigating the impact of the Supreme Court cases previously discussed on First Amendment rights of police officers who blow the whistle on their employers or fellow officers and later retaliate for their expressive activities.

III
Methodological Approach

A model was developed to examine the impact of two U.S. Supreme Court decisions and judges' personal characteristics on individual voting by U.S. Courts of Appeals judges in First Amendment Free Speech claims brought by law enforcement officers against their departments asserting that they had been retaliated against by their departments. The U.S. Supreme Court cases under study were Garcetti v. Ceballos (2006) and Lane v. Franks (2014). The judges' personal characteristics included: judges' party affiliation (Republican -Democrat), race (white-other), gender (male-female), years on bench and judges' age. I expect that the Courts of

Appeals judges' political ideology as well as the decisions in these two key Supreme Court cases will have a significant effect on how those judges voted.

This research relied heavily on information obtained from multiple law databases concerning 327 U.S. Court of Appeals judges in 109 First Amendment retaliation cases involving claims asserted by law enforcement officials. The primary source for much of the information concerning the cases was obtained from, Nexis Uni (2020), an academic legal research database.

Data concerning the District court cases was accessed using the Public Access to Court Electronic Records system (PACER). PACER is an online national index providing instant 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 involved claims brought 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 workplace. Additionally, the speech in question involved some type of whistleblowing activity alleging wrongdoing, corruption, or other unethical behaviors. Each case was independently reviewed by three researchers to verify that it met the parameters of the study. Data entered into the database used to conduct the statistical analyses for this study was independently validated for accuracy by me and a fellow researcher. 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 U. S. Courts of Appeals judges and 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, ten 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 Judges Votes Pro-Plaintiff or Pro-Defendant	Number of Votes	Results Chapter
Party Affiliation (Ideology)	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.1
Pre-Post Garcetti v. Ceballos	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.2
Pre-Post Lane v. Franks	U.S. Courts of Appeals Judges Individual Voting	192	Table 4.3
Gender (Male-Female)	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.4
Race (White- Other Race)	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.5
Prosecutorial Experience	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.6
Judges Age	U.S. Courts of Appeals Judges Individual Voting	327	Table 4.7
U.S. Courts of Appeals Judges' Party Affiliation (Republican-Democrat)	Vote Same or Different than Democrat District Court Judges	153	Table 4.8
U.S. Courts of Appeals Judges' Party Affiliation (Republican-Democrat)	Vote Same or Different than Republican District Court Judges	174	Table 4.9

U.S. Courts of Appeals Judges' Party Affiliation (Republican-Democrat)	Vote Same or Different than All District Court Judges	327	Table 4.10

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 political ideology and also for those examining the effects of the *Garcetti* and *Lane* Supreme Court decisions were predicted to have a significant association with how the U.S. Courts of Appeals voted, therefore, a one tailed test was applied to these analyses.

Binary Logistic Regression Analyses

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

Three 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 recorded independent variables (IV), except for the pre and post *Lane* variable, on the dependent variable (DV). This analysis was labeled "the *Garcetti* model".

The second analysis included the full model examining the significance of all recorded independent variables (IV), except the *Garcetti v*ariable was replaced with the *Lane* variable, on the dependent variable (DV). This analysis was labeled "the *Lane* model".

The third analysis was labeled, the "Removal analysis". This analysis removed all non-significant variables from "the *Garcetti* model".

The independent variables (predictors) used in the database were political ideology as measured by party-of-the-appointing president coded as (0) for Democrat and (1) for Republican,

judges' race coded (0) for white and (1) for all other races, gender coded as (0) for males and (1) for females, age coded as a continuous number, prior prosecutorial experience coded (0) for No and (1) for Yes, and years on bench coded as a continuous variable. Pre and post *Garcetti* rulings are coded as (0) for pre and (1) for post. pre and post *Lane* ruling is coded as (0) for pre and (1) for post. The dependent variable was the individual vote placed by each Court of Appeals judge. It was recorded into the database as "0" for pro-plaintiff (employee) and "1" for pro-defendant (employer). The legal precedent variables studied were set-up as binary predictors: pre or post *Garcetti* and pre or post *Lane.* The first variable was coded as follows: pre was coded as "0" for appellate cases decided before *Garcetti* (2006) and post was coded as "1" for appellate cases decided after *Garcetti* (2006). The second variable was coded as follows: pre was coded as "0" for appellate cases decided before *Lane* (2014) and post was coded as "1" for cases decided after *Lane* (2014). The

The District court decision for each Appellate case was also recorded and coded as pre or post *Garcetti* and pre or post *Lane* using the same codes as used for the Appellate cases.
The District court judges' political ideology was recorded and coded as "0" for Democrat and "1" for Republican. The votes by judges in the District court were also coded as "0" for pro-plaintiff and as "1" for pro-defendant. District court judges' votes were used for comparison analyses and considered whether the Appellate court judge followed the finding of the lower court or if it reversed the finding and the possible role political ideology played in that decision. Chi Square analyses were performed in SPSS to determine if when reviewing Republican or Democrat District court decisions whether Republican or Democrat Court of Appeals judges voted differently or the same as the District court judge. The outcome from these analyses were confirmed using an online Chi Square calculator (Chi Square test Calculator, 2020). Results from

the ten Chi Square analyses and three Binary Logistic Regression models are shown in the next chapter along with an explanation of the findings.

IV
RESULTS

This chapter examines the relationship among the independent variables under study and U.S. Courts of Appeals judicial voting, the dichotomous dependent measure.

To gain an initial understanding of the data set, a series of crosstabs were performed to show the significance of the association between each 2 x 2 set of variables using the Chi Square Test of Independence. In the second section I analyze the whole data set employing logistic regression modeling and then re-calculate the data set employing logistic regression modeling, excluding all independent variables except Courts of Appeals judges' political ideology and race.

Crosstabs

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

Table 4.1 revealed that of the 168 votes by Republican appointees, 55 were pro-plaintiff (32.7%) and 113 were pro-defendant. For the Democratic appointees, of the 159 total votes, 73 were pro-plaintiff (45.9%) and 86 were pro-defendant. This showed that Democrat judges voted pro-plaintiff 13% more often than Republicans.

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

Party Affiliation	**Pro Plaintiff**	**Pro Defendant**	**Total**

Republicans	55 (32.7%)	113 (67.3%)	168
Democrats	73 (45.9%)	86 (54.1%)	159
Totals	128	119	327

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. There was a tendency for Democrats to vote pro-plaintiff significantly more often than their Republican colleagues. (X^2 = 5.411, df = 1, p = .020 with the Yate's correction applied).

Table 4.2 revealed that of the 135 votes pre-Garcetti, 51 were pro-plaintiff (37.77%) and 84 were pro-defendant. There were 192 votes Post Garcetti, 77 were pro-plaintiff (40.10%) and 115 were pro-defendant. This model saw a slight shift of 2.33% in judicial voting across party lines towards the plaintiff (employee) post *Garcetti.*

Table 4.2 Frequency distribution of pro-plaintiff and pro-defendant voting by Court of Appeals judges' pre- and post-Garcetti.

	Pre *Garcetti*	**Post *Garcetti***	**Total**
Pro Plaintiff	51 (37.77%)	77 (40.10%)	128
Pro Defendant	84 (62.22%)	115 (59.89%)	199
Totals	135	192	327

To determine if there was a difference in pro plaintiff and pro defendant voting pre and post Garcetti, a Chi Square Test of Independence was performed. The results indicated there was not a significant association in pro-plaintiff voting during the pre and post Garcetti eras (X^2=.096, df = 1, p = .757 with the Yate's correction applied).

Table 4.3 revealed that of the 87 votes Pre-*Lane*, 38 were pro-plaintiff (43.67%) and 49 were pro-defendant (56.32%). There were 105 votes Post *Lane*, 39 were pro-plaintiff (37.14%) and 66 were pro-defendant (62.85%). This model saw a slight shift of 2.33% in judicial voting across party lines towards the plaintiff (employee) post *Lane.*

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

	Pre *Lane*	**Post *Lane***	**Total**
Pro Plaintiff	38 (37.77%)	39 (40.10%)	77
Pro Defendant	49 (62.22%)	66 (59.89%)	115
Totals	87	105	192

To determine if there was a difference in pro plaintiff and pro defendant voting pre and post Garcetti, a Chi Square Test of Independence was performed. The results indicated there was not a significant association between pre and post Lane and voting. (X^2=.596, df = 1, p = .440 with the Yate's correction applied).

Table 4.4 revealed that of the 252 votes by male judges, 94 votes were pro-plaintiff (37.3%) and 158 votes were pro-defendant (62.69%). For the female judges, of the 75 votes, 34 were pro-plaintiff (45.33%) and 41 votes were pro-defendant (54.66%). This showed that female Court of Appeals judges voted pro-plaintiff 8 % more often than male Court of Appeals judges.

Table 4.4 Frequency distribution of pro-plaintiff and pro-defendant voting by Court of Appeals judges' gender.

Judge's Gender	**Pro Plaintiff**	**Pro Defendant**	**Total**
Male	94 (37.30%)	158 (62.69%)	252
Female	34 (45.33%)	41 (54.66%)	75
Totals	128	199	327

To determine whether there was a significant association between judge's gender and voting a Chi Square Test of Independence was performed. Although female judges voted more often in favor of the plaintiff, this association did not attain statistical significance at the .05 alpha level, (X^2 = 1.246, df = 1, p = .264 with the Yates correction).

Table 4.5 revealed that of the 282 votes by white judges, 114 votes were pro-plaintiff (40.42%) and 168 votes were pro-defendant (59.57%). There were 45 votes by judges of other races. 14 of these votes were pro-plaintiff (31.12%) and 31 were pro-defendant (68.88%). This showed that white judges voted pro-plaintiff 9.3 % more often than judges of other races (combined).

Table 4.5 Frequency distribution of pro-plaintiff and pro-defendant voting by Court of Appeals judges' Race.

Race	**Pro Plaintiff**	**Pro Defendant**	**Total**
White	114 (40.42%)	168 (59.57)	282
Other Races*	14(31.12%)	31 (68.88%)	45
Total	128	119	327

*Ethnicities recorded as others include Hispanic, Asian, and African American judges

To determine whether there was a significant association between judges' race and voting a Chi Square Test of Independence was performed. The results indicated there was not a significant association between the judges' race and voting. (X^2= 1.049, df = 1, p = .306 with the Yate's correction).

Table 4. 6 revealed that among the 106 Court of Appeals judges with prior prosecutorial experience 35.8% voted pro plaintiff. Among the 221 Court of Appeals judges without

prosecutorial experience, 40.7% voted pro-plaintiff. Thus, judges without prosecutorial experience voted pro-plaintiff 4.9% more often than judges with prosecutorial experience.

Table 4.6 Frequency distribution of pro-plaintiff and pro-defendant voting of Court of Appeals judges by prosecutorial experience.

Prosecutorial experience	**Pro Plaintiff**	**Pro Defendant**	**Total**
Prior experience	38 (35.8%)	68	106
No prior experience	90 (40.7%)	131	221
Totals	128	199	327

To determine whether there was a significant association between prosecutorial experience and voting, a Chi Square Test of Independence was performed. The results indicated there was not a significant association. $X^2=0.525$, df = 1, p = .469 with the Yate's correction applied).

Table 4.7 examined the association between Court of Appeals judges' age and the direction of their voting. In order to convert the "age" variable into a dichotomous variable, I ran a descriptive analysis and determined that the median age of all judges in the model was 66 years old. I then created a code for judges who were less than 66 years old and another code for judges who were 66 years old and older. This was necessary in order to run the Chi Square analysis. It can be observed that Courts of Appeals judges over 66 yrs. of age and older voted 3.1% more often for the plaintiff.

Table 4.7 Frequency distribution of pro-plaintiff and pro-defendant voting of Court of Appeals judges by age.

Judges' age	Pro Plaintiff	Pro Defendant	Total
Less than 66 years of age	61 (47.7%)	67 (52.3)	128
66 years of age or older	103 (51.7%)	96 (48.3)	199
Totals	164	163	327

To determine whether there was a significant association between Court of Appeals judges' age and voting, a Chi Square Test of Independence was performed. The results indicated there was not a significant association. (X^2=0.373, df = 1, p = .541 with the Yate's correction employed.)

Concordance Between U.S. District Court and Court of Appeals Judges' voting Based on Party Affiliation

To enhance our understanding of the data I investigated whether Courts of Appeals judges voting corresponded to their lower court judges voting based on their common party affiliation. The different analyses performed were:

1. Examining the concordance of Republican and Democratic Court of Appeals judges' voting with Democrats in the lower courts.
2. Examining the concordance of Republican and Democratic Court of Appeals judges voting with Republicans in the lower courts
3. Examining voting in the Courts of Appeals when District court judges from both parties are included in the database.

Each of these datasets are examined in turn

Table 4.8 displays the distribution of voting by Republican and Democratic judges in the U.S. Courts of Appeals in terms of its concordance with Democratic judges' voting in the district

courts. The Court of Appeals vote was recorded as the same or different than the district court vote. Republican Courts of Appeals judges' votes corresponded 19% more often with the votes of the district court Democrats than did the Democratic Courts of Appeals judges.

Table 4.8 Frequency distribution of Courts of Appeals voting as same or different than the District court Democratic judges.

Cases where the District Court judge was Democrat	**Same**	**Different**	**Total**
Republicans	61 (77%)	18 (23%)	79
Democrats	43 (58.1%)	31 (41.9%)	74
Totals	104	49	153

To determine whether there was a significant association between the Court of Appeals voting by Republicans and Democrats where the district court judge was a Democrat, a Chi Square Test of Independence was performed. The results indicated that Courts of Appeals Republican judges agreed significantly more often with the voting of district court Democrats than did the Courts of Appeals Democrat judges (X^2= 5.560, df = 1, p = 0.018 with the Yate's correction). This surprising result is discussed in the next Chapter.

Table 4. 9 displays the distribution of voting by Republican and Democratic judges in the U.S. Courts of Appeals in terms of its concordance with Republican judges' voting in the district courts. The Court of Appeals vote is recorded as the same or different than the District court vote. Republican and Democratic Courts of Appeals judges' votes corresponded 53 and 51 %, respectively with the district court voting, only a difference of about 1%.

Table 4.9 Frequency distribution of Courts of Appeals voting as same or different than the District court Republican judges.

Cases where the District Court judge was Republican	**Same**	**Different**	**Total**
Republicans	53 (59.5%)	36 (40.5%)	89
Democrats	51 (60%)	34 (40%)	85
Totals	104	70	174

To determine whether there was a significant association between the party affiliation of the Court of Appeals judges' and their voting where the district court judges were Republican a Chi Square Test of Independence was performed. The results indicated there was not a significant association. (X^2= .000, df = 1, p = 1.0 with the Yate's correction at the .05 level) between the party affiliation of the Courts of Appeals judges and their voting to affirm or reverse decisions by Republicans in the district courts.

Table 4.10 examined the association between Court of Appeals judges' voting and voting in cases by both Republican and Democrat district court judges. The Court of Appeals vote is recorded as same or different.

Table 4.10 Frequency distribution of pro-plaintiff and pro-defendant voting of Court of Appeals judges including all cases both Republican and Democrat.

Includes All Cases Both Republican and Democrat District court judges	**Same**	**Different**	**Total**
Republicans	114(67.8%)	54 (32.2%)	168
Democrats	94 (60%)	65 (40%)	159
Totals	208	119	327

Republican Courts of Appeals judges voted the same as the district court judges (Republican and Democrats combined) 67% of the time while Democratic Courts of Appeals judges did so 60% of the time.

To determine whether there was a significant association between the vote in cases where the District court judge was Republican and the Appellate court judges' votes a Chi Square test was performed. The results indicated there was not a significant association. (X^2= 2.33, df = 1, p = 0.127 with the Yate's correction at the .05 level) between Courts of Appeals judges' voting to affirm or reverse when the party affiliation of the district court judges was combined.

Binary Logistic Regression Analyses

To determine the impact of the independent variables being studied, Logistic Regression analyses was performed on the dataset. The independent variables entered into the equation were political ideology [party of the appointing president], race [white, other], gender, age, prior prosecutorial experience, years on the bench, and decisions made pre and post Garcetti and pre or post *Lane.* The dependent measure was the direction of the Courts of Appeals judges voting, categorized dichotomously as pro plaintiff or pro defendant. The results of these analyses are reported in Tables 4.11 and 4.12.

In Table 4.11 it can be observed that a total of 327 individual votes were analyzed and a test of the full model against a constant-only model was not statistically significant (omnibus chi square = 13.719, df = 8, *p* = .089) at the alpha .05. The predictors, as a whole, were not found to have a significant association with the way in which Courts of Appeals judges voted. The results for the pseudo-R Square analyses for model fit were .041 for the Cox & Snell and .056 for the Nagelkerke statistic with 59.8% of the pro-defendant votes successfully predicted. However,

only 40.10% of the pro-plaintiff votes were successfully predicted. Overall, 59.9% of predictions were accurate.

Table 4.11 gives 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 ideology as determined by party of the appointing president had a significant effect on voting. at the alpha .05 level. A judge appointed by a Democratic president was 1.871 times more likely to vote in a liberal/pro-employee direction than a judge appointed by a Republican president. Other judges' demographic and personal attributes [race, gender, prosecutorial experience, years on the bench,] showed no significant effect on how U.S. Courts of Appeals judges' voted in cases within the study dataset.

The analysis also revealed that contrary to my expectations, the U.S. Courts of Appeals decisions made pre *Garcetti* did not differ from those made post *Garcetti* at the .05 alpha level.

Table 4.11 Summary of Logistic Regression Analysis for Variables Predicting Judicial Voting in First Amendment Retaliation Case in U.S. Courts of Appeals (the *Garcetti* model)

Independent Variables	B (S.E.)	Wald	df	P	Exp (B)
Ideology [P-A-P].	.627 (0.248)	6.399	1	.011	1.871
Race [W/Other*]	.648 (0.376)	2.962	1	.085	1.912
Gender [M/F]	.268 (0.283)	.895	1	.344	1.307
Age	-.018 (0.019)	.920	1	.337	0.982
Pros. Exp [Yes/No].	-.191 (0.260)	.540	1	.462	0.826
Yrs./ Bench	.012 (0.021)	.337	1	.561	1.012
Pre/Post Garcetti	.109	.183	1	.669	1.115

	(0.254)				
Constant	.903 (1.013)	.795	1	.373	2.467

In Table 4.12 it can be observed that a total of 192 individual votes were analyzed and a test of the full model against a constant-only model was not statistically significant (omnibus chi square = 9.756, df = 7, p = .203) at the alpha .05. When the *Garcetti* variable was replaced with the *Lane* variable and the cases were adjusted to only include cases decided post *Garcetti* none of the independent variables were found to have a significant association with the way in which Courts of Appeals judges voted. The results for the pseudo-R Square analyses for model fit were .050 for the Cox & Snell and .067 for the Nagelkerke statistic with 87.4% of the Pro-defendant votes successfully predicted.

Table 4.12 shows the results when the *Lane* variable was substituted for the *Garcetti* variable. None of the judges' demographic and personal attributes [ideology, race, gender, prosecutorial experience, years on the bench, and the legal precedent variable] showed a significant effect on how U.S. Courts of Appeals judges' voted in cases within the study dataset.

The decisions made pre-*Lane* did not differ from those made post-*Lane* at the .05 alpha level. These results are discussed in the next chapter.

Table 4.12 Summary of Logistic Regression Analysis for Variables Predicting Judicial Voting in First Amendment Retaliation Case in U.S. Courts of Appeals (the *Lane* model)

Independent Variables	B (S.E.)	Wald	df	P	Exp (B)
Ideology [P-A-P.]	.568 (0.331)	2.950	1	.086	1.764
Race [W/Other*]	.562	1.749	1	.186	1.755

	(0.425)				
Gender [M/F].	.498	2.002	1	.157	1.646
	(0.352)				
Age	-.013	.240	1	.624	.987
	(0.026)				
Pros. Exp [Yes/No].	-.220	.063	1	.475	.802
	(0.308)				
Yrs./ Bench	-.007	.063	1	.802	.993
	(0.029)				
Pre/Post *Lane*	.109	.183	1	.669	.702
	(0.254)				
Constant	.948	.467	1	.494	2.581
	(1.388)				

Table 4.13 shows the results of logit analysis when the non-significant predictors in the *Garcetti* model were removed from the equation, except for the judges' race [because it approached statistical significance]. A total of 327 individual votes were analyzed and the full model was significantly reliable. (omnibus chi square =10.101, df =,2 p =.006). As a set, the predictors reliably showed that political ideology and race had a significant effect on judges' voting in cases pertaining to First Amendment retaliation claims brought by police officers and other law enforcement officials at the alpha .05 level.

The R Square statistic for model fit was .030 for the Cox & Snell and .041 for the Nagelkerke statistic. Overall, 60.9% of predictions were accurate. Table 4.12 gives coefficients, the Wald statistic, the associated degrees of freedom, and the probability values for each of the predictor variables.

Ideology, as determined by the nominating president's political party [Wald=8.516, df=1, p=.004], and the Courts of Appeals judges' race [Wald=3.929, df=1, p=.047] were significant predictors of individual judge voting. The odds ratio, as revealed by the Exp. (B) column

indicates that Democratic appointees were 2.201 times more likely than Republican appointees to vote in favor of the plaintiff police officers bringing First Amendment retaliation claims against their departments. White Courts of Appeals judges were 2.052 times more likely more likely than "other "judges [black, Hispanic, Asian] to vote in favor of the plaintiff police officers who brought such claims against their departments

Table 4.13 Summary of Logistic Regression Analysis for Variables Predicting Judicial Voting in First Amendment Retaliation Case in U.S. Courts of Appeals with all predictors removed except Ideology and Race (The Removal Analysis).

Independent Variables	B (S.E.)	Wald	df	P	Exp (B)
Ideology [P-A-P]	.704 (0.363)	8.516	1	.004	2.201
Race [W/Other*]	.719 (0.241)	3.929	1	.047	2.052
Constant	.006 (0.180)	0.001	1	.373	0.994

The latter results are somewhat surprising given that non-white judges are often expected to vote in a more liberal direction than their minority groups counterparts while the former results were consistent with my predictions. These and other results are interpreted in the next chapter.

IV Discussion

The purpose of this chapter is to review the results described in the previous chapter and to offer plausible interpretations of the results.

The Garcetti Effect

Table 4.11 Summary of Logistic Regression analysis for variables predicting judicial voting in First Amendment Retaliation Case in U.S. Courts of Appeals (the *Garcetti* model) revealed no significant difference in pro-plaintiff pro-defendant voting, pre- and post-*Garcetti* (Wald=.109 df=1, p=.669). These results are surprising because they differ in crucial respects from previous studies that examined Courts of Appeals judges' voting in cases concerning public employee whistleblowing. Previous research has shown, "…direct statistical support" reinforcing the assertion that Courts of Appeals judges were heavily impacted by legal precedent from key Supreme Court decisions, such as in *Garcetti*, in cases involving public employee whistleblowers (Wasserman & Connolly, 2017).

The absence of differences in voting pre and post *Garcetti* might be explained by considering the content and context in which these cases arose. It may be the case that, even during the pre-*Garcetti* period, judges, when deciding First Amendment claims in quasi-military settings such as police departments, were already reluctant to validate claims by employees. For example, in 2000, the case of *Cochran v. The City of Los Angeles*, 222 F.3d 1195, was decided pro-defendant in favor of the employer by two Democrat judges and one Republican judge. The judges' opinion following the outcome explained that they had given, "…wide deference to the employer…" because given that, "the unit of government in which appellees worked was a police department, a quasi-military organization…discipline and spirit de corps were vital to its functioning" (*Cochran v. City of Los Angeles*, 2000). They also stated that the, "…extra power the government has in this area, comes from the nature of the government's mission as an employer" (*Cochran v. City of Los Angeles*, 2000; *Garcetti v. Ceballos*, 2006).

Lane v. Franks

Similar results were obtained when the Garcetti variable was replaced with the Lane variable and all other variables were included. See **Table 4.12** Summary of Logistic Regression Analysis for Variables Predicting Judicial voting in First Amendment retaliation cases in U.S. Courts of Appeals (the *Lane* model). There the pre and post *Lane r*esults indicated no meaningful difference in the voting [Wald=.467, df=1, p=.494]. It seems then, that as with *Garcetti*, pre and post *Lane* voting did not differ from one another because of deference given to law enforcement agency decisions not observed in other contexts such as public education [see for example, Wasserman & Connolly, 2017]. Considering the results for the Garcetti model this outcome is not surprising. After all, *Lane i*s just a specific application of Garcetti principles to a compelling set of facts involving corruption by a university employee and testimony by an auditor whose ordinary job duty did not include that testimony and was therefore First Amendment protected.

Ideology Effects

In contrast to the absence of *Garcetti* and *Lane* effects on judges' voting, the full *Garcetti* model showed significant ideological impact on pro-plaintiff-pro-defendant voting. See, **Table 4.11** Summary of Logistic Regression Analysis for Variables Predicting Judicial Voting in First Amendment Retaliation Case in U.S. Courts of Appeals (the *Garcetti* model) (Wald=.6.399 df=1, p=.011). The effect size for the data set revealed that Democratic appointees were 1.871 times more likely to vote pro-plaintiff than were the Republican appointees. Results in this study found that judges' political ideology did significantly impact how Courts of Appeals judges voted. This was consistent with current literature examining the effects of judges' ideological beliefs on judicial voting in Courts of Appeals decisions (Lim, 2000; McKenzie, 2012; Sisk, 2011 & Wasserman & Connolly, 2017) and extends this phenomenon to First Amendment

retaliation claims by law enforcement officers. In sum, it may be the case that Democratic appointees are more sympathetic to the plight of police officers than Republican judges and are more willing to protect whistleblowers than the Republican judges. This result is consistent with the voting which occurred in the *Garcetti* case itself where voting was largely along ideological lines with all but one Republican justice voting in favor of the defendants.

When the *Garcetti* precedent was removed from the data base and the *Lane* variable substituted, the ideology effect disappeared. See **Table 4.12** Summary of Logistic Regression Analysis for Variables Predicting Judicial Voting in First Amendment Retaliation Cases in U.S. Courts of Appeals (the *Lane* model) (Wald=.2.950 df=1, p=.086). Although ideology attained significance at the .10 alpha level in the Lane model, it failed to satisfy the .05 criterion for significance set at the beginning of the study. Most likely the difference for the significance attained for the ideological variable in the *Garcetti* model compared to the Lane model is simply a function of the N used in the models. The *Garcetti* model ran 327 votes whereas in the *Lane* model there were only 192 votes, thereby making it more difficult to reach statistical significance in the *Lane* model due to the differences in sample size. Nevertheless, ideological factors seem to have influenced voting in the *Lane* model as well and it seems likely that as the number of post-*Lane* cases increase statistical significance will be attained in the *Lane* model as well.

Concordance Between U.S. District Court and Court of Appeals judges' voting Based on Party Affiliation

I conducted additional analyses not included in the original study design to determine if judicial voting by U.S. Courts of Appeals judges might vary according to whether they were reviewing a decision made by a district court judge of same party verses different party. The results displayed in Table 4.7 indicated that Courts of Appeals Republican judges agreed

significantly more often with the voting of district court Democrats than did the Courts of Appeals Democrat judges (X^2= 5.560, df = 1, p = 0.018 with the Yate's correction) . However, there was not a significant association. (X^2= .000, df = 1, p = 1.0 with the Yate's correction at the .05 level) between the party affiliation of the Courts of Appeals judges and their voting to affirm or reverse decisions by Republicans in the district courts. Although this outcome might be a result of chance it seems at least feasible that Republican judges are more likely to vote "institutionally" in the sense of being reluctant to overturn the votes of their colleagues whereas Democrats give less weight to such considerations. Such conclusions are of course speculative and must await further study.

Gender, Years on Bench, Prosecutorial Experience

Results of statistical analyses in this study revealed limited gender effects. Although women voted 8% more than men in a pro plaintiff direction, the Chi Square value did not approach significance (X^2 = 1.246, df = 1, p = .264 with the Yates correction). In the full model including all the predictors, gender had no significant impact in either the Garcetti [Wald=1.810, df=1, p=.179] or Lane models [Wald=.596, df=1, p=.440]. To the extent of gender differences between judges, most likely these are issue-specific outcomes and one should be cautious about making assertions based only on gender.

In the current context, Chi Square Tests of Independence regarding judges' age [X^2 = .222, df = 1, p =.473], the number of years each judge had served on the bench [X^2 = .586, df = 1, p = .444], and judges' prosecutorial experience [X^2 =.738, df = 1, p =.390] were not found to have a significant effect on judges' voting. Similarly, the logistic regression results revealed non-significant impact for each of these variables when all predictors were included in the analyses.

[Wald=.243, df =1, p = .622 (age); Wald=.050, df = 1, p = .823 (years on bench); Wald= .503, df = 1, p = .478 (prosecutorial experience)].

Race and Voting

Chi Square analysis from Table 4.5 examining the association between the judges' race and the judges' vote did not show a significant relationship. Similarly, as shown in Tables 4.11 (the Garcetti model) and in Table 4.12 (the Lane model) the race/other predictor failed to show significant impact on pro-plaintiff-pro-defendant voting [Wald=2.963, df=1, p=.085 (Garcetti model); Wald=.1.749, df=1, p=.186 (Lane model). However, when all but the race and ideological predictors were removed from these models the race variable reached statistical significance [Wald=4.102, df=1, p=.043 (race)]. The results showed that that white judges were 2.052 times more likely to render a pro-plaintiff vote than other racial and ethnic identities. Although these results may be counter intuitive, several possible explanations may point us to a better understanding of this phenomena.

First, methodologically, different ethnicities were combined into one variable labeled "other ethnicities" and contrasted with white judges. Because judges of different ethnicities were combined, it may be the case that had African Americans, Hispanics and Asians been classified separately, a different result would have been obtained. Unfortunately, the number of cases representing each of these other ethnicities was insufficiently large enough to perform a meaningful analysis. Such investigations must be relegated to future studies.

Second, the assumption that judges in the "other ethnicities" category would vote in a liberal direction may be short sighted, at least, on the issue being studied. It is possible that these judges might have been exposed to higher crime rates at earlier phases in their lives and might have stronger support for the institutional needs of law enforcement. Such a theory could be studied

in the future. Third, although the logistic regression model held party affiliation constant when differentiating the whites and "others" voting it did not interact race and ethnicity and the other variables under study. It is therefore possible pursuing such a course might reveal differential effects of ideology in interaction models. This might be an area for future investigation.

Summary

This study examined how U.S. Courts of Appeals judges voted in cases pertaining, specifically, to police officers and other law enforcement officials who alleged violations of their First Amendment right to Free Speech and retaliation. The study examined the possible association between two key Supreme Court decisions in *Garcetti* (2006) and *Lane* (2014) and whether those decisions influenced Appellate Court judges voting in these types of case.

The findings indicate that judges may view cases involving police officers and other law enforcement officials differently from cases involving employees from other governmental sectors. Judges may have a greater tendency to favor law enforcement institutions or police department hierarchy because they believe these employers need greater control over their employees due to the nature of the job. Courts of Appeals judges may take the same view as Justice Gajarsa opined in the *Willis* case, that disagreements between employees and supervisors are best handled within the hierarchy of the institution (Willis v. Dept. of Agriculture, 141 F.3d 1139, 1998). Information taken directly from the judges' opinion in many of the Courts of Appeals cases included in this study indicated that judges may view employees from highly structured quasi-military organizations such as police departments and other law enforcement institutions differently than public employees from other sectors of government.

I turned to studies that examined the influence of ideology and partisanship on Federal Judges' voting in a range of different types of cases. One study by McKenzie (2012) found that

when the law was clear and unambiguous, the judges followed legal precedent and the effects of partisanship was limited (p.802). This may explain why the legal precedent in a case such as Garcetti did not prove to be significant. The language in the Garcetti case has been criticized by legal scholars as being too broad and ambiguous. The ambiguity inherent in the Garcetti decision may have made it more likely that judges voting in subsequent cases would vote ideologically in their decision and less likely to rely on the legal precedent (McKenzie, 2012, pp 801-805).

Another possible explanation has been proffered by legal realists and scholars that in deciding case outcomes, "…judges are more likely to obey (disobey) legal doctrine when such doctrine supports (does not support) their own partisan or ideological policy preferences" (Tiller & Cross, 1998). According to this study, judges follow an Attitudinal model whereby they examine the facts of the case and vote based on personal, "…political proclivities," rather than strictly following legal precedent (Ibid). Modesitt, (2011) asserted that the Federal Circuit judges in the *Willis* case disregarded the language within the statute and its legislative history, relying primarily on their personal interpretations of what they believed Congress intended for the WPA to cover (p.153).

The Supreme Court's decision in *Lane* helped clarify some of the ambiguous language in *Garcetti* concerning the definition of "official duties". The Court applied a straightforward application of *Garcetti* and found that Lane's speech did not pertain specifically to his everyday "official duties" (*Lane v. Franks*, 2014). This case narrowed the threshold concerning what constituted an employee's official duties and job description.

Empirical analyses in this study found a slight pro-plaintiff shift in voting after the *Lane* decision. Although the shift was in the expected direction following the *Lane* decision, it was not found to be statistically significant. This case was decided in 2014, limiting the number of cases

and votes included in the analyses. It may be that as more cases meeting the criteria for the study are decided in the Courts of Appeals, the model will show a more significant move. Future studies will require a continued effort to update and maintain this dataset to accurately monitor any changes that may occur.

This study filled the gap in the literature concerning the impact of *Garcetti v. Ceballos* and ideology as measured by the political party of the appointing president on U.S. Courts of Appeals voting in decisions involving First Amendment retaliation claims brought by police officers against their departments. Unexpectedly, voting in this category of cases was not significantly decision was rendered. I attributed this result to the special characteristics of law enforcement agencies including a reluctance on the part of judges to infringe on the operations of quasi-military organizations such as law enforcement agencies. Underlying this reluctance is probably different before and after the *Garcetti* judicial concern about public safety and greater deference granted to such agencies as compared to other agencies where the disruptive impact of judicial intervention might be more attenuate. Notably, as has been observed in other settings, ideological dispositions in the context of police officers' First Amendment claims was shown to be consistent with judicial voting in other contexts. Here like elsewhere, voting tendencies reflect ideology all the way down.

Accountability and transparency within law enforcement agencies has never been greater than it is today. Improving relationships between communities and law enforcement will require a commitment from law enforcement agencies to show a willingness to enforce policies and procedures within its organizational hierarchy. It is important that officers who participate in criminal or unethical behaviors are held accountable for their actions and whistleblowers who report wrongdoing are protected from retaliation and punishment. Results from this study

indicated that judges' political ideology and attitudes concerning law enforcement agencies may override all other influences in judges' voting in these types of cases.

Moving forward, one avenue for continued research would involve further studies regarding judicial attitudes concerning law enforcement agencies. This study indicated that the majority of Courts of Appeals judges are inclined to apply *Garcetti* in a way which defers to the employment decisions made by police departments leave the policing of officers to the police rather than to risk opening the courts up to waves of claims, they believe, are better decided within the hierarchy of their organizations. This may mean that police officers who are subjected to First Amendment retaliation are disadvantaged relative to other public employees making First Amendment claims. The remedy to fix this disparity may be strengthening statutory protections for whistleblowers rather than waiting for the federal courts to do the job.

References

Allred, S. (1984). Connick v. Myers: Narrowing the Free Speech Right of Public Employees, *33 Cath. U. L. Rev. 429.* Retrieved November 21,2019, from https://scholarship.law.edu/lawreview/vol33/iss2/7

Americans for Effective Law Enforcement (AELE) Mo. L. J. 201, (2016). Whistleblower Protection for Public Safety. Retrieved February 10, 2020, from http://www.aele.org/law/2016all02/2016-02MLJ201.pdf

Bollinger, L. C., & Stone, G. R. (Eds.). (2019). *The Free Speech Century*. Oxford University Press.

Brock J. (2001) United States Public Sector Employment. In: Dell'Aringa C., Della Rocca G., Keller B. (eds) Strategic Choices in Reforming Public Service Employment. Palgrave Macmillan, London

Callahan, E. S., & Dworkin, T. M. (2000). The state of state whistleblower protection. *Am. Bus. LJ*, *38*, 99.

Ceballos v. Garcetti, 361 F.3d 1168 (2004).

Chi-Square Test Calculator. (2020). Retrieved April, 16,2020, from https://www.socscistatistics.com/tests/chisquare2/default2.aspx.

Cochran v. The City of Los Angeles, 222 F.3d 1195 (2000).

Connick v. Myers, 461 U.S. 138 (1983).

Cross, F. & Tiller, E., (1998). Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals. *YALE LJ*, *107*, 2155.

Dallago, L. (2016). Silence or Noise: The Future of Public Employees Free Speech Rights and the United States Supreme Court's Jurisprudence on the Scope of the Right. *Wash. & Lee J. Civ. Rts. & Soc. Just.*, *22*, 239.

Epstein, L., Martin, A. D., Quinn, K. M., & Segal, J. A. (2007). Ideological drift among Supreme Court justices: Who, when, and how important. *Nw. UL Rev.*, *101*, 1483.

Flynn, C. A. (2012). Policeman, Citizen, or Both-A Civilian Analogue Exception to Garcetti v. Ceballos. *Mich. L. Rev.*, *111*, 759.

Federal Judicial Center (FJC) (2020) An Integrated Database of federal cases, reports and studies. Retrieved Feb 10, 2020 from https://www.fjc.gov/research.

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Glazer, M. (1983). Ten Whistleblowers and How They Fared. *The Hastings Center Report, 13*(6), 33-41. doi:10.2307/3560742

Hodges, A.C. & Pugh, J. (2018). Crossing the Thin Blue Line: Protecting Law Enforcement Officers Who Blow the Whistle. *UC Davis L. Rev. Online,* 52,1.

Hopson, J. (2011). *Breaking the Blue Wall: One Man's War Against Police Corruption.* WestBow Press.

Huq, A. Z., & McAdams, R. H. (2016). Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation. *U. Chi. Legal F.*, 213.

Hyland, S. (2018). Full-Time Employees in Law Enforcement Agencies, 1997-2016. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics

Johnson, R. (2005). Whistleblowing and the Police. *Rutgers Journal of Law & Urban Policy, 3*, 74.

Kleinbrodt, J. (2013). Pro-whistleblower Reform in the Post-Garcetti Era. *Michigan Law Review, 112*(1), 111-138. Retrieved from www.jstor.org/stable/23816118

Klockars, C. B., Ivkovich, S. K., Harver, W. E., & Haberfeld, M. R. (2000). The measurement of police integrity (NIJ Publication No. 181465). *Washington, DC: Government Printing Office.*

Lane v. Franks, 573 U.S. 228, (2014).

Lim, Y. (2000). ARTICLE: An Empirical Analysis of Supreme Court Justices' Decision Making. *The Journal of Legal Studies, 29*, 721-753. Retrieved, April, 10, 2020, from https://advance-lexis-com.ezproxy.uta.edu/api/document?collection=analytical-materials&id=urn:contentItem:40RS-8570-00CV-S0PY-00000-00&context=1516831.

McKenzie, M. J. (2012). The influence of partisanship, ideology, and the law on redistricting decisions in the federal courts. *Political Research Quarterly*, *65*(4), 799-813.

Modesitt, N. M. (2011). The Garcetti Virus. *University of Cincinnati Law Rev.*, *80*, 137.

Myers v. Connick, 501 F. Supp. 75, (1981).

Nexis-Uni (2020), Academic Legal Research Database, Retrieved Feb, 10, 2020, from https://advance-lexis-com.ezproxy.uta.edu/bisacademicresearchhome?

Pickering v. Board of Education, 36 Ill. 2d 568, (1967).

Public Access to Court Electronic Records, (PACER), (2020), Retrieved Feb. 10, 2020, from www.pacer.gov/findcase.html

Pickering v. Board of Education, 391 U.S. 563, (1968).

Roberts, R. (2015). Public service, public corruption and the first amendment: The implications of *Lane v. Franks* for public employee public corruption watchdogs. *Review of Public Personnel Administration*, *35*(4), 386-405.

Rowland, C. K., & Carp, R. A. (1980). A Longitudinal Study of Party Effects on Federal District Court Policy Propensities. *American Journal of Political Science*, 291-305.

Schweitzer, T. A. (2014). Lane v. Franks: The Supreme Court Clarifies Public Employees' Free Speech Rights. *Touro L. Rev.*, *31*, 333.

Sisk, G. C., & Heise, M. (2011). Ideology All the Way Down-An Empirical Study of Establishment Clause Decisions in the Federal Courts. Mich. L. Rev., 110, 1201.

Souter, D.H. (n.d.). *Oyez*. Retrieved April 22, 2020, from https://www.oyez.org/justices/david_h_souter

Still, S. (2020). NOTE: A PUBLIC CONCERN: PROTECTING WHISTLEBLOWERS UNDER THE FIRST AMENDMENT. *Fordham Law Review*, *88*, 1543.

Tsesis, A. (2015). Multifactorial Free Speech. *Nw. UL Rev.*, *110*, 1017.

U.S. Bureau of Labor Statistics, 2018.

Wasserman, L. M., & Connolly, J. P. (2016). Unipolar panel effects and ideological commitment: An analysis of US Courts of Appeals free speech decisions involving K-12 public education employees. *ABA Journal of Labor & Employment Law*, 537-552.

Wasserman, L. M., & Connolly, J. P. (2017). The Garcetti Effect and the Erosion of Free Speech Rights of K-12 Public Education Employees: Trends and Implications. *Teachers College Record*, *119*(6).

Whistleblower. (2019). In the Oxford *Online Dictionary*. Retrieved March 20, 2020, from https://en.oxforddictionaries.com/definition/whistleblower

Wynee, S. L., & Vahughn, M. S. (2017). Silencing Matters of Public Concern: An Analysis of State Legislative Protection of Whistleblowers in Light of the Supreme Court's Ruling in Garcetti v. Ceballos. *Ala. CR & CLL Rev.*, 3-25.

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