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Fifth Amendment Protection for Public Employees: Garrity and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations

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Fifth Amendment Protection for Public Employees: Garrity and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations

Cover Page Footnote

24-4

**FIFTH AMENDMENT PROTECTION FOR PUBLIC
EMPLOYEES:
GARRITY AND LIMITED CONSTITUTIONAL PROTECTIONS
FROM USE OF EMPLOYER COERCED STATEMENTS IN
INTERNAL INVESTIGATIONS AND PRACTICAL
CONSIDERATIONS**

*J. Michael McGuinness**

Public employees are not relegated to a “watered-down version of constitutional rights.”

Garrity v. New Jersey, 385 U.S. 493, 500 (1967)

“[E]xtremism in the defense of liberty is no vice! . . .
[M]oderation in the pursuit of justice is no virtue.”

Senator Barry Goldwater, Republican National Convention,
1964

In this Article, the author explores a unique and narrow aspect of public employment law with substantial implications for all public employees: the right of public employees not to have employer coerced statements used against the employee in criminal proceedings. With growing regulation and scrutiny of public employees, investigations of public employees constitutes a significant concern of employee survival as well as public agency management. Increasing complaints against public employees have generated more prevalent legal risks for public employees who might be charged by multiple adversaries in several forums.

* The McGuinness Law Firm, www.mcguinnesslaw.com. Mr. McGuinness has represented public employees for over twenty-four years. This Article is based on a presentation given at the National Organization of Lawyers for Education Associations conference in Savannah, Georgia. This Article is dedicated to William J. Johnson, General Counsel and Executive Director of the National Association of Police Organizations. Mr. Johnson has tirelessly fought to preserve and protect *Garrity* rights for his clients and all public employees.

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INTRODUCTION

Public employment investigations invoke application of federal and state constitutional principles in determining the scope of permissible investigations and the use of the evidence obtained. *Garrity v. New Jersey*¹ enunciated the basic principle precluding the admission of employee statements from internal investigations into evidence in a criminal case against the employee. Thus, the employee is afforded “use immunity,” while the employer’s coerced statement from an internal investigation cannot be admitted against the employee in a criminal proceeding.

Although the core principle of the *Garrity* rule has remained for forty years, some lower courts have restricted the scope of application and protection. Some courts require notice of *Garrity* rights and its’ consequences; other courts do not require any notice or warning to the employee.² The federal circuit courts are split on this and

¹ 385 U.S. 493 (1967).

² See *Sher v. U.S. Dep’t of Veterans Affairs*, 488 F.3d 489, 509-10 (1st Cir. 2007) (stating circuits disagree on the level of advisement an employer must give an employee before questioning). Compare *Hill v. Johnson*, 160 F.3d 469, 471-72 (8th Cir. 1998) (holding a compelled waiver is more than a failure to offer immunity), with *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002) (holding government employers must first warn employees “that because of the immunity to which the cases entitle him, he may not refuse to answer the questions on the ground that the answers may incriminate him.”).

other *Garrity* issues.³ Therefore, there is a need for the Supreme Court to resolve these conflicts and clarify the law for the benefit of employees, employers, prosecutors, and the public.

The last decade has revealed a gradual substantial erosion of constitutional protections for public employees. This trend presents new risks for America's public servants, especially for police officers and teachers who serve in environments that are especially risky and prone to employer abuse of power. Despite historical protection in many areas, the trends from the Roberts Court are not encouraging for public employees in need of protection from abusive employment misconduct.⁴ There is no arguable need to overrule or weaken *Garrity*, but the lower court trends do not suggest any expansion of *Garrity* rights. However, recent developments in state constitutional law may provide a more fertile ground for greater individual protection of public employees during internal investigations.

This Article reviews *Garrity* and its progeny.⁵ Several *Garrity* issues involving the scope and application of *Garrity* have gener-

³ *Id.*

⁴ Donald Wm. Driscoll, *Garrity v. New Jersey and its Progeny: How Lower Courts are Weakening the Strong Constitutional Protections Afforded Police Officers*, 22 BUFF. PUB. INT. L.J. 101, 131 (2003-2004) (asserting that the *Garrity* decision was based on the Court's intention to create strong constitutional protection for such employees and subsequent lower Courts' decisions are eroding what the court had originally created; a strong constitutional protection for employees). See J. Michael McGuinness, *Whistleblowing and Free Speech: Garcetti's Early Progeny and Shrinking Constitutional Rights of Public Employees*, 24 TOURO L. REV. 529 (2008).

⁵ For scholarly reviews of *Garrity*, see Steven D. Clymer, *Compelled Statements From Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309 (2001); Driscoll, *supra* note 4, at 101; Robert J. Goodwin, *The Fifth Amendment in Public Schools: A Rationale for its Application in Investigations and Disciplinary Proceedings*, 28 WM. & MARY L. REV. 683 (1987); Ralph Ruebner, *Police Interrogation: The Privilege Against Self-Incrimination, the Right to Counsel, and the Incomplete Metamorphosis of Justice White*, 48 U. MIAMI L. REV. 511 (1994); Byron L. Warnken, *The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination*, 16 U. BALT. L. REV. 452 (1987).

ated divergent circuit court opinions. At least one of these circuit splits has prompted a certiorari petition.⁶ Clarity of the applicable law is sorely needed so public employees and employers better understand the meaning of *Garrity* and the implications from coercing statements from public employees. Finally, this Article offers some practical observations that counsel should consider in representing public employees regarding internal investigations and employee responses.

This Article proceeds in nine parts. Part I posits that public employee investigations present a substantial risk to employees, stating that even the most benign investigation can prove harmful to a public employee in a later criminal investigation. Part II outlines *Garrity* and its basic principles, stating how the workplace environment has vastly changed in the forty years since *Garrity*. Part III reviews the basic principles of employment investigations. Part IV describes *Garrity* and its historical connection to the right against self-incrimination. Part V describes in detail several important cases that have arisen since *Garrity*. Part VI explores how some jurisdictions require that public employees be advised of their *Garrity* rights. Part VII outlines the practical considerations involved in responding to an internal or external public employee investigation. Part VIII outlines concepts involved in investigating a public employee dispute. Lastly, Part IX concludes that the erosion of constitutional rights provided by *Garrity* will lead to more government corruption and inefficiency.

⁶ Petition for Writ of Certiorari, *Aguilera v. Baca*, 76 U.S.L.W. 3674 (June 11, 2008) (No. 07-1547). Chief Judge Kozinski, who wrote the dissenting opinion for the Court of Appeals for the Fifth Circuit, characterized one of the remaining *Garrity* uncertainties as a “mess.” *Aguilera v. Baca*, 510 F.3d 1161, 1179 (9th Cir. 2007) (Kozinski, C.J., dissenting).

I. PUBLIC EMPLOYEE INVESTIGATIONS PRESENT SUBSTANTIAL RISKS TO EMPLOYEES

Serving as a public employee thrusts one into a dangerous world of endless investigations and complaints. Virtually everything that goes wrong in connection with public agencies potentially gives rise to complaints and resulting probative internal and external investigations into the work and lives of America's public employees. Every traffic stop can expose police officers to a full blown multi-year series of overlapping investigations. Everything that goes wrong with little Johnny at school can expose public school teachers to the wrath of seemingly endless investigations. The work and lives of American public employees are under constant scrutiny by agency bureaucracies, chief executives, interest groups, prosecutors, the media, counsel for purported victims, licensing bureaus and others.

The most trivial innuendo or total hearsay may spark a process that leads to multiple and overlapping personnel, administrative, licensure, criminal, and civil investigation of public employees. The employee may be immediately blasted on the front page of the local newspaper and on the nightly television news, yet have no meaningful recourse to rebut the allegations. Consequently, investigations of public employees arising out of their official conduct raises all sorts of thorny implications for both the employee and employer.

Investigations of public employees often involve high stakes for the employee, the agency, and the public. These internal investigations can, and often do ruin jobs, careers, families, and lives. Public employee investigations invoke application of the Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution

and many similar provisions under state constitutions.⁷ Typical internal investigations of public employees often present due process, equal protection, privacy, search and seizure, self-incrimination, and other Fifth Amendment issues.⁸ This Article explores one aspect of these constitutional rights—the *Garrity* rights of public employees to preclude statements made by them to their employer from being used against them in a criminal proceeding. This critically important constitutional right appears to be eroding as some courts have heightened the requirements for the application of *Garrity* “use immunity” for public employees.⁹

Garrity rights are encompassed within the body of constitutional law governing public employment relations. These principles profoundly affect the efficiency and quality of government services and the daily lives of millions of public employees. The rights of public employees during investigations of their conduct is one of the few areas of public employment rights the Supreme Court has not visited in recent years.¹⁰ Courts have continuously struggled to de-

⁷ See 2 ISIDORE SILVER, PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE 981-1008 (Panel Publishers 3d ed. 2001). In light of the prevailing trends in federal constitutional law, many state constitutions provide more fertile sources of protection for public employees. See also J. Michael McGuinness, *The Rising Tide of North Carolina Constitutional Protection in The New Millennium*, 27 CAMPBELL L. REV. 223, 224 (2005).

⁸ The Supreme Court has addressed Fifth Amendment related issues in a number of employment cases. See, e.g., *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass’n, Inc. v. Comm’r of Sanitation*, 392 U.S. 80 (1968); *Garrity*, 385 U.S. at 493. Cf. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973). See also *O’Connor v. Ortega*, 480 U.S. 709, 714 (1987) (addressing search and seizure issues). Recent cases interpreting *Garrity* demonstrate that *Garrity* issues have become more common for public employees. See generally *State v. Aiken*, 646 S.E.2d 222 (Ga. 2007); *State v. Stanfield*, 658 S.E.2d 837 (Ga. Ct. App. Mar. 5, 2008).

⁹ At least one circuit has allowed *Garrity* protected statements to be used before a federal grand jury. See, e.g., *In re Grand Jury Subpoenas Dated Dec. 7 and 8, 40 F.3d 1096*, 1104 (10th Cir. 1994).

¹⁰ In *Dwan v. City of Boston*, 329 F.3d 275, 279 (1st Cir. 2003), the First Circuit observed

fine the extent of constitutional rights retained by public employees compared to the rights of the governmental entity.¹¹

In recent years, public employee rights under the Federal Constitution have been gradually eroding. The courts are not justifying this erosion with any needs based analysis. Historic constitutional protections are no longer valued and enforced by many federal courts. However, some hope lies in many state courts. The power of governmental employers has been increasing.¹² The overall disrespect of public employees in America has never been greater.¹³ Since the Supreme Court has recently substantially eroded First and Fourteenth Amendment rights of public employees,¹⁴ the remaining rights of public employees during investigations appears all the more important.

Scores of cases demonstrate how public employees and

that “the Supreme Court has not recently revisited the *Garrity* line of cases.”

¹¹ See *Waters v. Churchill*, 511 U.S. 661, 696-97 (1994) (Stevens, J., dissenting) (“The need for governmental efficiency that so concerns the plurality is amply protected by the substantive limits on public employees’ rights of expression.”).

¹² Millions of individuals are employed by more than eighty-two thousand governmental units at local, state, and federal levels. As of 1991, more than eighteen million persons were employed by local, state or the federal government. See *id.* at 696.

¹³ For example, in North Carolina, the governor publicly vowed to block the reinstatement of a state trooper in defiance of an order of an administrative law judge. See *Poarch v. N.C. Highway Patrol*, 03 OSP 2004 (Sept. 17, 2007). In another case, the Governor’s press staff orchestrated the termination of a state trooper through political means. A Patrol management official proclaimed that “they [the Governor’s staff] want him gone.” *Jones v. N.C. Highway Patrol*, 07 OSP 2222 (June 5, 2008). Police officers have been disciplined for providing truthful testimony. See, e.g., *Kirby v. Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2005) (rejecting First Amendment protection for truthful testimony).

¹⁴ See, e.g., *Engquist v. Oregon Dep’t of Agric.*, 128 S. Ct. 2146, 2156 (2008) (holding that class-of-one equal protection is inapplicable to public employment); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (limiting First Amendment whistleblower claims by public employees to expression, which is not a part of the official duties of the speaking employee). *Garcetti* appears devastating for whistleblowing public employees and *Engquist* eliminates another of the few remaining constitutional claims for public employees. Interpreting *Garrity*, the Supreme Court explained that it “has not been quite so hospitable recently to expanding rights.” *Dwan*, 329 F.3d at 279.

Americans from all walks of life need constitutional protection from increasingly arbitrary and oppressive government power.¹⁵ Contemporary public employer bureaucracies present vast opportunities for abusive bureaucrats to employ retaliation and other adverse actions against public employees.¹⁶ For example, in Alaska, compelling evidence including tape recorded evidence and admissions from Governor Sarah Palin reveal how the Governor's agents and husband sought the termination of employment of a state trooper who is Governor Palin's ex-brother-in-law.¹⁷ Evidence suggests that the Governor's agents and husband pressured the agency head to fire the trooper. When he declined, the agency head was fired.¹⁸ Public employees have to remain on guard from interference both internally and from external political sources.

II. THE BASIC PRINCIPLES OF *GARRITY*

One of the foremost constitutional principles arising from an employer's internal investigative process is the "*Garrity* rule." *Garrity* precludes an employer's use of coerced statements against employees in criminal proceedings. The *Garrity* rule has become a central principle of public administration in light of the criminalization

¹⁵ See SENATOR SAM J. ERVIN, JR., PRESERVING THE CONSTITUTION 165, 213-14 (1984); JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 1-6, 49-51 (1995).

¹⁶ See Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674-75 (1996) (cataloging cases of government retaliation in different contexts); Kirby, 388 F.3d at 448 (holding that a police officer did not enjoy First Amendment protection after truthful testimony about malfunctioning police equipment).

¹⁷ See Alan Suderman, *State Troopers File Ethics Complaints*, JUNEAU EMPIRE, Sept. 5, 2008, http://juneauempire.com/stories/090508/sta_328880478.shtml (last visited Oct. 12, 2008). This article attaches a tape-recorded transcript of evidence.

¹⁸ *Id.*

of American public sector workplaces.¹⁹ However, *Garrity* has been characterized as an abstract right and has limitations.²⁰ Thus, the rule is widely overlooked from law schools to contemporary public administration training. *Garrity*'s progeny includes confusion and circuit splits on important issues.

Garrity held that a public employee may not be forced to provide a statement to his or her employer and then have that statement used against the employee in a criminal proceeding.²¹ The *Garrity* doctrine is unquestionably among the most important principles in public personnel administration. The basic rules are as follows: one, a public employee can be ordered to cooperate in an internal administrative investigation to provide statements regarding matters that are specifically, directly, and narrowly related to the employee's official conduct or fitness to serve;²² two, statements made pursuant to an order to cooperate in an internal administrative investigation cannot be used against the employee in any criminal proceeding;²³ three, a pub-

¹⁹ As governmental employers have grown, their force as "internal police officers" has similarly grown. Trivial matters that historically were handled administratively now routinely turn into criminal investigations.

²⁰ *Dwan*, 329 F.3d at 280.

²¹ *Garrity*, 385 U.S. at 500 ("We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.").

²² Off-duty conduct can be reached under a *Garrity* order if there is a rational nexus between the off-duty conduct and the employer's legitimate interests. *Michigan State Police Troopers Ass'n, Inc. v. Hough*, No. 88-1663, 1989 WL 33906, at *3 (6th Cir. 1989). "We think the district court properly concluded that the questions about the troopers' off-duty conduct in this case were 'specifically, directly, and narrowly relat[ed] to the performance of the troopers' official duties.'" *Id.* (alteration in original).

²³ A recent case demonstrating the application of *Garrity* appears in *In re Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d 581, 584-85, 586 (4th Cir. 2007). The Fourth Circuit affirmed the district court's quashing of "a subpoena duces tecum" seeking production of an internal affairs investigation that contained *Garrity* protected statements. *Id.* at 586. A criminal proceeding is likely going to be held at trial, although some circuits allow grand

lic employee may not refuse to answer specific, direct, and narrow job-related questions so long as the agency does not seek to compel a waiver of constitutional rights;²⁴ four, a public employee can be substantially disciplined or terminated for refusing to cooperate and failing to provide statements in an internal non-criminal administrative investigation;²⁵ and, five, in order for the statement to be protected by *Garrity*, it must be ordered or coerced—the statement cannot be voluntary.²⁶

The immunity conferred by *Garrity* is known as “use immunity.”²⁷ The information obtained from the employee or obtained from leads furnished by the employee cannot be used against the employee in a criminal proceeding.²⁸ In *Kastigar v. United States*, the Supreme Court held the Fifth Amendment does not mandate transactional immunity.²⁹ Therefore, independently obtained evidence may be introduced if the government can establish the evidence was not

jury use of *Garrity* statements. See *In re Grand Jury Subpoenas* Dated Dec. 7 and 8, 40 F.3d at 1104 (“Accordingly, we hold that the mere disclosure to the grand jury of a police officer’s potentially incriminating compelled statement does not constitute a violation of the officer’s Fifth Amendment privilege against self-incrimination.”).

²⁴ *Sher*, 488 F.3d at 501 (citing *Gardner*, 392 U.S. at 278).

²⁵ *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). Some jurisdictions require specific *Garrity* warnings and notice of the consequences. Other jurisdictions do not require notice of *Garrity* rights or advice about *Garrity*. See *supra* text accompanying note 2.

²⁶ *Sher*, 488 F.3d at 502 (categorizing the employer’s threat of removal as “sufficient to constitute coercion under *Garrity*”).

²⁷ *Id.* at 501 n.10 (citing *Kastigar*, 406 U.S. at 453) (“[U]se immunity . . . protects the witness from ‘the use of compelled testimony, as well as evidence derived directly and indirectly there from [in a subsequent criminal proceeding].’ ”).

²⁸ *Id.*

²⁹ *Kastigar*, 406 U.S. at 462. The District of Columbia Circuit has required a higher showing by the government in a *Kastigar* hearing. See *id.* at 460-62; *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991). But cf. *Carney v. City of Springfield*, 532 N.E.2d 631, 635-36 (Mass. 1988) (noting that transactional immunity is required under the state’s constitution).

the product of the employee's coerced disclosures.³⁰ In *United States v. Koon*,³¹ the Ninth Circuit held the prosecution must prove that each matter admitted into evidence "is derived from a source independent of the immunized testimony."³² Additionally, these cases require the government to show the "witness exposed to [the] compelled statements has not shaped or altered her testimony . . . directly or indirectly, as a result of that exposure."³³

The practical implications of *Garrity* are limited and provide only a very narrow basis for civil claims for violation of *Garrity* rights.³⁴ *Garrity* protects very little. It precludes direct admission of coerced statements in a criminal proceeding.³⁵ A "criminal proceeding" as contemplated by *Garrity* appears to be shrinking as some courts have limited criminal proceedings to the criminal trial.³⁶ In some circuits, the only clear prohibition of using the coerced statement is at trial in the prosecution's case-in-chief.

In the forty years since *Garrity*, public sector workplaces have

³⁰ *In re Grand Jury Subpoenas* Dated Dec. 7 and 8, 40 F.3d at 1101 n.4 ("[G]overnment must carry this burden of proving that its evidence against the defendant derives entirely from sources other than the defendant's immunized statements, or that the use of any evidence tainted by the statements was harmless beyond a reasonable doubt.").

³¹ 34 F.3d 1416 (9th Cir. 1994) (Rodney King case).

³² *Id.* at 1431.

³³ *Id.* at 1432.

³⁴ Civil claims arising from violations of *Garrity* rights often do not state claims or survive qualified immunity. See, e.g., *Dwan*, 329 F.3d at 282; *Lingler v. Fechko*, 312 F.3d 237 (6th Cir. 2002); *Wiley v. Mayor & City Council of Balt.*, 48 F.3d 773 (4th Cir. 1995). Cf. *Benjamin v. City of Montgomery*, 785 F.2d 959, 963 (11th Cir. 1986) (regarding termination of employee for refusing to waive Fifth Amendment rights actionable); *Kalkines v. United States*, 473 F.2d 1391, 1398 (Ct. Cl. 1973) (termination predicated upon a *Garrity* violation held invalid and plaintiff recovered damages).

³⁵ *Garrity*, 385 U.S. at 500.

³⁶ See, e.g., *United States v. Vangates*, 287 F.3d 1315, 1318-19 (11th Cir. 2002) ("The magistrate judge found, however, that, unlike the statements contained in the Internal Affairs file, the testimony given by the officers during the course of the civil trial was not protected by *Garrity*.").

vastly changed. The scrutiny of public employees has greatly intensified. Legal risks to public employees are much more prevalent. *Garrity* is ripe for some clarification. For example, Ninth Circuit Chief Judge Alex Kozinski recently observed that despite being a public employee for several decades, he was not familiar with the *Garrity* principle.³⁷ If Chief Judge Kozinski was unaware of the meaning of *Garrity*, it is inconceivable to expect eighteen million public employees to be aware of and understand the rule.³⁸

III. BASIC PRINCIPLES IN PUBLIC EMPLOYMENT INVESTIGATIONS

When someone complains about the conduct of a public employee, some inquiry is almost always conducted. Public employee investigations can also be instigated internally without an external complainant—a simple routine negative performance evaluation can spark an investigation. This investigation is almost always conducted by the government agency itself. Large public employers typically have a special unit responsible to investigate public employees, and in some instances, recommend discipline and other actions.³⁹

The public interest is well served by a system allowing a proper and fair investigation into legitimate complaints against public

³⁷ *Aguilera*, 510 F.3d at 1179 (Kozinski, C.J., dissenting) (“We can’t expect public employees who are pressured to give a statement to know that they have immunity. I, for example, had no idea, even though I have been a government employee involved in law-related activities for almost three decades.”).

³⁸ In 2005, there were 18,644,112 public employees. See *Waters*, 511 U.S. at 696 n.3 (1994) (Stevens, J., dissenting) (citing the 1991 data of over eighteen million public employees in America).

³⁹ Law enforcement agencies often denominate their internal investigative units as “Internal Affairs” or “Professional Standards.” These units are the direct arm of management.

employees. However, in the complaint and investigative process, the employee often becomes an accused target.⁴⁰ Such internal investigations present dangerous opportunities for bureaucrats to retaliate against subordinates who are perceived as disloyal. The Troopergate scandal in Alaska demonstrates how public employees can be investigated and disciplined, and thereafter repeatedly targeted for additional reprisal with highly publicized smear campaigns.

The investigative authority afforded to public administrators is broad, but is not unlimited. Generally, a public employer is free to use reasonable means to examine the job-related conduct of its employees. As public employers, they should have constitutionally reasonable ability to ensure the fitness for duty of its employees. However, public employers are not free to investigate with unlimited or absolute power because of an employee's protected conduct.⁴¹

Public employees and their advocates must instantaneously be prepared to respond to the investigation and defend the employee being subjected to an internal investigation. The defense efforts may require actions in multiple forums and in the media, where the stakes are high and no rules of fairness apply. Basic constitutional principles protect the employee from self-incrimination and from retaliation from invoking that constitutional protection.

Public employees are often confronted with investigative

⁴⁰ In many areas of the country, especially the South, public employees have no right to legal counsel to assist them in direct dealings with public employers. For example, a public employee has no right to bring counsel to an interrogation by a public employer. Public employees can be ordered into sensitive interrogations without the presence of counsel.

⁴¹ *Michigan State Police*, 1989 WL 33906, at *3 (“[C]ourts have sometimes held that police officers may not be fired for refusing to answer questions about off-duty personal conduct less closely related to job performance, such as sexual indiscretions.”).

processes that are multiple, camouflaged, overlapping, and anything but fair. These multiple investigations often have different purposes. Each investigation must be addressed separately. Different legal standards apply to each investigation. *Garrity* limits the use of employer-coerced statements.⁴²

Public employees are confronted with a vast array of potential legal adversaries: their supervisors, the agency head, the governing board of the employing entity, the local police and sheriffs' departments, the local prosecutor, the state attorney general, the state bureau of investigation, the Federal Bureau of Investigation, the United States Department of Justice, the employee's licensing agency, the media, interest groups, counsel for the complainant, citizens' groups, and more. Public employees have to defend the efforts from all of these entities at once. After a complaint, the never ending scrutiny by this "system" commences, a process of "Monday morning quarterbacking" that often continues for many years with complaints, investigations, interviews, interrogations, testing, polygraphs, drug tests, administrative charges, media scrutiny, grand jury probes, state criminal charges, and federal criminal charges. This process and the multiple adversaries is often very overwhelming to public employees.

In incidents involving allegations of assault, sexual malfeasance, and other types of alleged misconduct, a criminal investigative agency will likely conduct a full criminal investigation into the employee's conduct. In most states, there are numerous criminal laws

⁴² *Garrity*, 385 U.S. at 500.

that can be applied to public employees in many contexts.⁴³ Alleged sexual relationships with students or minors, other unlawful relationships, and alleged assaults capture most of the headlines. However, most jurisdictions have a number of other criminal charges that can hook a public employee with criminal liability: malfeasance in office offenses, obstruction of justice, failing to report, witness intimidation, embezzlement, obtaining property by false pretenses, assault and battery, misappropriation, bribery, and many other offenses. The tiniest of innuendo can set off a criminal investigation into these and other possible offenses.

Public employee advocates must instantaneously spot disputes with criminal implications. Adverse employment action is one thing; however, a criminal charge represents a far greater lifelong risk to the employee. After an initial complaint, the investigative processes usually begin quickly. However, the investigation of a public employee may last for years.

Despite personnel privacy laws in many jurisdictions, when a public employee becomes the subject of a criminal investigation the whole community will often know of the allegations quickly, courtesy of the media.⁴⁴ Leaks from within public agencies often smear

⁴³ For example, North Carolina has a broad “catch all” statute that criminalizes conduct for willfully failing to discharge duties of office. See N.C. GEN. STAT. ANN. § 14-230 (2007). These types of “malfeasance in office” statutes can hook an employee for the most minor transgression. Taking home a paper clip from the office may be a chargeable offense. Other examples of crimes that public employees are accused of include manslaughter, aiding and abetting other offenders, conspiracy, ethnic intimidation, communicating threats, harassing phone calls, stalking, various computer-related crimes, larceny, false imprisonment, extortion, blackmail, forgery, injury to personal property, disorderly conduct, possession of illegal weapons, obscenity, fraud offenses, making false statements, and perjury, among others.

⁴⁴ See, e.g., David Johnston & Philip Shenon, *U.S. Defends Tough Tactics With Spitzer*,

and ruin honorable public employees. Once publicly sensationalized in the media with a stigmatizing criminal allegation, public employees usually suffer permanent employment-related harm.

IV. **GARRITY AND THE HISTORIC RIGHT AGAINST SELF-INCRIMINATION BY PUBLIC EMPLOYEES AS A RESULT OF INTERNAL JOB-RELATED INVESTIGATIONS**

The seminal case addressing the use of statements from an administrative or internal non-criminal investigation is *Garrity v. New Jersey*.⁴⁵ In *Garrity*, police officers were questioned during the course of a state investigation concerning alleged ticket fixing.⁴⁶ The officers were ordered to respond to the internal investigation's questions, and were also advised that the refusal to respond to the questions would result in their discharge from employment.⁴⁷ The officers answered the questions and their answers were subsequently used to convict them in criminal prosecutions.⁴⁸ The Supreme Court reversed and held that the use of the employees' statements violated

N.Y. TIMES, March 21, 2008, at A1. ("Eliot Spitzer announced his decision to resign after U.S. agents eavesdropped on his calls, tailed him and checked his banking."); Carl Hulse & William Yardley, *Craig Said to Reconsider Resigning From Senate*, N.Y. TIMES, Sept. 5, 2007, at A24.

After intense pressure from Republican colleagues in the Senate, Mr. Craig announced Saturday that it would be best for 'the people of Idaho' if he resigned after the disclosure of his guilty plea last month to disorderly conduct charges stemming from his arrest in June in a Minneapolis-St. Paul International Airport bathroom.

Id.

⁴⁵ *Garrity*, 385 U.S. at 493. For contemporary applications of *Garrity*, see *Sher*, 488 F.3d at 489; *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005); *Singer v. Maine*, 49 F.3d 837 (1st Cir. 1995); *Wiley*, 48 F.3d at 773; *Koon*, 34 F.3d at 1416; *North*, 910 F.2d at 843; *State v. Aiken*, 646 S.E.2d 222 (Ga. 2007); *State v. Stanfield*, 658 S.E.2d 837 (Ga. Ct. App. 2008).

⁴⁶ *Garrity*, 385 U.S. at 494.

⁴⁷ *Id.* at 494-95.

⁴⁸ *Id.* at 495.

the Fifth Amendment privilege against self-incrimination.⁴⁹ The *Garrity* procedure has been historically followed and has served public employers and employees well in delineating the scope of duties and responsibilities during internal investigations.⁵⁰

In *Garrity*, the Court reasoned that “[t]he choice imposed on [the employees] was one between self-incrimination or job forfeiture.”⁵¹ The Court deemed this so-called choice to constitute “coercion.”⁵² *Garrity* concluded that “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.”⁵³

In *In re Grand Jury Subpoenas Dated December 7 and 8*, the Tenth Circuit held that disclosure of *Garrity* statements to a grand jury did not violate the employee’s privilege against self-incrimination.⁵⁴ The Tenth Circuit held that *Garrity* protection is appropriate when “the government attempts to use the information against the defendant at trial.”⁵⁵ This case appears to have substantially reduced *Garrity* protection within the Tenth Circuit. Allowing a grand jury to use *Garrity*-protected statements appears inconsistent with the spirit of *Garrity*.

Garrity protections apply whenever an employing agency co-

⁴⁹ *Id.* at 500.

⁵⁰ *See Sher*, 488 F.3d at 501-02 (applying the *Garrity* procedure and its progeny).

⁵¹ *Garrity*, 385 U.S. at 496.

⁵² *Id.* at 496-98.

⁵³ *Id.* at 500 (“We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”).

⁵⁴ *In re Grand Jury Subpoenas Dated Dec. 7 and 8*, 40 F.3d at 1097.

⁵⁵ *Id.* at 1103.

erces an employee to answer questions in an investigation by threat of removal from office and attempts to use the statements obtained in a subsequent criminal proceeding.⁵⁶ In other words, the testimony of an employee may be compelled when the employee receives immunity from criminal prosecution thereby subjecting the employee to discipline if he or she refuses to cooperate with the employer. Under *Garrity*, some courts have held that the employer should provide an affirmative guarantee that the information sought will not be used against the employee in a criminal proceeding and warn the employee that the failure to respond to questioning could lead to disciplinary action.⁵⁷ In order for *Garrity* to apply, the statement must be compelled and involuntary.⁵⁸

There is a split among the circuits regarding whether *Garrity* is automatic or self-executing, and whether the employee must objectively believe he or she will be disciplined if they decline a request for a statement.⁵⁹ Under one school of thought, the employee must believe his statements are being compelled under threat of substantial discipline for *Garrity* to apply.⁶⁰ The employee's belief must also be objectively reasonable.⁶¹

Another line of *Garrity* cases requires the employer to: one,

⁵⁶ See *Garrity*, 385 U.S. at 500.

⁵⁷ See *Weston v. U.S. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Confederation of Police v. Conlisk*, 489 F.2d 891, 895 n.4 (7th Cir. 1973); *Uniformed Sanitation Men*, 426 F.2d at 621, 627.

⁵⁸ See *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); *Cunningham*, 431 U.S. at 801, 805; see also *United States v. Najarian*, 915 F. Supp. 1460, 1478 (D. Minn. 1996).

⁵⁹ Compare *United States v. Friedrich*, 842 F.2d 382 (D.C. Cir. 1988), and *United States v. Camacho*, 739 F. Supp. 1504 (S.D. Fla. 1990), with *Singer*, 49 F.3d at 837, and *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980).

⁶⁰ *Friedrich*, 842 F.2d at 395.

⁶¹ *Id.*

order the employee to answer questions and advise that the penalty for refusal is dismissal or punishment; two, ask questions that are specifically, directly, and narrowly related to the employee's fitness for duty; and three, advise the employee that the answers to the questions will not be used against the employee in criminal proceedings before disciplining a public employee for refusing to answer questions.⁶² However, other courts hold that *Garrity* is self-executing or automatic. Therefore, the employer is not required to provide specific notice of the employee's *Garrity* rights before requesting a statement.⁶³ The practical problem is that public employees are not constitutional lawyers and often do not fully understand their rights or investigative processes.

V. EXAMPLES FROM *GARRITY*'S PROGENY

A. *Gardner v. Broderick*

In *Gardner v. Broderick*, a police officer questioned about alleged bribery and corruption was discharged after he refused to sign a waiver of immunity, which would have allowed the use of his state-

⁶² See *Turley*, 414 U.S. at 76 (holding that New York statutes preventing architects from obtaining government contracts unless they cooperate with questioning, testifying and waiving their privilege against self-incrimination are unconstitutional); *Conlisk*, 489 F.2d at 895 (holding the discharge of an employee predicated solely upon the invocation of his Fifth Amendment right when called upon to testify before a grand jury is unconstitutional when the employee previously answered questions which were "specifically, directly and narrowly" related to his employment but was not informed about his *Garrity* rights).

⁶³ See *Wiley*, 48 F.3d at 777 n.7 (holding that requiring police officers to submit to polygraph examinations in order to retain employment was not a violation of their Fifth Amendment privilege against self-incrimination because no officer attempted to invoke his right during the polygraph test).

ments in a subsequent criminal prosecution.⁶⁴ The Supreme Court found the officer was discharged solely for his refusal to waive a constitutional right and overturned the discharge.⁶⁵ The Court held that while a public agency can conduct an administrative investigation of an employee, it cannot in the course of that investigation compel the employee to waive the immunity *Garrity* requires.⁶⁶

Gardner reasoned that “the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.”⁶⁷ *Gardner* also made clear that there are limits to the scope of questioning under *Garrity*. The questioning must be “specifically, directly, and narrowly” related to the employee’s job.⁶⁸ However, even off-duty conduct can be job-related if the off-duty conduct could reasonably adversely affect the agency or the employee.

In *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation*, a companion case to *Gardner*, the Court held that the government could require public employees to answer questions concerning the performance of their public duties, but not at the penalty of forfeiting their right against self-incrimination.⁶⁹ “[P]ublic employees are entitled, like all other persons, to the benefit of the

⁶⁴ *Gardner*, 392 U.S. at 274-75.

⁶⁵ *Id.* at 278-79.

⁶⁶ *Id.*

⁶⁷ *Id.* at 279.

⁶⁸ *Id.* at 278.

⁶⁹ *Uniformed Sanitation Men*, 392 U.S. at 284-85.

Constitution, including the privilege against self-incrimination.”⁷⁰

B. *Aguilera v. Baca*

In *Aguilera v. Baca*, the Ninth Circuit addressed a law enforcement personnel dispute involving *Garrity* related issues.⁷¹ There, the plaintiffs alleged they were wrongfully detained at the sheriff’s office and subsequently “punished through involuntary shift transfers for failing to give non-privileged statements in connection with an internal criminal civil rights investigation of their possible misconduct while on uniformed patrol duty.”⁷²

Upon an internal criminal investigation bureau agent’s questioning, each plaintiff refused to give a statement.⁷³ None of the plaintiffs were asked to waive their Fifth Amendment privilege, nor were they required to provide a compelled or involuntary statement.⁷⁴ Approximately one year after the alleged misconduct occurred, the district attorney’s office requested the plaintiffs provide compelled statements.⁷⁵ “During the process of extracting these compelled

⁷⁰ *Id.* See also *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551, 561 (1956) (explaining that the punishment of an employee for exercising his Fifth Amendment privilege in an employment context is a substantive due process violation).

⁷¹ *Aguilera*, 510 F.3d at 1164-67.

⁷² *Id.* at 1164.

⁷³ *Id.* at 1166.

The Los Angeles County Sheriff’s Department has two separate internal investigation units; the Internal Affairs Bureau (“IAB”), which investigates allegations of an administrative nature and can recommend employee discipline up to and including termination; and the Internal Criminal Investigation Bureau (“ICIB”), which only investigates allegations of a criminal nature for presentation to prosecuting attorneys who can pursue criminal charges against employees.

⁷⁴ *Id.*

⁷⁵ *Id.*

statements, none of the deputies were asked to waive [their] constitutional right against having the statement used against [them] in a criminal proceeding.”⁷⁶ After providing these statements, the supervisors cleared the deputies and resumed their pre-investigation duties.⁷⁷

The plaintiffs in *Aguilera* alleged they were “deprived of their Fifth Amendment right . . . against self-incrimination.”⁷⁸ They argued their Fifth Amendment rights were violated by “forcing them to choose between giving a voluntary, non-immunized statement that could be used against them in subsequent criminal or administrative proceedings and retaining their current job assignments and work shifts.”⁷⁹ The Ninth Circuit concluded that “the supervisors did not violate the deputies’ Fifth Amendment rights when they were questioned about possible misconduct, given that the deputies were not compelled to answer the investigator’s questions or to waive their immunity from self-incrimination.”⁸⁰ The Ninth Circuit explained that the plaintiffs’ Fifth Amendment claim was unsuccessful because “the deputies were never charged with a crime, and no incriminating use of their statements ha[d] ever been made.”⁸¹

Chief Judge Kozinski issued a compelling dissent.⁸² Judge Kozinski’s dissent highlights an issue involving divergent opinions among other circuits. The issue is whether or not the governmental

⁷⁶ *Aguilera*, 510 F.3d at 1166.

⁷⁷ *Id.* at 1166-67.

⁷⁸ *Id.* at 1171.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1172.

⁸¹ *Aguilera*, 510 F.3d at 1173.

⁸² See *id.* at 1174-1180 (Kozinski, C.J., dissenting).

employer must expressly inform public employers of their *Garrity* rights, including advice that any statements given cannot be used against them in criminal proceedings.⁸³ As Judge Kozinski explained, the Second, Seventh, and Federal Circuits hold that “[t]he government must tell public employees that they have immunity before it can constitutionally punish them for refusing to make self-incriminating statements.”⁸⁴ On the contrary, the Fifth and Eighth Circuits do not require that public employees be informed of their *Garrity* rights and whether they have immunity.⁸⁵

C. *Sher v. United States Department of Veterans Affairs*

In *Sher v. United States Department of Veterans Affairs*, the First Circuit issued a comprehensive split decision providing an excellent overview of the *Garrity* doctrine.⁸⁶ The majority opinion held that *Garrity* protection is automatic and self-executing, thus no notice or specific advice of *Garrity* rights is required.⁸⁷ Judge Stahl issued a dissenting opinion and concluded that notice and specific advice of *Garrity* rights should be required.⁸⁸

Sher, the appellant, was suspended and subsequently demoted from his position as Chief Pharmacist of a hospital controlled by the Veterans Administration in Maine.⁸⁹ The Veterans Administration

⁸³ *Id.* at 1177-79.

⁸⁴ *Id.* at 1178.

⁸⁵ *Id.* at 1178. See also *supra* text accompanying note 37 (discussing how Chief Judge Kozinski was unaware that public employees, such as himself, have immunity relating to such statements).

⁸⁶ See *Sher*, 488 F.2d at 493.

⁸⁷ *Id.* at 501-02, 505-06.

⁸⁸ *Id.* at 511 (Stahl, J., dissenting).

⁸⁹ *Sher*, 488 F.3d at 493.

alleged that he procured free pharmaceutical samples for his own personal use and refused to comply with an administrative investigation.⁹⁰ Initially, an administrative law judge reversed the failure to cooperate charge.⁹¹ However, despite this initial reversal, the Merit Systems Protection Board upheld the Veterans Administration disciplinary ruling and issued a final order.⁹² Consequently, Sher filed suit in federal district court challenging the board's determination.⁹³ Sher also brought additional claims of employment discrimination.⁹⁴

The First Circuit addressed the *Garrity* issues in detail.⁹⁵ The court observed that *Garrity* and *Gardner*

stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent.⁹⁶

The First Circuit stated that “the employee is not guaranteed transactional immunity. Rather, ‘the United States is prohibited from using the testimony or its fruits, and . . . this degree of prohibition is enough.’ ”⁹⁷ The First Circuit noted that the “ ‘very act of . . . telling

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Sher*, 488 F.3d at 493. Sher filed employment discrimination charges based on religion and national origin under Title VII, 42 U.S.C. § 2000e-2 (2000). *Id.*

⁹⁵ *See id.* at 500-06.

⁹⁶ *Id.* at 501.

⁹⁷ *Id.* (quoting *Uniformed Sanitation Men*, 426 F.2d at 624 n.2).

the witness that he would be subject to removal if he refused to answer was held to have conferred such immunity.’ ”⁹⁸ The court explained that “[u]nder these circumstances, no specific grant of immunity is necessary.”⁹⁹ Therefore, “no authority or statute needs to grant” *Garrity* immunity.¹⁰⁰

The First Circuit observed how the circuits have taken different approaches on whether a public employer is required to provide notice of *Garrity* rights to employees. The First Circuit explained how the Seventh and Federal Circuits have held that a government employer has an affirmative duty to inform an employee of both the application and consequences of *Garrity* immunity.¹⁰¹ The First Circuit observed that no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity.¹⁰² Because Sher had counsel, the court concluded that there was no independent violation of *Garrity* rights as a result of failure to provide notice to the employee.¹⁰³

D. *United States v. Vangates*

In *United States v. Vangates*, the Eleventh Circuit addressed issues regarding “whether certain statements made by a correctional officer [were] protected under the Fifth Amendment” and the *Garrity*

⁹⁸ *Id.* at 501-02 (quoting *Uniformed Sanitation Men*, 426 F.2d at 626).

⁹⁹ *Sher*, 488 F.3d at 502.

¹⁰⁰ *Id.* (quoting *United States v. Veal*, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998)).

¹⁰¹ *See id.* at 502-05; *see also* *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002); *Weston*, 724 F.2d at 948.

¹⁰² *Sher*, 488 F.3d at 505.

¹⁰³ *Id.*

doctrine.¹⁰⁴ Vangates, a correctional officer, was convicted of a federal criminal civil rights violation and obstruction of justice.¹⁰⁵ Vangates argued her convictions should be reversed because the trial court erroneously concluded her testimony from a previous civil trial was admissible in the criminal case.¹⁰⁶

The alleged victim in the underlying dispute had filed a Section 1983 action stemming from the underlying assault that became the subject of the federal criminal prosecution.¹⁰⁷ In the civil trial, the plaintiff introduced evidence from the internal affairs investigative file, which included transcripts and tape recordings of interviews with the officers that were protected by *Garrity*.¹⁰⁸ When the *Garrity*-protected evidence surfaced in the civil trial, there was no objection to its admission.¹⁰⁹ Subsequently, three of the officers were indicted for allegedly for violating 18 U.S.C. § 242 and 18 U.S.C. § 1512(b)(3).¹¹⁰

The Eleventh Circuit observed that Fifth Amendment protection extends to any “ ‘proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.’ ”¹¹¹ The Eleventh Circuit explained that public employees often need this protection; the “Fifth Amendment . . . attempts to strike a balance between the privilege against self-incrimination and

¹⁰⁴ *Vangates*, 287 F.3d at 1316.

¹⁰⁵ *Id.* at 1316-17.

¹⁰⁶ *Id.* at 1319.

¹⁰⁷ *Id.* at 1318.

¹⁰⁸ *See id.*

¹⁰⁹ *Vangates*, 287 F.3d at 1318.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1320 (quoting *Murphy*, 465 U.S. at 426).

the state's interest in obtaining information necessary for the advancement of governmental functions.”¹¹² In *Vangates*, the defendant was granted immunity pursuant to the order for the “statements she made during the Internal Affairs investigation.”¹¹³ However, the trial court determined that such immunity did not apply to statements she made during the civil trial.¹¹⁴ The Eleventh Circuit reasoned that the *Garrity* immunity pursuant to the internal affairs investigation did not apply to the statements she made at the civil trial because she was not given a “‘duly authorized assurance of immunity at the time’ she testified at the civil trial.”¹¹⁵ The Eleventh Circuit observed that “[e]ven absent an explicit grant of immunity, however, Vangates’s civil trial testimony still would be protected if she had been compelled to give it.”¹¹⁶

The Eleventh Circuit also concluded that Officer Vangates’ appearance for testimony did not convert her testimony into compelled statements. The court found that Vangates’ testimony at the civil trial did “not constitute coercive state action.”¹¹⁷ Vangates’ subjective belief that she faced employment sanctions if she invoked the Fifth Amendment was not found objectively reasonable. Therefore, the court concluded that her testimony was “not protected by *Garrity*, and the district court did not err in determining that it was admissi-

¹¹² *Id.*

¹¹³ *Id.* at 1321.

¹¹⁴ *Vangates*, 287 F.3d at 1321.

¹¹⁵ *Id.* (quoting *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263 (1983)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1324.

ble” against her in the criminal case.¹¹⁸

E. *In re Grand Jury, John Doe No. G.J. 2005-2*

In *In re Grand Jury, John Doe No. G.J. 2005-2*, an appeal arose from an order by a district court quashing a subpoena duces tecum.¹¹⁹ A subpoena was granted by a federal grand jury allowing a police department to obtain documents relating to an investigation of one of the department’s officers.¹²⁰ As a result of an alleged excessive force complaint, federal prosecutors “undertook an investigation of the same incident to determine whether it constituted a civil rights violation under 18 U.S.C. § 242.”¹²¹ Pursuant to the subsequent investigation, a subpoena duces tecum was granting and allowing the department to receive the results of the original investigation.¹²²

The City moved to overturn the subpoena on grounds “that compliance would destroy the confidentiality of the internal affairs investigation,” and further, that compliance would be inconsistent with the police officers’ Fifth Amendment rights.¹²³ The Fourth Circuit reviewed the *Garrity* doctrine and observed that “*Garrity* provides that if a governmental employee is compelled to incriminate himself on pain of dismissal or other penalty, the state cannot use [those] statements against him in a subsequent criminal prosecution.”¹²⁴

¹¹⁸ *Id.* at 1325.

¹¹⁹ *In re Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d at 582-83.

¹²⁰ *Id.* at 582.

¹²¹ *Id.* at 583.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *In re Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d at 587 (citing *Garrity*, 385 U.S.

The Fourth Circuit observed that it had “no reason to disapprove of the *Garrity* review process” and no basis “to express an opinion on its suitability in all instances.”¹²⁵ The Fourth Circuit reasoned that the district court considered the City’s two primary interests, “preserving confidentiality and forestalling possible self-incrimination problems—together, and weighed those interests as a whole against those of the United States.”¹²⁶ The court concluded the district court did not abuse its discretion in quashing the subpoena duces tecum.¹²⁷

VI. SOME JURISDICTIONS REQUIRE THAT PUBLIC EMPLOYEES BE SPECIFICALLY ADVISED OF THEIR CONSTITUTIONAL RIGHTS AND THE CONSEQUENCES OF *GARRITY*

Many courts have held that public employees cannot be required to guess whether they have criminal immunity for their statements.¹²⁸ The right to be “duly advised” of these constitutional rights has been held to be a prerequisite to the imposition of discipline. “[T]he coercive power of job forfeiture should not be employed unless it is made clear that to speak will not result in criminal prosecution.”¹²⁹

In *United States v. Devitt*, the court held that the employer

at 500).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 588.

¹²⁸ See, e.g., *Benjamin*, 785 F.2d at 959; *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974); *Conlisk*, 489 F.2d at 891; *Kalkines*, 473 F.2d at 1391; *Uniformed Sanitation Men*, 426 F.2d at 619; *D’Acquisto v. Washington*, 640 F. Supp. 594 (N.D. Ill. 1986); *McLean v. Rochford*, 404 F. Supp. 191, (N.D. Ill. 1975); *Oddsden v. Bd. of Fire and Police Comm’rs*, 321 N.W. 2d 161 (Wis. 1982).

¹²⁹ *Oddsden*, 321 N.W.2d at 172.

must advise the employee that compelled information may not be used against the employee in subsequent proceedings.¹³⁰ In *Uniformed Sanitation Men*, the court explained that “the employee is . . . [to be] duly advised of his options and the consequences of his choice.”¹³¹ Similarly, in *Confederation of Police v. Conlisk*, the Seventh Circuit held that “a public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee’s official duties and advises the employee of the consequences of his choice. . . .”¹³²

In *Wiley v. Mayor and City Counsel of Baltimore*, the Fourth Circuit noted that it may be “necessary to inform an employee about [the] nature and scope” of *Garrity*.¹³³ Other state supreme courts have underscored this traditionally protected right to be advised of one’s *Garrity* rights and the consequences thereof. In *Carney v. City of Springfield*, the Massachusetts Supreme Judicial Court reversed a lower court decision upholding the discharge of a public employee, and announced the following:

Where public employers compel answers in an investigation, however, the employer, at the time of the interrogation, must specify to the employee the precise repercussions (i.e., suspension, discharge, or the exact form of discipline) that will result if the employee fails to respond. . . . Where . . . economic sanctions threaten an individual’s livelihood, a general warning that the employee may be subject to “departmental discipli-

¹³⁰ *Devitt*, 499 F.2d at 141.

¹³¹ *Uniformed Sanitation*, 426 F.2d at 627.

¹³² *Conlisk*, 489 F.2d at 894.

¹³³ *Wiley*, 48 F.3d at 777 n.7.

nary proceedings” is insufficient.¹³⁴

Kalkines v. United States, is particularly instructive on the question of notice to the employee. The employee in *Kalkines* was accused of receiving a bribe and became the subject of an administrative and criminal investigation.¹³⁵ Since the employee was not “advised of his options and the consequences of his choice,” the court held that the procedure was constitutionally defective.¹³⁶ The “*Kalkines* right” of advice has become a term of art in public employee investigative procedures.¹³⁷ Many courts have required strict compliance with the *Kalkines* procedure to the extent that the employee be advised of his rights prior to the interview.¹³⁸

In *D’Acquisto v. Washington*, the court considered a class action suit challenging the constitutionality of suspension procedures used where employees are accused of offenses subjecting them to both criminal charges and internal departmental charges, potentially leading to their termination.¹³⁹ There, the court observed that disciplinary action cannot be taken against an employee for his refusal to discuss a matter under internal departmental charges that could lead to their termination. There, the court observed that disciplinary action cannot be taken against an employee for his refusal to discuss a

¹³⁴ *Carney*, 532 N.E.2d at 635 (internal citations omitted).

¹³⁵ *Kalkines*, 473 F.2d at 1391-92.

¹³⁶ *Id.* at 1393 (quoting *Uniformed Sanitation Men*, 426 F.2d at 627) (emphasis in original).

¹³⁷ See, e.g., *Pension Benefit Guar. Corp. v. F.L.R.A.*, 967 F.2d 658, 661 (D.C. Cir. 1992).

¹³⁸ See *Masino v. United States*, 589 F.2d 1048, 1053 (Ct. Cl. 1978); *Peden v. United States*, 512 F.2d 1099, 1101 (Ct. Cl. 1975).

¹³⁹ *D’Acquisto*, 640 F. Supp. at 602.

matter under internal investigation without being advised by the interrogator. The court reasoned that since “officers under interrogation are not expected to know the ‘ins’ and ‘outs’ of Fifth Amendment law, and they should not have to guess whether or not they have criminal immunity for their statements.”¹⁴⁰

The developing circuit court splits on this question of notice presents an opportunity and need for clarification by the Supreme Court. The dissents of Chief Judge Kozinski in *Aguilera* and Judge Stahl in *Sher* have highlighted these longstanding conflicts of law. With these recent dissents by Judge Kozinski in *Aguilera* and Judge Stahl in *Sher*, this issue of notice of *Garrity* rights is ripe for Supreme Court review.¹⁴¹ However, some public employee advocates are concerned that the trends from the Roberts Court suggest that *Garrity* may not survive Supreme Court reconsideration.

VII. PRACTICAL CONSIDERATIONS IN RESPONDING TO INTERNAL OR EXTERNAL PUBLIC EMPLOYEE INVESTIGATIONS

While a public employee is given no real choice when instructed to provide a statement for their employer, the employee is confronted with a number of other issues to be addressed generally. The employee will often have to quickly decide whether to provide a statement to a criminal investigator. There is room in this investigative process for advocacy to protect the employee’s interest.

¹⁴⁰ *Id.* at 624.

¹⁴¹ Scholarly commentators have addressed the issue of whether a public employer is required to advise or inform an employee of *Garrity*’s application and consequences. *See generally* Matthew Bernt, Comment, *Should Public Employers Be Forced to Warn Their Employees of Their Immunity and Duty to Answer Questions Before Demanding Answers and Taking Adverse Action?*, 56 CATH. U. L. REV. 1037 (2007).

A public employee is under no duty to submit to an interview or otherwise cooperate with an agency investigating the employee for possible criminal misconduct. Furthermore, a public employee cannot be punished for declining to waive his or her constitutional rights, or for refusing to provide a statement in a criminal investigation. Moreover, the employee is entitled to preserve his or her Fifth Amendment rights to avoid self-incrimination by giving a statement that might be used against the public employee in a criminal proceeding.

Providing a written or verbal statement to a criminal investigator is perhaps the most important decision made when there are implications of possible criminal charges against a public employee. Generally, an employee should not waive any constitutional rights until counsel can complete an investigation on behalf of the employee. Any waiver of rights should occur only after careful consideration of all of the facts and circumstances, after appropriate investigation is completed, and after advice of counsel. In the current climate of prosecutions of public employees, an employee should be extremely careful about waiving constitutional rights. Virtually every incident where a public employee uses any force or has physical contact with anyone gives rise to a prospective criminal charge of assault and battery, a civil rights charge of excessive force, and an internal or administrative charge of misconduct under the agency's internal rules. The Fifth and Fourteenth Amendments to the United States Constitution are invoked when employees are directed to make

statements regarding the official performance of their duties.¹⁴²

When confronted with a request to provide a statement, the employee must determine the nature and purpose of the request for the statement. The employee must initially determine the specific nature of the inquiry. Is the inquiry administrative by the employee's employer, or is it a criminal inquiry? The employee must determine the accurate answer to this question before proceeding. The answer to this crucial question is often determined by who is asking the question. Police officers have no jurisdiction or authority to investigate internal personnel disputes unless the officers are clearly serving in an internal affairs non-criminal context. Human resource personnel have no jurisdiction or authority to investigate alleged crimes—personnel investigations involve fundamentally different interests. Therefore, investigations should be kept separate.¹⁴³

The employee should seek a written statement from the interrogating official identifying the nature and purpose of the inquiry. If the employee's own agency is seeking information through an administrative, personnel, or related internal inquiry, the *Garrity* doctrine will apply. If the employer's inquiry is within the parameters of *Garrity*, the employee must ordinarily cooperate in the inquiry and make a statement in order to avoid being disciplined for insubordination. The employee must be truthful in providing information to the employer or be subject to discipline for untruthfulness.

¹⁴² See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

¹⁴³ Lieutenant Commander Richard F. Walsh, *Concurrent Administrative and Criminal Proceedings*, 36 NAVAL L. REV. 133, 157 (1986) ("The nation's interest in maintaining capable and effective military units will, in most cases, outweigh the interests of disruptive servicemembers who cannot explain their criminal acts. In such cases, administrative separation processing in advance of trial should be allowed.").

A statement that the employee is complying with an order by his or her employer to provide the statement is not voluntary, and the employee understands that the statement cannot be used against the employee in any criminal proceeding, should precede any statement provided by the employee. This clarifies the application of *Garrity* protection.

When a criminal agency investigates, the rules and the stakes are completely different. When an employee becomes the subject of a criminal inquiry, he or she may assert his or her constitutional right to remain silent whenever the interrogating official is investigating possible crimes.

After consultation with counsel, an employee may want to consider providing a statement to a criminal investigator when it is strategically beneficial to the employee. Furthermore, any such statements to criminal investigators should only be done in a strictly controlled environment with the employee's counsel present. Additionally, a proffer from the employee's counsel may be the best alternative for getting the employee's account to the criminal agency. If a proffer is not acceptable, a written statement is likely the best alternative. Finally, if a verbal interview is to be given, the employee must be fully protected by recording the statement.

A statement to a criminal investigator should only be provided after careful preparation and complete analysis of the risks and benefits to the employee. In addition, statements made to a criminal investigator may help to resolve the investigation without prosecution, thus there are many cases where such statements may be a part

of wise advocacy. The employee must always be truthful in any kind of interview. In order to avoid risks associated with “rough note” and other unrecorded interviews, the employee’s counsel should independently record the interview.

An employee is generally required to cooperate with a proper internal employment-related investigation pursuant to *Garrity*. If given a proper order to provide a statement in connection with an internal investigation, provided the information being requested is appropriate, an employee is required to cooperate and provide a statement or else the employee is subject to being charged with insubordination.

VIII. THE INVESTIGATION OF A PUBLIC EMPLOYEE DISPUTE

Public employees are frequently confronted with a variety of issues that may jeopardize their employment, their careers, their families, and their lives. When an employee becomes an accused, many strategic considerations have to be addressed. To what extent does the employee remain passive? Does the employee await the outcome of the internal investigation? Discipline may be looming. How soon does the employee get ready to defend? Should a grievance be filed? Should the employee take the offensive?

The investigation of a public employment dispute is a challenging and often difficult task. The employment investigation often arises out of an underlying alleged incident or accusation. This Part outlines some of the steps often taken when investigations are made. Obviously, some of the concepts outlined herein might not be necessary or appropriate in particular cases.

A public employment investigation will substantially vary depending on a number of threshold facts and circumstances, including whether there is a collective bargaining agreement or other employment agreement. Obviously, the applicable laws and other governing provisions of the employment relationship must be identified and analyzed. These legal provisions may substantially determine the best course of action to employ in investigating the particular dispute.

A. The Forty-Eight Hour Aftermath

Experience has demonstrated that the forty-eight hour period immediately following the alleged incident or accusation is the most critical time, where strategic decisions may predetermine the ultimate outcome of the dispute. In this initial period, the employee's advocacy network must function properly in order to adequately protect the employee from multiple potential threats.

The employee's advocates should develop a strategic plan upon receipt of the basic information following a critical incident—counsel must conduct an immediate legal evaluation to assess the risks. An investigative plan must be developed. Who needs to be interviewed? Is there physical evidence, and if so, who has it? Are there witnesses, and if so, what did they see and hear? These and other investigative basics will shape the subsequent course of legal assistance.

Furthermore, the employee does not have to participate in a criminal investigation unless it is strategically sound to do so. Unless seized and placed in official custody, an employee need not remain in the aftermath of a critical incident for the convenience of the criminal

investigators. The employee must focus upon and protect her own individual legal interests.

B. Responses to the Investigative Process

A decision regarding whether and to what extent to voluntarily waive constitutional rights and voluntarily provide nonrequired information to criminal investigators and other authorities is a critically important decision that has to be made on a case-by-case basis. It would be imprudent to suggest any general methodology to be employed as the answer to this crucial question.

An employee is of course free to waive all of his or her constitutional rights and make a statement to a criminal investigator. There certainly are appropriate cases where this approach may be warranted. However, that decision should not be made lightly; it should not be made without the benefit of counsel, and it should not be made under the stress of a critical incident. A decision to waive one's constitutional rights should be made voluntarily, knowingly, and while the employee is in his or her proper frame of mind. Any statement provided must be truthful.

C. Preserve the Original Evidence

If a decision is made to provide a voluntary statement to a criminal investigative agency, it is imperative that counsel take all appropriate steps to safeguard and preserve the integrity of the evidence being offered. Particularly, any statements given by the employee should be audio and/or video taped.

Surprisingly, some criminal investigative authorities still do

not utilize modern technology in criminal investigations. Some agencies use a process whereby an investigating agent verbally interviews a witness or a suspect employee, and the agent will subsequently prepare a summary report of the interview which is then reduced to a word processed form. This rough note involves editing and synthesizing. Cases have demonstrated how critically important facts and circumstances are edited out in that process.

The employee's conduct throughout the investigation is very important. It is imperative to understand his or her own unique role in that investigation. At all times, the employee must remain professional and dignified so as to not allow the investigators to create additional evidence that can be used against the employee.

Employees should be trained to protect themselves by incorporating a protective *Garrity* assertion before giving any statements in connection with an investigation into his or her conduct. If there is any doubt, employees should "Garrityize" themselves. The employee may be able to invoke self-Garrity by addressing the employer's basis for the requested statement and confirming that the statement to be given is involuntary.

IX. CONCLUSION

Garrity provides minimum protection for public employees in criminal proceedings. *Garrity* protection is very narrow: it prohibits admission of coerced statements in criminal proceedings and provides a narrow possible constitutional claim for violation of *Garrity* rights of public employees. The *Garrity* protection provides so little, yet it appears to be slipping away along with other constitutional

rights. *Garrity* mandated that America's public employees not have a watered down version of constitutional rights, yet the forty years since *Garrity* have brought us just that. The erosion of *Garrity* and other public employee constitutional rights suggests more hard times for America's eighteen million public employees.

Garrity's future is uncertain. One cannot rationally have any faith that the current Supreme Court will strengthen it. Public employees will be fortunate if *Garrity* survives at all. As evidenced by *Garcetti* and *Engquist*, the current Court does not envision the United States Constitution as a meaningful tool to combat governmental retaliation, corruption and malfeasance in public sector workplaces. The result of the erosion of constitutional rights of public employees will serve to promote more bureaucratic corruption and inefficient government throughout America because employees do not have adequate remedies to protect themselves from abuse.

Many of America's public servants make life better for the rest of us. By continuing to erode and strip away traditional constitutional protection for public employees, the Supreme Court has sent a powerful message that more raw government power and control will be the norm. Abuse will result. As a result of *Garcetti*, many public employees no longer feel comfortable to report fraud, corruption and malfeasance. The erosion of *Garrity* and other rights has caused many public employees to resign and forego careers in public service because the increasing employer control with declining constitutional protection leaves them without legal protection to combat retaliation, disparate treatment and other workplace injuries.

If *Garrity* collapses, another segment of remaining public employee protection will collapse with it, thereby further deteriorating morale, esprit de corps and the efficiency of government. This scenario is not the constitutional prescription needed in the new millennium when America needs a strong and effective force of public employees to serve and administer public agencies.