



# BETWEEN THE ROCK AND THE WHIRLPOOL: COMPELLED STATEMENTS BY PUBLIC EMPLOYEES

---

By Donald P. Taylor

## I. Introduction

---

In March 1991, the *New York Times* reported that during the investigation of Los Angeles police officers involved in the beating of Rodney King, more than two dozen investigatory interviews with officers had been abruptly discontinued. The article, entitled "Officers' Rights Hinder FBI Inquiry into Beating," noted that two years earlier, police chief Daryl Gates had issued a directive ordering officers to cooperate in investigatory interviews, even at the risk of incriminating themselves. The penalty for refusing to do so, Gates had said, would be "disciplinary action up to, and including, termination."<sup>1</sup>

Rather than compel cooperation pursuant to Gates' directive, the FBI chose to discontinue the interviews in the Rodney King case. Why? The officers' "Garrity Rights" would have rendered their statements unusable against them in a prosecution.

The Garrity Rights doctrine protects public employees from being compelled to incriminate themselves in investigatory interviews with their employers. The Fifth Amendment to the United States Constitution prohibits the government from compelling a person to incriminate themselves, and public workers are employees of the government itself; therefore they are protected from being compelled by their employer to incriminate themselves in an investigatory interview.

Public employees face intense scrutiny from their superiors, legislators, and the public, resulting in a constant flow of complaints and investigations. As a

---

*Donald Taylor* is an assistant professor at the University of Wisconsin's School for Workers.

result of this continuous and intense scrutiny, Garrity Rights have become a critical part of public sector labor relations, particularly in law enforcement. These rights are “unquestionably among the most important principles in public personnel administration,”<sup>2</sup> and “a cornerstone of police labor relations,”<sup>3</sup> as well as “something of a Holy Grail to police officers.”<sup>4</sup>

These rights are derived from the 1967 United States Supreme Court decision, *Garrity v. New Jersey*, and a series of subsequent related cases. Federal and state courts have repeatedly re-examined this bundle of protections, and in some key aspects the result has been confusion and conflicting interpretation. This article will address one of the most significant problem areas – the nature and definition of “compulsion” under Garrity Rights. If a public employee cannot legally be compelled to incriminate themselves by their employer, then what constitutes compulsion?

The key to defining compulsion revolves primarily around one question: what is the penalty for refusing to answer questions? In general, the courts have found that if a public employer threatens an employee with severe administrative sanctions – usually discipline – for refusal to answer questions, then the employees’ statements are considered compelled and therefore unusable against the employee in any future criminal proceeding. In the LAPD case, had the FBI proceeded with questioning, the officers’ statements would have been considered compelled by Chief Gates’ threat of termination. However, the courts have varied in regard to the level of penalty required to cause compulsion, and have also been inconsistent about the level of objective awareness the employee must have regarding the potential penalty. Must the employee be explicitly told they will be fired for noncooperation, or is an implied threat sufficient? Can an employee have a legitimate subjective belief that they face discipline for non-cooperation, or must the

**Garrity Rights have become a critical part of public sector labor relations, particularly in law enforcement.**

words actually come from the lips of management? The answers vary.

Whether from the standpoint of the public employee or the public manager, the implications of widespread ignorance, confusion, or misinformation are significant. Most public employees have little or no understanding of their Garrity Rights. Organized employees may have some awareness as a result of educational efforts by their unions. However, many of the public employee unions themselves have inaccurate or incomplete understandings of Garrity Rights. The implications of this are serious. Not understanding their rights, an uninformed employee might incriminate themselves unintentionally, or might continue to refuse to answer questions, even after protected by Garrity Rights, not knowing the limits of their protection.

Public employers share a similar level of misunderstanding. Confusion may even be more prevalent as one gets closer to the “front line” of supervisors – the very people who conduct most initial investigations of employee misconduct. An uninformed public manager might mislead an employee regarding their rights, or even worse, might immunize a guilty employee’s statements by inadvertently triggering *Garrity* protection, thus rendering their statements unusable in a criminal proceeding. Such a mistake could undermine or even fatally cripple a prosecution.

The goal of this article is to untangle the confusion around the compulsion question, in order to provide some degree of clarity and understanding to both public employees and public employers. In this article, I argue that:

1. The confusion surrounding the nature of compulsion is unnecessary, because the United States Supreme Court has given consistent opinions on the matter.
2. The United States Circuit Courts of Appeal have mostly acted in accordance with the rulings of the Supreme Court, with one stark and significant exception: the First Circuit

(Maine, Massachusetts, New Hampshire, Rhode Island).

3. Numerous state courts, influenced in some instances by the flawed decisions of the First Circuit, have erroneously veered toward restrictions on employees' rights which were not envisioned by the Supreme Court.

In what follows, I will first survey the development of Garrity Rights and review the basic practice of these rights in the employment context. Then, after a discussion and analysis of the broader aspects of compulsion, I will examine the cases that deviate from the original *Garrity* line and the impact of those decisions at the federal and state levels. Lastly, I will provide recommendations for both public managers and public employees in their efforts to navigate the compulsion issue.

## **II. The Development Of Garrity Rights**

---

The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." However, prior to the 1960s, U.S. courts did not recognize Fifth Amendment rights for public employees – mainly police officers – who refused to incriminate themselves. The general view was that if one accepted a job as a public servant, certain rights were surrendered and full disclosure was a condition of continued employment. The 1939 California decision *Christal v. Police Commission of San Francisco*,<sup>5</sup> which held that police officers had a duty to waive their constitutional rights, was generally cited as the foundation for this viewpoint. More broadly, courts interpreted the Fifth Amendment as binding only upon the federal government, not on state or local governments. So even aside from decisions such as *Christal*, the protections of the Fifth Amendment simply did not apply to the growing public sector workforce at the state, county, and municipal levels.

The landmark case *Malloy v. Hogan*<sup>6</sup> reversed this interpretation, holding that the Fifth Amendment was indeed binding on the states – due to the Fourteenth Amendment, which reads in part, "No state shall . . . deny to any person within its

jurisdiction the equal protection of the laws." Via the Fourteenth Amendment, the Fifth Amendment was made binding on the states, and thus constitutional protections could conceivably be extended to state, county, and municipal workers. This extension of Fifth Amendment rights came in 1967, with the U.S. Supreme Court's decision in *Garrity v. New Jersey*.<sup>7</sup>

### **A. Garrity v New Jersey**

In 1961, the New Jersey attorney general began investigating allegations of "fixing" of traffic tickets in the towns of Bellmawr and Barrington. The investigation focused on Bellmawr police Chief Edward Garrity, along with five other officers and civilian staff. When questioned, each employee was warned that anything they said might be used against them in a criminal proceeding that they could refuse to answer to avoid self-incrimination, but that a refusal to answer would result in removal from office.

Rather than forfeit their jobs, they answered the questions. Their answers were then used in their prosecutions – over their objections – and they were convicted. The United States Supreme Court held in a 5-4 decision that "the option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."<sup>8</sup> Stating that "policemen . . . are not relegated to a watered-down version of Constitutional rights," the Court determined that "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."<sup>9</sup> Therefore, the Supreme Court found that statements made by public employees under threat of job termination were compelled and that it was unconstitutional to use the statements in a prosecution. The convictions were overturned, and Chief Garrity continued his law enforcement career. He retired from the police force in 1978 and began a new career with the Camden County Prosecutor's office.<sup>10</sup>



Coinciding with the *Garrity* decision, was the Supreme Court decision in *Spevack v. Klein*,<sup>11</sup> in which an attorney had been disbarred for asserting his Fifth Amendment privilege. The Court found that the threat of disbarment for refusal to self-incriminate was sufficient to bring about unconstitutional compulsion. Here the Court stated that "the threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion" and that an improper "penalty" would be "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'."<sup>12</sup>

Subsequent cases refined and clarified the bundle of protections that today fall under the umbrella of Garrity Rights:

1. Compelled statements cannot be used in a subsequent criminal proceeding (protection from use).<sup>13</sup>
2. The employer cannot use a threat of discharge to coerce an employee to waive their constitutional rights.<sup>14</sup>
3. An employee cannot be lawfully dismissed for refusing to incriminate themselves (protection from coercion).<sup>15</sup>
4. If the employee's statements are immunized from use in future criminal proceedings and yet they still refuse to answer, they can be discharged.<sup>16</sup>
5. The employee may still be prosecuted as long as the evidence used against them does not include their compelled statements or any evidence derived from those statements (known as use/derivative immunity, or "use plus fruits" immunity).<sup>17</sup>

The third and fourth items above are illustrative of several basic principles of Garrity Rights, and bear some explanation as they are derived from cases that bear the same name, *Uniformed Sanitation Men Association Inc. v. Commissioner of Sanitation*. Item 3, also known as *Uniformed Sanitation I*, involved a group of New York City sanitation workers who were terminated for refusing to participate in questioning they felt could lead to self-incrimination. Citing *Garrity*, the U.S. Supreme Court found the terminations

improper. Whereas *Garrity* explicitly addressed the use of compelled statements in criminal prosecution, *Uniformed Sanitation I* addressed the administering of a penalty for refusal to make a statement. Where *Garrity* made "use" of compelled statements improper and thus overturned convictions, *Uniformed Sanitation I* put workers back on the job who had been fired as a penalty for refusing to self-incriminate, thus overturning terminations.

Item 4 involved events that directly followed *Uniformed Sanitation I*. After the sanitation workers returned to work vindicated, the Sanitation Commission resumed their investigation of the workers' supposed misconduct; but this time, in accordance with the Supreme Court's ruling, management carefully warned the workers that their answers were immune and would not be used against them in a criminal proceeding. However, despite this immunity, several of the workers again refused to cooperate, and were fired again. This time, in *Uniformed Sanitation II*, the U.S. Court of Appeals for the Second Circuit determined that because the workers were protected from self-incrimination, they could no longer refuse to cooperate – and thus their new terminations were proper.

### III. Garrity Rights In Practice

Having examined the family of cases that form the basis for Garrity Rights, we should briefly explore how these rights generally operate in the public employment context.

A police officer sits down with an Internal Affairs investigator, who asks questions about his involvement in the beating of a suspect. At this point, the officer faces a choice: do I answer questions, or do I assert my Fifth Amendment privilege? If the officer has no involvement in the beating and knows he has nothing to be concerned about, he might choose to cooperate. However, if he has any concern that something he might say could potentially be used against him in a future criminal proceeding, he may elect to assert his Fifth Amendment privilege.

Whether his Garrity Rights come into play depends on the penalty for non-cooperation. If there is a sufficiently severe penalty, courts

would generally hold that the officer's statements were compelled and therefore, the use of those statements in a future criminal proceeding would be unconstitutional. While the exact nature of the penalty might vary, the most common penalty is a threat of dismissal from office or threat of "disciplinary action up to and including termination." If faced with the choice between self-incrimination and job loss – what the Supreme Court called being placed "between the rock and the whirlpool,"<sup>18</sup> the employee could argue that their statements were compelled.

Before any investigatory interview of a public employee, the investigating manager must consider how the employee's answers will be used. Is the goal of the agency to investigate for the purpose of possible administrative discipline, for the purpose of possible criminal charges, or potentially both? One must proceed carefully, because if the employee's statements are not voluntary, they cannot be used in a criminal proceeding. At the same time, voluntary participation truly means that the employee can choose not to cooperate. Instinctively, a manager may order an employee to answer or face termination or discipline; in doing so, they render the employees' statements unusable by a prosecutor.

In the most common Garrity Rights scenarios, the essential functions can be expressed as two dichotomous variables: Immunity (employee's statements are either immune, or they are not) and Answer (does the employee answer the questions, or do they not). These two variables can be combined to form four possible common scenarios:

**Scenario 1: Immunity No, Answer Yes.** A nurse at a county nursing home meets with her administrator. The administrator advises her that her participation in the interview is completely voluntary and she can refuse to answer questions at any time, with no penalty for doing so. She is also advised that her answers may be used against her in a criminal proceeding. During the course of the interview, she admits that she abused a resident. For this violation of the nurs-

ing home's rules, she is terminated. Her admission is turned over to law enforcement and used against her in a prosecution. In sum: voluntary statements can be used in prosecution.

**Scenario 2: Immunity No, Answer No.** A nurse at a county nursing home meets with her administrator. The administrator advises her that her participation in the interview is completely voluntary and she can refuse to answer questions at any time, with no penalty for doing so. She is also advised that her answers may be used against her in a criminal proceeding. She is asked about the abuse and refuses to answer, asserting her rights under the Fifth Amendment. The administrator cannot take adverse action against the nurse for her assertion of her rights. In sum: "voluntary" means the employee can decline to participate, without repercussion for doing so.

**Scenario 3: Immunity Yes, Answer Yes.** A nurse at a county nursing home meets with her administrator. The administrator advises her that she is ordered to cooperate, and that if she refuses to answer questions, she will be dismissed from her job. She is also advised that any statements she makes will not be used against her in any future criminal proceeding. During the course of the interview, she

admits to abusing a resident. Management can discipline or terminate her for the violation of the nursing home's rules, but her answers cannot legally be used against her in a prosecution. In sum: compelled statements are protected from use in criminal proceedings.

**Scenario 4: Immunity Yes, Answer No.** A nurse at a county nursing home meets with her administrator. The administrator advises her that she is ordered to cooperate, and that if she refuses to answer questions, she will be dismissed from her job. She is also advised that any statements she makes will not be used against her in any future criminal proceeding. Despite this, she still refuses to answer questions, asserting her Fifth Amendment privilege. She is lawfully terminated for insubordination. In sum:

**What the Supreme Court called being placed "between the rock and the whirlpool."**

once protected, answers are immune and the employee can no longer refuse to answer.

It is easy to see that an untrained public manager can bestow use/derivative immunity on an employee's statements simply by saying "Answer my questions or you will be fired." The ease with which immunity could be accidentally triggered has led some to criticize the legitimacy of the entire *Garrity* case line.<sup>19</sup> Attorneys who advise public administrators are likewise very careful in the advice they give, cautioning their clients about inadvertently conferring use/derivative immunity.<sup>20</sup>

Most often, public employers will want to conduct an administrative investigation in order to ascertain whether misconduct has occurred, and to determine if disciplinary action is warranted. Accordingly, many public employers begin investigatory interviews by asking employees to sign a statement that explicitly triggers *Garrity* protection. These are alternatively called "Garrity Statements," "Garrity Advisements," or "Garrity Warnings."

These advisement documents generally read as follows:

1. The purpose of this questioning is to obtain information, which will assist in the determination of whether administrative disciplinary action is warranted.
2. I am not questioning you for the purpose of instituting criminal proceedings against you.
3. During the course of this questioning even if you do disclose information which indicates that you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.
4. I am ordering you to answer the questions that I direct to you concerning this matter.
5. If you refuse to answer my questions, you will be subject to immediate dismissal.

When these advisory statements are not put forth by the public employer, organized employees – particularly in law enforcement – are often trained by their unions to assert their rights and make a "Garrity Statement" of their own.<sup>21</sup>

Armed with a general understanding of the *Garrity* case line and the package of rights involved, we now can analyze the critical "compulsion" component, the trigger for the rights and protections we have discussed thus far.

#### IV. The Supreme Court's "Penalty Cases"

In the years since the *Garrity* decision, the courts have not reached a consistent answer as to what actually renders statements compelled. This has become increasingly problematic as public employees and employers alike attempt to craft and navigate constitutionally sound personnel practices. The Supreme Court itself, however, has remained relatively consistent. The starting point for examining this aspect of *Garrity* Rights is a review of what the Court has called their "penalty cases."<sup>22</sup>

In the original *Garrity* case, the Court found that the officers' statements were compelled because they were threatened with dismissal from their jobs if they refused to cooperate. The choice "was one between self-incrimination or job forfeiture."<sup>23</sup> Labor relations professionals often call dismissal the work equivalent of capital punishment; it is understandable that this, the most severe employment sanction possible, should be considered coercive within the employment context. However, in *Garrity*, the Court did not address other possible methods of compulsion. It examined dismissal in isolation and did not rule on whether other forms of sanctions could be considered compulsion. In the specific circumstances of this case, then, we simply start from the premise that the threat of termination is certainly definable as compulsion.

The *Spevack v. Klein* decision issued the same day made very clear that the Court would not define compulsion narrowly. In that case, the threat of disbarment was deemed sufficient. Indeed, as discussed earlier, the Court stated that disbarment and its associated effects were "powerful forms of compulsion"<sup>24</sup> and they defined compulsion as the imposition of any penalty that made the assertion of one's rights



“costly.”<sup>25</sup> This is an important point, because in *Spevack v. Klein* the court accepted a sanction in which the economic impact was not direct, but was instead one step removed (the immediate sanction was disbarment, which would then lead to other coercive effects).

In the next decade after *Garrity* and *Spevack*, the definition of compulsion could be viewed as relatively flexible and somewhat broad. In 1968’s *Uniformed Sanitation I*, the Court affirmed their *Garrity* opinion that, when faced with the threat of termination, public employees could not be forced to incriminate themselves. In 1973’s *Lefkowitz v. Turley*, the Court held that presenting a contractor with the threat of disqualification from certain public contracts was sufficiently coercive as to render statements unconstitutionally compelled: “There is no constitutional distinction in terms of compulsion between the threat of job loss . . . and the threat of contract loss to a contractor.”<sup>26</sup> Utilizing language that other courts would use as a guidepost thereafter, the court stated the threat of a “substantial economic penalty” was sufficient to render statements involuntary.<sup>27</sup>

Therefore, by the early 1970s it was clearly established by the Supreme Court that:

1. A direct threat of termination of employment was definitely compulsion in a self-incrimination context (*Garrity v. New Jersey, Uniformed Sanitation I*) but;
2. A direct threat of immediate termination of employment was not the only possible penalty that could bring about compulsion (*Spevack v. Klein, Lefkowitz v. Turley*).

This flexibility continued at the federal level, in various contexts. The Court ruled that the threat of placing a prison inmate in punitive segregation for refusing to self-incriminate was unlawful compulsion under the Fifth Amendment,<sup>28</sup> as was the threat of losing an unpaid, volunteer political position.<sup>29</sup> In the latter case, *Lefkowitz v. Cunningham*, the court went to considerable lengths to clarify that compulsion can take many forms. Actions the court equated with unconstitutional compulsion included act-

ing to “inflict potent sanctions” and to “impose substantial penalties.” Further, the Justices said: “. . . our earlier cases were concerned with penalties having a substantial economic impact. The touchstone of the Fifth Amendment is compulsion, and direct sanctions and imprisonment *are not the only penalties* capable of forcing the self-incrimination which the amendment forbids” (emphasis added).<sup>30</sup>

An article in the University of Baltimore Law Review noted that the decision in *Lefkowitz v. Cunningham* demonstrated an increasing stability and acceptance of *Garrity*, as *Garrity* had been a tenuous 5-4 decision, while *Cunningham* was decided by a solid 7-1 majority that relied upon *Garrity*.<sup>31</sup> I would add that the strong majority in *Cunningham* also clearly demonstrated the near-unanimity of the Justices on a broad interpretation of “compulsion.”

Following the Supreme Court’s lead, the U.S. Court of Appeals for the Second Circuit held in 1974 that the “state is prohibited . . . from compelling a statement through economically coercive means.”<sup>32</sup> Citing *Lefkowitz v. Turley*, the Second Circuit explained further that compulsion would not be triggered simply by “any adverse economic consequence, however slight or insubstantial;” this occurs “only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his ‘free choice to admit, to deny, or to refuse to answer.’”<sup>33</sup> Thus, while noting that there were some sanctions that were so minor that they would not trigger protection, the Second Circuit was repeating the Supreme Court’s view that compulsion could still be broadly defined.

The same year, the United States Court of Appeals for the First Circuit weighed in, but without acknowledging the definition of compulsion drawn from *Lefkowitz v. Turley*. Where the Second Circuit had discussed both what compulsion is as well as what it is not, the First Circuit chose to dwell on what it is not. In *Flint v. Mullen*<sup>34</sup>, the petitioner argued that testimony required at a probation violation hearing would incriminate him in an upcoming criminal trial connected to the same incident. In its ruling, the

First Circuit specifically addressed the earlier penalty cases and sidestepped them: "Petitioner . . . likens his plight to that of the defendants in *Lefkowitz v. Turley*, *Garrity v. New Jersey*, and *Spevack v. Klein*, where the Court held unconstitutional various penalties (disqualification from public bidding, removal from office, and disbarment) which attached to the valid exercise of the privilege against self-incrimination . . .

Yet not every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as a penalty."<sup>35</sup>

Clearly, the Supreme Court has taken a broad and inclusive view of what compulsion could encompass, including dismissal, disbarment, loss of contracts, prisoner segregation, and even the loss of a volunteer position. A seven-to-one majority of the Court re-emphasized this broad definition in *Lefkowitz v. Cunningham*. The ability of a public employee to be compelled (and thus use-immunized) by "potent sanctions" and "substantial penalties" ensured their protection in numerous coercive scenarios. However, in New England's First Circuit, a very different perspective was soon to emerge.

### **V. First Circuit Throws A Curveball: *United States V. Indorato***

The First Circuit's twist on public employee Garrity Rights came in 1980, with *United States v. Indorato*.<sup>36</sup> Mario Indorato was a lieutenant with the Massachusetts state police who in late 1978 had orchestrated the theft of parked freight trailers. After being questioned by the FBI and a state police detective, he was convicted of conspiracy, theft, and perjury. On appeal, he argued that statements he had given were coerced and therefore their use was in violation of the Fifth Amendment.

His claim of coercion stemmed from statements made to him by the state police detective during the interview. The detective told him, "The time has come, push has now come

to shove," and that an answer was expected "this minute."<sup>37</sup> Indorato argued that these statements constituted a threat of dismissal, because state police departmental rules specifically directed officers to "promptly obey any lawful order emanating from any superior

officer," and that violating this rule would lead to a trial board where a finding of guilt "may be subject to dismissal or such disciplinary action

as the Commissioner or Executive Officer may direct."<sup>38</sup>

The case involved an officer given an order by a superior, and departmental rules that mandated a trial board and potential dismissal for noncompliance with orders received from superiors. In the mind of the public employee, the connection should be clear: if I refuse the order, I will most likely be "convicted" by a trial board and then terminated. This corresponds with the situation deemed unlawfully coercive by the Supreme Court in *Garrity* and *Uniformed Sanitation I*, except that the penalty is indirect – as in *Spevack v. Klein*. In *Indorato*, the threat of termination did not come directly from the superior's lips – it was a penalty that the employee simply *knew* would result from refusing to answer. What disposes a public employee to self-incriminate is their own assessment of the circumstances: will I lose my job or face other severe consequences if I refuse to answer? If yes, then I'd better answer.

Not good enough, according to the First Circuit, which held that, "there was no overt threat that defendant would be dismissed," and that, "the language used in the rules providing that for a violation a member may be tried and upon conviction may be subject to dismissal or other disciplinary action suggests that dismissal would not have automatically followed defendant's invocation of the fifth amendment."<sup>39</sup> Therefore, the court found that:

"We do not think that the subjective fears of defendant as to what might happen if he refused to answer his superior officers are

**The First Circuit consciously sought to define compulsion as narrowly as possible.**



sufficient to bring him within *Garrity's* cloak of protection . . . defendant, here, was not, as in *Garrity*, put 'between the rock and the whirlpool;' he was standing safely on the bank of the stream."<sup>40</sup>

To clarify, one must ask: What if Indorato had refused to comply with the order from his superior officer? Is there any doubt that he would have been convicted by trial board and dismissed? It is difficult to imagine a scenario in which a trial board would not have reached a finding of guilt, given the officer's clear refusal to obey orders and the seriousness of the alleged offense. Equally difficult to imagine is a scenario in which the guilty finding would not have been followed by a dismissal decision by the police commissioner or executive officer. Any other disciplinary penalty would have subjected the department to massive excoriation by the public, media, and policymakers.

The First Circuit had an obvious case of compulsion before them, and consciously sought to define compulsion as narrowly as possible, so as to exclude Lt. Indorato from that definition. In effect, they argued that it doesn't matter if you incriminate yourself simply because you *believe* you are going to be terminated; if threats do not emanate from a supervisors' lips, public employees are not entitled to Fifth Amendment protections. Despite the numerous penalty case rulings from the Supreme Court which held that sanctions such as dismissal, disqualification from bidding on contracts, and disbarment constitute compulsion, the First Circuit found that a direct line of events leading to job loss (refusal – trial board – termination) does not.

### **A. Indorato: Impact At The Federal Level**

As previously discussed and as can be seen in Table I, most federal courts have generally tended toward inclusion regarding the various penalties placed before them, in employment situations and otherwise; they have viewed the definition of compulsion very broadly. Seemingly unwilling to prescribe a precise definition of unconstitutional compulsion, the courts have found a wide range of penalties sufficiently

coercive so as to constitute compulsion under the Fifth Amendment: not just job loss, but also disbarment, disqualification from bidding, loss of unpaid volunteer position, and, for an inmate, punitive segregation. Clearly, the Supreme Court's *Lefkowitz v. Cunningham* decision in 1977 can be seen as summarizing this broad view, in its holding that compulsion can take many forms, as long as it constitutes a "substantial penalty."

After *Indorato*, the First Circuit continued its extremely narrow view of compulsion in *Singer v. Maine*,<sup>41</sup> *United States v. Stein*,<sup>42</sup> and *Dwan v. City of Boston*.<sup>43</sup> Outside a signal that the First Circuit's interpretation might have influenced the Third Circuit in 1984's *FOP Lodge No. 5 v. City of Philadelphia*,<sup>44</sup> there has been little sign that the *Indorato* interpretation has had a marked impact at the federal level outside the First Circuit. Meanwhile, the Supreme Court has continued to emphasize its broad view of compulsion, in 1984's *Minnesota v. Murphy*<sup>45</sup> and again in 2002's *McKune v. Lile*.<sup>46</sup> The latter case is particularly significant as it is a more recent Supreme Court view on the subject, one in which the Court once again summarized the wide range of penalties that were found to be compulsory in their earlier penalty cases.

In 1988, the D.C. Circuit explicitly recognized that compulsion depended to some extent on the perception of the employee. In doing so, it effectively established a polar opposite standard to *Indorato*. In *United States v. Friedrich*,<sup>47</sup> the D.C. Circuit proposed a two-prong test for determining whether compulsion exists in Fifth Amendment terms. In its view, the subject "must have in fact believed his . . . statements to be compelled on threat of loss of job and this belief must have been objectively reasonable."<sup>48</sup> Whereas the *Indorato* doctrine required a clear and explicit threat of dismissal, what has become known as the "*Friedrich* Test" (or the "Subjective/Objective Test") allowed for the possibility that an employee can be compelled by his/her own belief that they are subject to dismissal, so long as this belief was based on objective facts. At the federal level, the *Friedrich* test has been the more influential, explicitly adopted by the Eleventh Circuit and acknowledged by the Fifth

and Sixth Circuits.<sup>49</sup>

In addition to the influence of the *Friedrick* test at the federal level, the Circuit Courts of Appeals have generally maintained the Supreme Court's broad view of the of the types of sanctions that could constitute compulsion. Since 1990, the Third, Sixth, Seventh, and Ninth Circuits have all stated that penalties short of job dismissal can be sufficiently coercive to trigger compulsion.<sup>50</sup>

Clearly then, the U.S. Circuit Courts of Appeals have moved more toward the D.C. Circuit's *Friedrick* model than toward the First Circuit's *Indorato* model. Allowing for a reasonable subjective belief that one is facing severe sanctions for noncooperation falls in line with the broad, inclusive view of coercion held by the Supreme Court and re-emphasized by them in decision after decision.

### **B. Indorato: Impact At The State Level**

*Indorato* has had more a significant influence on the states, and a number of state courts have "jumped on the *Indorato* fictional bandwagon."<sup>51</sup> Even when state courts give a nod to *Friedrick*, the second prong of the test – whether the person's subjective belief is objectively reasonable – is used to undermine *Garrity* protections. Upon acknowledging a petitioning employee's subjective belief that they were subject to termination, many courts have then ruled that this belief was not objectively reasonable.<sup>52</sup> As one employee advocate has lamented, "Most courts shoot down [prong] #2 with bombastic legal artillery."<sup>53</sup>

Some of the most extreme denials of employees' rights have come out of the state courts of northern New England, the geographic jurisdiction of the First Circuit Court of Appeals.

One of the narrowest rulings related to *Garrity* Rights at any level occurred with the New Hampshire Supreme Court's 2002 decision in *State of New Hampshire v. Valerie Litvin*.<sup>54</sup> In this case, Litvin, a clerk in the collections department of the city of Berlin, was convicted for theft of approximately \$40,000 in city funds. Statements she made during her employer's investigatory interview were used in court to convict her, despite the fact that she had signed an employer-

provided statement affirming her *Garrity* Rights. This statement read:

I am not questioning you for the purpose of instituting a criminal prosecution against you. During the course of this interview, even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings.

Since this is an administrative matter and any self-incriminating information you may disclose will not be used against you in a criminal case, you are required to answer my questions fully and truthfully. If you refuse to answer my questions, you will be in violation of City policy and shall be subject to disciplinary penalties.<sup>55</sup>

Amazingly, the New Hampshire Supreme Court decided that Litvin's statements were *not* unlawfully used against her, despite the clear affirmation of rights that she was given by her management to sign, and a city policy allowing termination for insubordination.

Again, we put ourselves in the employee's place: our employer has presented us with a statement that we are required to answer, and that refusal to answer will be subject us to disciplinary penalties. There is a city policy that allows termination as a possible penalty for insubordination. This scenario is obviously within the scope of *Garrity*. But even further, the statement says any self-incriminating information we provide will *not* be used against us in a criminal case. This is the textbook situation examined by the *Garrity* line of cases: if I am directed to answer under threat of discipline, I am being compelled; if I am being compelled, my answers cannot constitutionally be used against me in a future criminal proceeding. The fact that the City of Berlin put this statement in front of Valerie Litvin and asked her to sign it clearly shows that it was their intention to extract

information purely for administrative purposes and to gain her cooperation by immunizing her answers – the classic scenario envisioned in the doctrine established by the Supreme Court’s penalty cases.

However, relying on *Indorato*, the New Hampshire Supreme Court held that because Litvin was not explicitly threatened with automatic termination for refusing to answer, she was not compelled. Therefore, they found that her statements were voluntary. The New Hampshire court interpreted, as narrowly as possible, the First Circuit’s already overly narrow view:

“The First Circuit Court of Appeals has held that in order to trigger Garrity protections, a defendant must have been threatened with automatic dismissal for failing to cooperate and that the defendant’s subjective belief that he or she would be dismissed does not render his or her statements compelled.”<sup>56</sup>

Further, “the city’s policy, like the department policy at issue in *Indorato*, permitted dismissal for ‘insubordination,’ but did not require it.”<sup>57</sup> The court then erroneously stated that “the facts of this case are similar to those in *Singer v. State of Maine*,”<sup>58</sup> when the circumstances of the two cases are conspicuously different. In *Singer*, the employee was never presented with a statement of her Garrity Rights that directed her to answer on pain of discipline and informed her that her answers were use-immunized. Litvin was presented with such a statement. The State never demonstrated a desire to cloak Ms. Singer with Garrity Rights, as the City of Berlin so clearly did with Ms. Litvin. Further, the employee in *Singer* was never even prosecuted – so her statements, protected or not, were never actually used to incriminate her. The facts of these two cases could hardly differ more.

While not bound by circuit decisions outside of the First Circuit, the New Hampshire court certainly could have reviewed the interpretations of other courts. However, *New Hampshire v. Litvin* didn’t even pay lip service to the D.C. Circuit’s “subjective-objective” test established in *United*

*States v. Friedrich*. In fact, in its strict adoption of *Indorato*, the court rejected any possibility that an employee’s subjective belief that they faced dismissal would *ever* be found objectively reasonable or justifiable.

Interestingly, only nine days before the New Hampshire Supreme Court issued their *Litvin* decision, the Eleventh Circuit Court of Appeals issued a decision in which it examined similar circumstances and arrived at a markedly different conclusion. In *United States v. Vangates*, a Florida correctional officer faced an investigatory interview conducted by her superiors. Just like Litvin, she was given a document informing her that she would be subject to discipline if she refused to answer questions, and that her answers would not be used in a future criminal proceeding. The resulting statements were placed on file at the Internal Affairs Division. In a subsequent criminal proceeding, the alleged victim sought to use both the statements in the IAD file, as well as statements Vangates made at a civil proceeding. The court allowed use of the civil testimony because it had not been compelled; however, the contents of the IAD file were found to have been compelled and thus, protected. In finding against her in regard to the civil testimony, the Eleventh Circuit adopted and validated the *Friedrich* test – ruling that Vangates’ civil testimony was not protected because her subjective belief that the testimony was compelled was not objectively reasonable: “Vangates could not have formed an objectively reasonable belief that her testimony in the civil case was compelled by any state action.”<sup>59</sup>

Thus, while on the one hand the court found her statements in the IAD file protected by an affirmation of rights virtually identical to that used in the *Litvin* case, they also wholesale the D.C. Circuit’s *Friedrich* Test applies to the civil testimony. The Eleventh Circuit also looked beyond its boundaries to cite the Second Circuit’s 1974 decision in *United States v. Montanye*,<sup>60</sup> defining compulsion as “economically coercive means, whether they are direct or indirect.”

The contrast between the New Hampshire Supreme Court and the Eleventh Circuit Court of Appeals, in decisions issued only nine days



apart, is striking. The wide divergence clearly demonstrates the breakdown and inconsistency in how Garrity Rights are applied across the country.

Notably, two months after these drastically divergent decisions, the US Supreme Court again listed the penalties they had found to be coercive –reaffirming that, in their view, compulsion comes in many forms.<sup>61</sup> Thus, while the First Circuit continued to pronounce that a direct threat of automatic termination and nothing else constituted compulsion under the Fifth Amendment, and now had been joined in that view by the New Hampshire Supreme Court, the United States Supreme Court said otherwise.

Despite the Supreme Court's views and the availability of sensible guidepost decisions like *Friedrick*, other state courts outside the First Circuit's jurisdiction have gone in the direction of *Indorato*. As illustrated in Table II, courts in Colorado, Florida, Idaho, Illinois, New Jersey, Minnesota, and Wisconsin have rendered decisions stating that if termination is merely possible, but not explicit and definite, compulsion does not exist.<sup>62</sup> Michigan appeared to be heading down the *Indorato* path with 1998's *People v. Coutu*,<sup>63</sup> but then swung back toward a broader view of compulsion in 2000 with *People v. Wyngaard*.<sup>64</sup> Perhaps in an effort to eliminate the instability and prevent what some viewed as gradual erosion of Garrity Rights, the state enacted legislation in 2006 defining compulsion as being caused by an explicit threat of dismissal "or any other job sanction."<sup>65</sup> However, this law covers only police officers; leaving all other public employees in the state to the unpredictable mercies of the courts.

The *Indorato* interpretation was most recently cited in the 2006 Wisconsin Supreme Court decision, *Wisconsin v. Brockdorf*.<sup>66</sup> Vanessa Brockdorf, a police officer, had attempted to cover up her partner's beating of an arrestee in custody. After initially lying to an Internal Affairs investigator, she admitted the truth in a second interview. At trial, she successfully had her statements from that second interview suppressed

based on *Garrity*. The prosecution disagreed, and ultimately the state Supreme Court had to decide if the trial court had correctly granted the motion to suppress the statements from the second interview.

Officer Brockdorf was not explicitly threatened with dismissal if she refused to answer questions; she was told she would be charged with obstruction. Knowing that an obstruction conviction would lead to her dismissal, Brockdorf argued that she had been compelled. Essentially, she was arguing that although she had not been explicitly threatened with dismissal, she had been explicitly threatened with a penalty that would lead to her dismissal. This threat mirrors the indirect nature of the penalty found coercive in *Spevack v. Klein*.

The court held that "this does not rise to the level of coercive conduct so as to negate the voluntariness of the statement."<sup>67</sup> Although this conclusion might not be surprising if one assumed the court had been purely inspired by *Indorato*, the surprise is that the court actually reached their conclusion by adopting the *Friedrick* "subjective-objective" test – and then using *Indorato* to negate it.

The court actually asserted that it was adopting the two-prong test first described by the D.C. Circuit in *United States v. Friedrich*. As previously discussed, the *Friedrick* test posits that when an employee is not specifically told that refusing to answer will lead to

dismissal, compulsion still exists when the employee has a subjective belief that refusing to answer will lead to dismissal and that subjective belief is objectively reasonable.

Then, having "adopted" the *Friedrick* test, the Wisconsin court stated that, per the First Circuit's *Indorato* decision, an employee's subjective belief could not be objectively reasonable unless they are explicitly and directly told that refusing to answer will lead to termination. Referring to *Indorato*, the court said that the First Circuit "essentially concluded that the implied threat the officer subjectively believed in was not objectively reasonable without an actual,

**Should the status quo remain in place, confusion will continue.**

overt threat of termination for invoking the Fifth Amendment right against self-incrimination.”<sup>68</sup> Obviously unaware of the contradictions in their reasoning, the Wisconsin Supreme Court flatly stated that *Friedrick* and *Indorato* are “functionally equivalent.”<sup>69</sup>

### **C. The Impact of *Indorato***

Tables I and II show that federal and state courts are operating in opposite directions on the matter of compulsion. Where the Supreme Court has maintained a broad view of the concept and the federal courts of appeals have reinforced this view with the *Friedrick* test, many states have moved in the direction of a narrow definition, inspired by *Indorato*. While *New Hampshire v. Litvin* possibly represents the most extreme application of *Indorato*, *Wisconsin v. Brockdorf* represents the genetic engineering of the *Indorato* and *Friedrick* breeds, a Frankenstein’s monster that attempts to fuse together two completely incompatible interpretations.

Should the status quo remain in place, confusion will continue, because “the Courts have been all over the map in their application of *Garrity*.”<sup>70</sup> If the trends at the state level continue, more states will embrace *Indorato* interpretations, making public employees’ subjective beliefs irrelevant when they feel compelled to incriminate themselves.

## **VI. Conclusion**

---

Many observers worry that *Garrity* is endangered due to the courts’ misunderstandings, evasions, and tightening restrictions on employee rights,<sup>71</sup> even accusing judges of doing “headstands” to dodge the prospect of awarding *Garrity* immunity.<sup>72</sup> The confusion about compulsion that has made its way into the state courts serves neither public agencies nor the people they employ. As courts continue to walk their own paths and find new ways to restrict the constitutional rights of public employees,

state and local governments will continue to find themselves mired in *Garrity*-related litigation. The results will be continuing confusion and additional distraction from the actual missions of public employees and the agencies that employ them. The greatest risks and most significant difficulties confront public managers and employees who must attempt to understand the application of

*Garrity* Rights in this confusing patchwork of interpretation.

For public managers, *Garrity* has become akin to a maze or a minefield. Application of *Garrity* Rights varies depending on which jurisdiction one is in, making the researching and proper application of personnel practices the job of attorneys, not managers. However, a number of sensible recommendations can be made to public managers:

1. Understand your goals very clearly. Is your priority an administrative investigation to determine whether disciplinary action is warranted? Then go ahead and make it very clear to the employee that failure to cooperate will lead to termination. You will get the answers you require and will be able to use them in determining the appropriate disciplinary penalty. You will not have completely closed the door to prosecution, but will have triggered use/derivative use immunity for the statements the employee gives to you.
2. Use a very clear “*Garrity* Statement” in internal investigations one that unequivocally stated that termination will result from refusing to answer questions. Do not use vague statements such as “disciplinary penalties” or “discipline up to and including termination.”
3. If you place a priority on prosecution, move extremely carefully so that your statements and actions do not trigger *Garrity* protection. One approach may be to encourage employees to make statements voluntarily – however,

**Many observers worry that *Garrity* is endangered due to the courts’ misunderstandings, evasions, and tightening restrictions on employee rights.**

you must remember that voluntary truly means voluntary; if you want to maximize the possibility that their statements can be used against them in a prosecution, you must also be open to the possibility that they will simply refuse to answer your questions. You cannot penalize them for that. Some advise convincing the employee to comply by threatening penalties short of termination.<sup>73</sup> Aside from its mendaciousness, the danger of this approach is that penalties short of termination may still be considered sufficient to trigger compulsion in places not subject to the *Indorato* interpretation. A much better approach would be to place the employee on administrative suspension ("pending investigation") and refrain from engaging in your investigation until after the criminal procedure has played itself out. This way you cannot accidentally muck up the prosecution, and can still come in afterward to investigate and administer disciplinary action – perhaps buttressed by a successful court conviction.

For public employees, the consequences of error and confusion are even greater, because the outcome could be imprisonment. As with managers, employees must deal with the fact that these rights vary with geography. The intricacies that have developed put employees at a severe disadvantage. "It is inconceivable to expect eighteen million public employees to be aware of and understand the rule . . .

public employees are not constitutional lawyers and often do not fully understand their rights or investigative processes."<sup>74</sup>

An employee who searches the Internet for information about Garrity Rights will find a wide variety of interpretations, many of them inapplicable and some incorrect. A review of union Websites also reveals a significant degree of confusion and misinformation. There is, however, some practical advice employees can follow:

**It may be sensible for public employers and employees to collaborate in efforts to secure legislation that would override the gray areas of court decisions.**

1. Don't guess as to whether you have *Garrity* protection in any given situation. If you're unsure, then you are very likely unprotected. There are two things that will do the most to ensure your protection no matter where you are a direct order to answer questions, and a clear, explicit statement that failure to comply will result in your termination. If these two components are in place, you have the strongest likelihood of *Garrity* protection. Don't guess; ask. "Am I being ordered to answer?" "What will the penalty be if I decline to answer?" Odd as it may sound, you want the answer to the second question to be "termination." It is the nearest thing to a sure trigger of use immunity, regardless of your geographical location or court jurisdiction.
2. If management provides a written "Garrity Statement" for you to review and sign, make sure that it is correctly worded to protect your rights. It should say that you will be asked questions specifically directed and narrowly related to the performance of your official duties; that any statements you make during the interview cannot be used against you in any subsequent criminal proceeding, nor can the fruits of any of your statements be used against you in any subsequent criminal proceeding; and that if you refuse to answer questions relating to the performance of your official duties, you will be subject to dismissal. If the form you are presented is not worded appropriately, request that it be amended prior to the commencement of questioning.
3. If you cannot convince management to make a clear statement or amend a "Garrity Statement" as indicated above, you are in danger and have important choices to make. If you refuse to answer, you may be fired anyway, even though this has not yet been threatened; if you give a statement, it will most likely be usable against you in a criminal proceeding. If you or your union representative can find



no other way out of this dilemma, the better choice may be refusing to answer and risking termination; it is generally easier to get a termination overturned than to suppress a self-incriminating statement in court. But there are no guarantees here.

Given the inability of many courts to consistently apply Garrity Rights as interpreted by the United States Supreme Court, it may be sensible for public employers and employees to collaborate in efforts to secure legislation that would override the gray areas of court decisions. In many ways, the Michigan law enacted in 2006 could serve as a model, at least in how it broadly defines compulsion. The problem with the Michigan law is that only applies to law enforcement officers – all other public employees, even correctional officers, are apparently excluded from the law’s protections. Many states have enacted a “Law Enforcement Officers’ Bill of Rights,” and there have been attempts at similar federal legislation. The problem with all of these legislative efforts is that they will not resolve the chaos and confusion around *Garrity* unless they are applied to all who are subject to *Garrity* – all public employees at the federal, state, county, and municipal levels.

Despite the confusion, there has been an additional ray of hope. In a 2007 decision, the First Circuit seems to have partially reversed – or at least temporarily contradicted – its *Indorato* interpretation. In *Sher v. U.S. Department of Veterans’ Affairs*,<sup>75</sup> the court reviewed a situation in which an employee was told that a refusal to cooperate “may result in disciplinary action,” and found that “this notification was a threat of removal sufficient to constitute coercion under *Garrity*.” While sticking to their opinion that *Garrity* required a threat of removal, the court found that a threat of “disciplinary action” in this case constituted a threat of removal. Obviously, it is unclear whether the First Circuit will

continue to soften their opinion and adopt a broader view of compulsion; equally obvious is that even if they do, there is still much damage to be undone elsewhere. If nothing else, *Sher v. U.S. Department of Veterans’ Affairs* shows that the First Circuit can be as inconsistent on *Garrity* as other courts.

Where *Garrity* has been applied properly and consistently, it has served both public managers and employees well. It has enabled managers to clearly understand the necessary divisions between administrative and criminal investigations and to proceed without violating employees’ rights in either regard. Likewise, *Garrity* Rights have enabled employees to protect their rights and avoid entanglements where their employment and their constitutional rights intersect. As one chief of police has said, “*Garrity* and its progeny set forth a time-tested procedural formula whereby public employees may be held accountable for refusing to divulge information pertinent to the faithful performance of their duties, while protecting the employee’s right against self-incrimination through a grant of immunity.”<sup>76</sup>

This is being gradually undone by the confusion over the compulsion issue, and the result is the deterioration of employees’ rights. “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.”<sup>77</sup> This can only contribute to cumulative confusion and legal entanglements, as employees and employers make wrong choices based on erroneous or incomplete understandings. Wrong choices by employers could mean immunizing guilty employees by accident, and wrong choices by employees could mean the unintentional surrender of constitutional rights – and prison time. The downside for both is severe.

Table I. Key Garrity Penalty Cases (Federal)

Case	Year	Court	Penalty sufficient to cause compulsion?
<i>Garrity v. New Jersey</i>	1967	Supreme Ct.	Threat of removal sufficient (but not explicitly limited to removal).
<i>Spevack v. Klein</i>	1967	Supreme Ct.	Threat of disbarment sufficient.
<i>Uniformed Sanitation I</i>	1968	Supreme Ct.	Threat of removal sufficient (but not explicitly limited to removal).
<i>Lefkowitz v. Turley</i>	1973	Supreme Ct.	Disqualification from bidding sufficient
<i>United States v. Montanye</i>	1974	2 <sup>nd</sup> Circuit	"Economic consequence" - "appreciable size and substance"
<i>Baxter v. Palmigiano</i>	1976	Supreme Ct.	Placing of inmate in punitive segregation sufficient.
<i>Lefkowitz v. Cunningham</i>	1977	Supreme Ct.	Loss of unpaid volunteer position sufficient. Compulsion takes many forms, "substantial penalty" sufficient.
<i>United States v. Indorato</i>	1980	1 <sup>st</sup> Circuit	Overt threat of removal required.
<i>Minnesota v. Murphy</i>	1984	Supreme Ct.	Revocation of probation, "substantial penalty," sufficient.
<i>FOP v. City of Philadelphia</i>	1984	3 <sup>rd</sup> Circuit	Lateral transfer not sufficient. Court says it knows of no penalties other than dismissal or suspension that would be sufficient.
<i>United States v. Friedrich</i>	1988	DC Circuit	"Subjective" fear based on "objective" conditions sufficient.
<i>United States v. Perez-Franco</i>	1989	1 <sup>st</sup> Circuit	Loss of reduction in sentence sufficient.
<i>United States v. Frierson</i>	1991	3 <sup>rd</sup> Circuit	Loss of reduction in offense level sufficient.
<i>Singer v. Maine</i>	1995	1 <sup>st</sup> Circuit	Overt threat of removal required.
<i>LaSalle Bank Lake View v. Seguban</i>	1995	7 <sup>th</sup> Circuit	Stated that Supreme Court has prohibited coercive practices that make assertion of Fifth Amendment privilege "costly"
<i>Chan v. Wodnicki</i>	1997	7 <sup>th</sup> Circuit	"Substantial economic penalty, "potent sanctions" required. Agree with Supreme Court view that coercion can take many forms, not all economic
<i>United States v. Stein</i>	2000	1 <sup>st</sup> Circuit	Overt threat of automatic disbarment required. "Possibility," inferences not sufficient.
<i>McKune v. Lile</i>	2002	Supreme Ct.	Reduction in inmate's privileges not sufficient. However, the "penalty" cases set broad parameters.
<i>United States v. Vangates</i>	2002	11 <sup>th</sup> Circuit	Adoption of DC Circuit's <i>Friedrich</i> test : "Subjective" fear based on "objective" conditions sufficient.
<i>Dwan v. City of Boston</i>	2003	1 <sup>st</sup> Circuit	Administrative leave, loss of overtime and special duty pay not sufficient.
<i>United States v. Waldon</i>	2004	11 <sup>th</sup> Circuit	Reaffirmed subjective-objective test; assessment of whether belief is objectively reasonable is derived from actions of employer
<i>United States v. Saechao</i>	2005	9 <sup>th</sup> Circuit	Revocation of parole sufficient.
<i>McKinley v. Mansfield</i>	2005	6 <sup>th</sup> Circuit	Job sanctions like suspension or demotion can constitute compulsion, but must be obj. evident.
<i>United States v. Antelope</i>	2005	9 <sup>th</sup> Circuit	Extension of prison term sufficient. Compulsion means to "impose substantial penalties"
<i>United States v. Trevino</i>	2007	5 <sup>th</sup> Circuit	Overt threat of removal required in this case, but implied threats not ruled out as possibly sufficient.



## BETWEEN THE ROCK AND THE WHIRLPOOL: COMPELLED STATEMENTS BY PUBLIC EMPLOYEES

**Table II. Key Garrity Penalty Cases (State)**

Case	Year	Court	Penalty sufficient to cause compulsion?
<i>People v. Allen</i>	1969	Michigan	Threat of suspension sufficient.
<i>Lurie v. Florida State Board of Dentistry</i>	1973	Florida	Revocation of dentist license sufficient.
<i>Odds v. Board of Police and Fire for the City of Milwaukee</i>	1982	Wisconsin	"Coercive character of surroundings" sufficient.
<i>Commonwealth v. Harvey</i>	1986	Massachusetts	Overt threat of removal required.
<i>Illinois v. Bynum</i>	1987	Illinois	If dismissal is possible but not definite – not sufficient.
<i>United States v. Camacho</i>	1990	Florida	If dismissal is possible but not definite – not sufficient.
<i>New Jersey v. Lacaille</i>	1993	New Jersey	General possibility of dismissal not sufficient.
<i>State v. Connor</i>	1993	Idaho	If dismissal is possible but not definite – not sufficient.
<i>United States v. Najarian</i>	1996	Minnesota	If dismissal is possible but not definite – not sufficient.
<i>Colorado v. Sapp</i>	1997	Colorado	Subjective-objective test, but "objective" requires "significant coercive action of the state"
<i>People v. Coutu</i>	1998	Michigan	Statutory automatic termination required.
<i>People v. Wyngaard</i>	2000	Michigan	Adopt <i>Minnesota v. Murphy</i> , "substantial penalty," not just termination.
<i>New Hampshire v. Litvin</i>	2002	New Hampshire	"Subject to disciplinary penalties" not sufficient.
<i>Hopp &amp; Flesch, LLC v. Backstreet</i>	2005	Colorado	If dismissal is possible but not definite – not sufficient.
<i>Wisconsin v. Brockdorf</i>	2006	Wisconsin	Overt threat of removal required.

### ENDNOTES

- <sup>1</sup> "Officers' Rights Hinder FBI Inquiry into Beating," *New York Times*, March 30, 1991.
- <sup>2</sup> J. Michael McGuinness, "Fifth Amendment Protection for Public Employees: Garrity and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations," 24 *Touro L. Rev.* 699 (2008): 706.
- <sup>3</sup> Mark Porter, "When the Cop Becomes the Suspect: A Primer on Garrity," *Michigan Criminal Law Annual Journal* Vol. 1 No. 1 (2002): 33.
- <sup>4</sup> *Id.*
- <sup>5</sup> 33 Cal. App. 2d 564, 92 P.2d 416 (1939).
- <sup>6</sup> 378 U.S. 1 (1964).
- <sup>7</sup> 385 U.S. 493 (1967).
- <sup>8</sup> *Garrity v. New Jersey*, 385 U.S. 493 (1967): 497.
- <sup>9</sup> *Id.* at 500.
- <sup>10</sup> <http://www.bellmawr.com> (accessed June 13, 2009).
- <sup>11</sup> 385 U.S. 511 (1967).
- <sup>12</sup> *Spevack v. Klein*, 385 U.S. 511 (1967).
- <sup>13</sup> *Garrity v. New Jersey*, 385 U.S. 493 (1967).
- <sup>14</sup> *Gardner v. Broderick*, 392 U.S. 273 (1968).
- <sup>15</sup> *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968).
- <sup>16</sup> *Uniformed Sanitation Men Association Inc. v. Commissioner of Sanitation*, 426 F.2d 619 (2<sup>nd</sup> Cir. 1970).
- <sup>17</sup> *Kastigar v. United States*, 406 U.S. 441 (1972).
- <sup>18</sup> *Garrity v. New Jersey*, 385 U.S. 493 (1967): 498.
- <sup>19</sup> Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 *U. Cin. L. Rev.* 671 (1968); Steven D. Clymer, "Compelled Statements from Police Officers and Garrity Immunity," 76 *NYU L. Rev.* 1309 (Nov. 2001); Akhil Reed Amar and Renee B. Lettow, "Fifth Amendment First Principles: The Self-Incrimination Clause," 93 *Mich. L. Rev.* 857 (1994-1995).
- <sup>20</sup> Kimberly A. Crawford, "Compelled Interviews of Public Employees," *FBI Law Enforcement Bulletin*, May 1993; Michael Ramage, "Criminal vs. Administrative Investigations ('Garrity' Issues and Workplace Searches)," Florida Department of Law Enforcement, 2000, [www.fdle.state.fl.us/OGC/Legal\\_Bulletins/lb0002-6-26.pdf](http://www.fdle.state.fl.us/OGC/Legal_Bulletins/lb0002-6-26.pdf) (accessed April 5, 2009).
- <sup>21</sup> For example, see Aaron Nisenson, "Garrity Rights Reviewed," [www.iupa.org](http://www.iupa.org) (accessed April 5, 2009); [www.njlawman.com/Garrity.htm](http://www.njlawman.com/Garrity.htm) (accessed July 31, 2009); [www.cilu.org](http://www.cilu.org) (accessed July 31, 2009); [www.mofop15.com/garrityrule.html](http://www.mofop15.com/garrityrule.html) (accessed July 31, 2009); [www.ipbo.org/work\\_rights.shtml](http://www.ipbo.org/work_rights.shtml) (accessed July 31, 2009).
- <sup>22</sup> *Minnesota v. Murphy*, 465 U.S. 420 (1984): 29.
- <sup>23</sup> *Garrity v. New Jersey*, 385 U.S. 493 (1967): 496.
- <sup>24</sup> *Spevack v. Klein*, 385 U.S. 511 (1967).
- <sup>25</sup> *Id.*
- <sup>26</sup> *Lefkowitz v. Turley*, 414 U.S. 70 (1973).
- <sup>27</sup> *Id.*
- <sup>28</sup> *Baxter v. Palmigiano*, 425 U.S. 308 (1976).
- <sup>29</sup> *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).
- <sup>30</sup> *Id.*
- <sup>31</sup> Byron Warnken, "The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination," 16 *U. Balt. L. Rev.* 452 (1986-1987).
- <sup>32</sup> *United States v. Montanye*, 500 F.2d 411 (2<sup>nd</sup> Cir. 1974).
- <sup>33</sup> *Id.*
- <sup>34</sup> 499 F.2d 100 (1<sup>st</sup> Cir. 1974).
- <sup>35</sup> *Id.*
- <sup>36</sup> 628 F.2d 11 (1<sup>st</sup> Cir. 1980).
- <sup>37</sup> *United States v. Indorato*, 628 F.2d 711 (1<sup>st</sup> Cir. 1980): 715.
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.* at 716.
- <sup>40</sup> *Id.* at 717.
- <sup>41</sup> 49 F.3d 837 (1<sup>st</sup> Cir. 1995).
- <sup>42</sup> 233 F.3d 6 (1<sup>st</sup> Cir. 2000).
- <sup>43</sup> 329 F.3d 275 (1<sup>st</sup> Cir. 2003).
- <sup>44</sup> 859 F.2d 276 (3<sup>rd</sup> Cir. 1988).
- <sup>45</sup> 465 U.S. 420 (1984).
- <sup>46</sup> 536 U.S. 24 (2002).
- <sup>47</sup> 842 F.2d 382 (D.C. Cir. 1988).
- <sup>48</sup> *United States v. Friedrich*, 842 F.2d 382 (D.C. Cir. 1988): 105.
- <sup>49</sup> *United States v. Vangates*, 287 F.3d 1315 (11<sup>th</sup> Cir. 2002); *United States v. Waldon*, 363 F.3d 1103 (11<sup>th</sup> Cir. 2004); *United States v. Trevino*, No. 05-51309 (5<sup>th</sup> Cir., Jan. 26, 2007), *McKinley v. City of Mansfield*, 404 F.3d 418 (6<sup>th</sup> Cir. 2005).
- <sup>50</sup> *United States v. Frierson*, 945 F.2d 650 (3<sup>rd</sup> Cir. 1991), *McKinley v. Mansfield*, 404 F.3d 418 (6<sup>th</sup> Cir. 2005), *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7<sup>th</sup> Cir. 1995), *Chan v. Wodnicki*, 123 F.3d 1005 (7<sup>th</sup> Cir. 1997), *United States v. Saechao*, 418 F.3d 1073 (9<sup>th</sup> Cir. 2005), *United States v. Antelope*, 395 F.3d 1128 (9<sup>th</sup> Cir. 2005).
- <sup>51</sup> Porter, "When the Cop Becomes the Suspect: A Primer on Garrity," 36.
- <sup>52</sup> *United States v. Camacho*, 739 F.Supp. 1504 (S.D. Fla. 1990), *State v. Lacaille*, 266 NJ Super. 522, 630 A.2d 328 (N.J. Super. Ct. App. Div. 1993), 915 F.Supp. 1460 (D. Minn. 1996), *Colorado v. Sapp*, 934 P.2d 1367 (Colo. 1997), *Wisconsin v. Brockdorf*, 2006 WI 76 (Wis. 2006), *People v. Smith*, 814 N.Y.S.2d 360 (App. Div. 3<sup>rd</sup> Dept. 2006).
- <sup>53</sup> Mark Porter, "Back to the Future with Garrity," *The Peace Officer* (Winter 2006): 24.
- <sup>54</sup> 147 N.H. 606 (2002).
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*
- <sup>57</sup> *Id.*
- <sup>58</sup> *Id.*, citing *Singer v. State of Maine*, 49 F.3d 837 (1<sup>st</sup> Cir. 1995).
- <sup>59</sup> *Minnesota v. Murphy*, 465 U.S. 420 (1984).
- <sup>60</sup> 500 F.2d 411 (2<sup>nd</sup> Cir. 1974).
- <sup>61</sup> *McCune v. Life*, 536 U.S. 24 (2002).
- <sup>62</sup> *Illinois v. Bynum*, 159 Ill.App. 3d 713, 512 N.E.2d 826 (1987); *United States v. Camacho*, 739 F.Supp. 1504 (S.D.Fla. 1990); *New Jersey v. Lacaille*, 266 NJ Super. 522, 630 A.2d 328 (1993); *State v. Connor*, 124 Idaho 547, 861 P.2d 1212 (1993); *U.S. v. Najarian*, 915 F.Supp. 1460 (D.Minn., 1996);



- Hopp & Flesch, LLC v. Backstreet*, #04SC697, 2005 Colo. Lexis 1044, 23 IER Cases (BNA) 1263 (2005); *Wisconsin v. Brockdorf*, 2006 WI 76 (Wis. 2006).
- <sup>63</sup> 245 Mich. App. 695, 599 NW2d 556 (1998).
- <sup>64</sup> *People v. Coutu*, 235 Mich. App. 695, 599 N.W.2d 556 (1998) and *People v. Wyngaard*, 462 Mich. 659, 614 N.W.2d 143 (2000), both cited in Porter, "When the Cop Becomes the Suspect: A Primer on *Garrity*," 36-37.
- <sup>65</sup> Michigan Public Act 563 of 2006: Disclosures by Law Enforcement Officers.
- <sup>66</sup> 2006 WI 76 (2006).
- <sup>67</sup> *Id.*
- <sup>68</sup> *Id.* at 18.
- <sup>69</sup> *Id.*
- <sup>70</sup> Nisenon, "Garrity Rights Reviewed."
- <sup>71</sup> Will Aitchison, "The *Garrity* Rule, Part I," [www.azfop.com/alc/prGarrityRule1.htm](http://www.azfop.com/alc/prGarrityRule1.htm) (accessed April 5, 2009); Byron Warnken, "The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination," 16 *U. Balt. L. Rev.* 452 (1986-1987); 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.* 102 (2003-2004).
- <sup>72</sup> Mark Porter, "Take the *Garrity* Quiz: Do You Know Your Rights?" *The Peace Officer* (Winter 2004-2005): 14; Porter, "Back to the Future With *Garrity*," 24.
- <sup>73</sup> Clymer, "Compelled Statements from Police Officers and *Garrity* Immunity," 1362-1363.
- <sup>74</sup> McGuinness, "Fifth Amendment Protection for Public Employees: *Garrity* and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations," 709, 716.
- <sup>75</sup> 488 F.3d 489 (1<sup>st</sup> Cir. 2007).
- <sup>76</sup> James D. Hill, "The *Garrity* Warning and Public Employees," *Kansas Government Journal* (April 2008): 113.
- <sup>77</sup> McGuinness, "Fifth Amendment Protection for Public Employees: *Garrity* and Limited Constitutional Protections from Use of Employer Coerced Statements in Internal Investigations and Practical Considerations," 737.