REPORT ON

The Nomination of Merrick B. Garland to the United States Supreme Court

WWW.THEGARLANDRECORD.ORG

ALLIANCE FOR JUSTICE

About Alliance for Justice

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society.

It works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. Through research, advocacy, and public education, AFJ promotes the creation of a diverse judiciary committed to equal justice for all. In addition, AFJ's Bolder Advocacy initiative is the leading resource on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

For more information on this report, contact AFJ's Washington headquarters.

Alliance for Justice
11 Dupont Circle NW, Second Floor
Washington, DC 20036
202.822.6070

Contents

EXECUTIVE SUMMARY

Introduction

On February 13, 2016, Associate Supreme Court Justice Antonin Scalia died at the age of 79, creating a vacancy on the Supreme Court. This is the third Supreme Court vacancy to arise during President Barack Obama's administration, following the retirements of David Souter and John Paul Stevens in 2009 and 2010, respectively. After news broke of Justice Scalia's death, it took only hours for Senate Republicans to set aside their constitutional obligations and pledge to obstruct any attempt by President Obama to fill the vacancy.

But President Obama fulfilled his own constitutional obligations and selected a highly qualified and dedicated public servant as his nominee. On March 16, 2016, President Obama nominated Merrick Garland, Chief Judge of the United States Court of Appeals for the D.C. Circuit, to the Supreme Court. President Obama praised Judge Garland as "one of America's sharpest legal minds" and "someone who brings to his work a spirit of decency, modesty, integrity, even-handedness, and excellence."[1]

Judge Garland's resume is unassailable, and neatly fits the mold of the modern consensus judicial nominee. He is Ivy League educated, clerked on the Supreme Court, has experience both as a corporate lawyer and prosecutor, and, of course, currently sits on the D.C. Circuit. Of the Supreme Court's eight current justices, three came directly from the D.C. Circuit (as did Justice Scalia), and all but one (Justice Elena Kagan) served on a federal court of appeals. Two justices are former prosecutors, and all eight have an Ivy league education. Only one, Justice Ruth Bader Ginsburg, worked as a lawyer at a public interest organization (the American Civil Liberties Union), and the Supreme Court has not had a justice with significant indigent criminal defense experience since Thurgood Marshall retired in 1991.

With such pristine, mainstream credentials, Judge Garland has received bipartisan praise throughout his career. Indeed, some of the very Senate Republicans who have so far refused to hold a confirmation hearing on his nomination have also lauded Judge Garland's character and qualifications. Senator Orrin Hatch has described Judge Garland as a "consensus nominee"[2] and as someone whose "integrity," "honesty," "legal ability," and "intelligence" "cannot be questioned."[3] Senator Jeff Sessions has applauded Judge Garland as "a fine person and an able lawyer."[4]

1 *Remarks By the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court*, The White House (Mar. 16, 2016), https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme.

2 Thomas Ferraro, *Republican Would Back Garland for Supreme Court*, Reuters (May 6, 2010, 7:18 PM), http://www.reuters.com/article/us-usa-court-hatch-idUSTRE6456QY20100506.

3 143 Cong. Rec. S2516–17 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch).

4 *Id.* at S2534 (statement of Sen. Sessions).

Yet others who oppose Judge Garland's nomination have chosen to distort rather than seriously engage with his judicial record.[5] They would rather the public see only the record they present in smear campaigns and attack ads, not the record that would emerge in a full, open, and fair confirmation hearing.

This report answers such superficial distortions with comprehensive analysis.

This Alliance for Justice report evaluates the nomination of Chief Judge Merrick Garland to the Supreme Court. Our goal is to capture who Judge Garland is as a lawyer and a jurist in order to better understand who Judge Garland would be as a justice. After a thorough review of his judicial record, the primary conclusion is that, on the merits, Judge Garland is highly qualified to serve on the Supreme Court, and there is no legitimate basis for the Senate to deny him full and fair consideration. Throughout his judicial career, Judge Garland has demonstrated extraordinary intellect, fairness, humility, and an unwavering commitment to the rule of law. And across issue areas, he has been a model of judicial restraint—strictly adhering to Supreme Court precedent, avoiding sweeping proclamations when a more narrow rationale will suffice, and restricting rulings to only those issues fully briefed and properly presented to the court. Judge Garland's voluminous writings clearly establish that his approach to deciding cases is not about ideological outcomes, but about rigorous legal analysis, fully accounting for the relevant law and facts in each case.

Fully assessing Judge Garland is no small task. Judge Garland's professional career spans almost 40 years, nearly 20 years of which have been spent as a judge on the D.C. Circuit. Combined with his clerkship, law firm, and prosecutorial experience, Judge Garland has an extensive record from which to cull information.[6] Our focus is Judge Garland's record on the D.C. Circuit. Where appropriate, we include references to some of Judge Garland's extra-judicial materials, such as law review articles and responses to Questions for the Record from his D.C. Circuit nomination, but the driving force of our evaluation is the cases he has decided.

This still leaves a record consisting of hundreds of cases, not all of which may provide valuable insight into Judge Garland's views or judicial philosophy. Thus, for purposes of this report and except for two issue areas, we did not review cases in which the court issued a unanimous opinion that Judge Garland did not author. (The two exceptions to this are criminal cases and cases dealing with Guantanamo detainees and other national security issues.) This left for review cases in which (1) Judge Garland authored the opinion of the court, unanimous or otherwise; (2) another judge authored the opinion of the court that was not unanimous, meaning there was a dissent or concurrence by Judge Garland or another judge; (3) the court issued a per curiam opinion with a separate dissent or concurrence by Judge Garland or another judge; and, (4) the court denied rehearing *en banc* and one or

5 *See* Kyle Barry, *On the Clean Air Act and the EPA, Justice Scalia Agreed with Judge Garland*, Justice Watch Blog (Apr. 21, 2016), http://www.afj.org/blog/on-the-clean-air-act-and-the-epa-justice-scalia-agreed-with-judge-garland.

6 We attempted to access memoranda and other correspondence written by Judge Garland during his 1978–79 Supreme Court clerkship with Justice William Brennan. These writings are part of the collection of Justice Brennan's papers kept at the Library of Congress. We were denied access to Judge Garland's writings, but we were able to examine other papers in the collection from the term Judge Garland clerked on the Court.

more judge filed a dissent or concurrence in the denial.

This universe of about 450 cases suitably captures Judge Garland's jurisprudence for three reasons. First, it includes all of Judge Garland's written opinions, which provide insight into his substantive views, approach to judicial decisionmaking, and temperament.

Second, it captures every split decision in which Judge Garland participated. Split decisions are uniquely valuable because they involve the most closely contested issues, and, unlike unanimous decisions, necessarily involve legal questions that do not compel a uniform result. Because split decisions provide an objective basis to conclude that a case could have come out differently, they are especially useful for identifying trends and drawing distinctions between individual judges. Importantly, we always identify split decisions by the particular issue over which the court divided.

Third, these cases capture all of Judge Garland's dissents and concurrences. Majority opinions are written to build consensus and therefore typically contain straightforward and anodyne legal analysis. But judges write separately to express their own judicial philosophies and personal views of the law, making dissents and concurrences especially useful guides for evaluating an individual judge.

Our analysis of these cases is both quantitative and qualitative. Rather than present rote summaries of all the cases we reviewed, the report highlights aspects of these cases that provide insight into Judge Garland's decisionmaking, issue by issue. With a particular focus on split-panel decisions and significant opinions Judge Garland has authored, we present analysis of important topics covered by the cases and, where possible, explore any patterns or trends that emerge.

Biography

Merrick Garland was born on November 13, 1952. A Chicago native, Judge Garland is a *summa cum laude* graduate of Harvard College, where he was first in his class, and a *magna cum laude* graduate of Harvard Law School. Following law school, he clerked for Second Circuit Judge Henry Friendly and Supreme Court Justice William Brennan. Until he joined the bench in 1997, Judge Garland alternated public service as a federal prosecutor and Department of Justice official with private practice at the D.C. law firm of Arnold & Porter, where he was a partner and associate from 1981 to 1989 and 1992 to 1993. He has also taught antitrust law at Harvard Law School, and was elected to the Harvard University Board of Overseers in 2003, serving as its president from 2009 to 2010.

Following his clerkships, Judge Garland served as Special Assistant to Attorney General Benjamin Civiletti from 1979 to 1981. From 1989 to 1992, he was an Assistant U.S. Attorney for the District of Columbia, where he handled the drug investigation of then-D.C. Mayor Marion Barry. During the first term of the Clinton Administration, Judge Garland served as Deputy Assistant Attorney General in the

Criminal Division of the Department of Justice and then Principal Associate Deputy Attorney General. The capstone of Judge Garland's career as an accomplished federal prosecutor was his work following the Oklahoma City bombing in April 1995, when he directed the Justice Department's investigation and prosecution of the bombers, Timothy McVeigh and Terry Nichols. Judge Garland also oversaw the investigation and prosecution of Ted Kaczynski, the Unabomber.

In September 1995, President Clinton nominated Judge Garland to the D.C. Circuit. The Senate Judiciary Committee held his hearing in December 1995, but he was not confirmed that year. President Clinton re-nominated Judge Garland in January 1997, and the Senate confirmed him in March 1997 by a vote of 76-23. In 2013, Judge Garland became the chief judge of the D.C. Circuit.

Judge Garland is well-known as a mentor to his law clerks, and since 1998 Judge Garland has tutored elementary school students in Northeast Washington, D.C.

Overview of Chief Judge Garland's Judicial Record and Key Findings

Judge Garland once observed that, "like other judges," he and his D.C. Circuit colleagues "aspire to write opinions like those that Judge Friendly said Justice Brandeis wrote: opinions in which 'the right doctrine emerges in heavenly glory and the wrong view is consigned to the lower circle of hell.'"[7] In truth, however, Judge Garland's opinions rarely assume such stark, self-righteous tones. Instead, his judicial decisions reflect a judge who is cautious, measured, and uniquely meticulous in his legal analysis. Far from one-sided polemics, Judge Garland's opinions fairly present both sides of each issue, acknowledge thorny and debatable questions when they arise, and thoroughly explain his conclusions. They also evince a commitment to judicial restraint, not as pretext to reach a preferred outcome, but to ensure the court decides only the questions properly before it.

Consistent with this tempered approach, Judge Garland has achieved remarkable consensus throughout his time on the bench. In 19 years, he has written a total of just 16 dissents.[8] By comparison, Judge David Tatel, who has served since 1994, has written 56 dissents, and Judge Judith Rogers, who has also served since 1994, has written 66 dissents. Judge Brett Kavanaugh, who has served since 2003, has authored 47 dissents—dissenting at nearly five times the rate of Judge Garland. Moreover, out of the more than 330 majority opinions Judge Garland has authored, only 21 have garnered a separate opinion, whether a dissent or concurrence.

Below, we summarize Judge Garland's decisions across a variety of legal issues. But before doing that, it's worth noting the areas in which Judge Garland has little or no

---

7 *Holland v. Williams Mt. Coal Co.*, 496 F.3d 670, 676 (D.C. Cir. 2007) (quoting *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173–74 (D.C. Cir. 2005)); *see also* Henry J. Friendly, *Mr. Justice Brandeis – The Quest for Reason*, *in* Benchmarks 291, 294 (1967)).

8 *See* APPENDIX A

record. These include important social issues like reproductive rights and LGBTQ equality, along with affirmative action and other programs aimed at desegregating schools and diversifying public education. And while Judge Garland has an extensive criminal justice record, there are certain areas of criminal law that he has not had occasion to address or on which he has a very limited record. Such areas include the Fifth Amendment privilege against self-incrimination and the Supreme Court's related *Miranda* jurisprudence,[9] the Sixth Amendment's right to confront witnesses, and the Eighth Amendment's prohibition on cruel and unusual punishment as applied to the death penalty.

Finally, Judge Garland also lacks a meaningful record on religious freedom, whether under the First Amendment's Free Exercise Clause or the Religious Freedom Restoration Act. In fact, one of his few writings on Free Exercise is a nearly forty-year-old memo that then-law clerk Merrick Garland wrote to his boss, Justice Brennan, during the 1978 Supreme Court term. In *NLRB v. Catholic Bishop*,[10] the Supreme Court held 5-4 that the National Labor Relations Act does not apply to lay teachers at schools operated by churches. The majority—which consisted of Chief Justice Warren Burger and Justices Potter Stewart, Lewis Powell, William Rehnquist, and John Paul Stevens—decided the matter on statutory grounds, and did not reach the question of whether, if the NLRA did apply and guarantee collective bargaining for such teachers, it would violate the Free Exercise Clause.

Justice Brennan dissented (joined by Justices Byron White, Thurgood Marshall, and Harry Blackmun), and before the decision came down Judge Garland prepared drafts for his review. In a memo accompanying the drafts, Judge Garland advocated dissenting on statutory grounds alone and not reaching the constitutional question. While his boss sided with the teachers over the religious schools, Judge Garland's explanation showed sensitivity to the implications for religious freedom:

> I'm not sure that the constitutional problem is really as easy as I make it sound in Option I. The real difficulty, in my view, is that even if there is no constitutional problem with a collective bargaining order per se, and even if we trust the [NLRB] to be sensitive in its treatment of teacher dismissals and mandatory bargaining subjects, there may still be a considerate chill on the religious authorities' exercise of their religious beliefs. They may fear to fire a heretic, or to exclude teachers from decisions of religious policy, simply because they fear extensive litigation and insensitivity on the part of the [NLRB]. A decision on our part to wait to decide such matters until they find their way to this Court may not be sufficient—the chill during the delay may be the very encroachment on religious freedom that should be of concern.[11]

Justice Brennan took his law clerk's advice, and concluded his dissent noting that: "Under my view that the NLRA includes within its coverage lay teachers employed

9 *See Miranda v. Arizona*, 384 U.S. 436 (1966); *see also United States v. Jones*, 567 F.3d 712 (D.C. Cir. 2009) (Maj. Op. by Judge Garland) (applying *Miranda*'s "public safety" exception).

10 440 U.S. 490 (1979).

11 The Papers of Justice William Brennan, Part I: Case File, 1956-1990; Box I:475, 77-752.

by church-operated schools, the constitutional questions presented would have to be reached. I do not now do so only because the Court does not."[12]

Turning to the issues analyzed in the report:

i | *Access to Civil Justice*

A defining feature of Justice Scalia's legacy is the role he played in closing the courthouse doors for everyday Americans like workers and consumers.[13] In contrast, Judge Garland's record shows that he values fair and open courts, and takes seriously the role that courts play in providing equal justice. In divided opinions, he has been reluctant to broaden doctrines that limit court access. For example, dissenting in *Saleh v. Titan Corporation*,[14] Judge Garland argued that the court improperly extended sovereign immunity to private military contractors accused of abusing and torturing Iraqi nationals at Abu Graib prison. Judge Garland has also argued for a relatively permissive approach to the standing requirement, which is often a threshold issue in cases brought to protect the environment, animal welfare, and public health.[15]

When defendants challenge the timeliness of claims, Judge Garland has shown a concern for fairness over technicalities, and has thoroughly considered the nature of legal claims and factual allegations before dismissing a case as time barred. In *Anderson v. Zubieta*,[16] for example, Judge Garland held that a Title VII wage discrimination claim was timely under a "continuing violation" theory, and Justice Ruth Bader Ginsburg later cited the case when she dissented in *Lilly Ledbetter v. Goodyear Tire & Rubber Company*.[17] Judge Garland has also defended the Seventh Amendment right to a jury trial when district courts prematurely dispose of claims via motions to dismiss or for summary judgment. In one instance, he admonished: "We understand why district courts may want to alleviate their crowded dockets by disposing quickly of cases that they believe cannot survive in the long run. But . . . this may not be accomplished by employing heightened pleading standards except in those cases specifically listed in [the Federal Rules]."[18]

ii | *Civil Rights*

Many of Judge Garland's civil rights cases have turned not on the merits of the claims, but on "access to courts" issues like immunity, statutes of limitations, and summary judgment. As a result, a substantial part of Judge Garland's civil rights record is that he has protected the rights of plaintiffs to have their day in court, thereby ensuring that courts are able to provide justice for victims of unlawful discrimination.

---

12 *Catholic Bishop of Chicago*, 440 U.S. at 518.

13 *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

14 580 F.3d 1 (D.C. Cir. 2009).

15 *See, e.g., Animal Legal Defense Fund v. Glickman*, 154 F.3d 436 (D.C. Cir. 1998) (*en banc*) (holding that plaintiff who alleged "aesthetic injury" from viewing animals kept under inhumane conditions had standing to challenge the governing USDA regulations).

16 180 F.3d 329 (D.C. Cir. 1999).

17 550 U.S. 618 (2007).

18 *Sparrow v. United Airlines*, 216 F.3d 1111, 1118 (D.C. Cir. 2000).

Judge Garland's record on substantive civil rights is limited. His record consists mainly of statutory rather than constitutional civil rights claims, and most of the cases involve claims of employment discrimination under Title VII or other federal antidiscrimination laws such as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). But regardless of the statute at issue, Judge Garland's opinions embrace the broader view that, as the Supreme Court has explained, our civil rights laws must be applied as "part of an ongoing congressional effort to eradicate discrimination in the workplace," as they "reflect[] a societal condemnation of invidious bias in employment decisions."[19]

Judge Garland's majority opinion in *Miller v. Clinton* reflects this understanding.[20] There, it was undisputed that the State Department terminated the plaintiff because he turned 65 years old, which typically is a flagrant violation of the ADEA. The only question was whether another statute, the Basic Authorities Act, exempted the plaintiff from the ADEA's protection. Finding that the ADEA applied (over Judge Kavanaugh's dissent), Judge Garland stressed the purpose and importance of the statute, noting that it is "one of the signature pieces of legislation prohibiting discrimination in the workplace," and that its "sweeping mandate 'broadly prohibits arbitrary discrimination in the workplace based on age.'"[21] He also noted the severe implications for civil rights more broadly if the State Department prevailed: "the necessary consequences of the Department's position is that it is also free from any statutory bar against terminating an employee . . . solely on account of his race or religion or sex."[22] Judge Garland could not conclude that "Congress meant to exempt [a class of U.S. citizens] from the . . . entire edifice of its antidiscrimination canon."[23]

Outside the employment context, Judge Garland has written notable opinions protecting the housing rights of low-incoming tenants, and upholding a jury verdict for a prisoner who suffered repeated sexual harassment and successfully sued the District of Columbia.[24]

iii | *Administrative Law*

Administrative law is a staple of the D.C. Circuit's docket, and in this section the report provides an overview of Judge Garland's voluminous record on the issue. It also includes Judge Garland's record on the environment, public health, labor law, and workplace safety, because the vast majority of such cases involve judicial review of agency action.

On the whole, the theme of Judge Garland's administrative record is deference. Under Supreme Court precedent, judicial review of agency action is cabined by several deference doctrines, including "*Chevron* deference," which applies when

19 *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).
20 687 F.3d 1332 (D.C. Cir. 2012).
21 *Id.* at 1336 (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978)).
22 *Id.* at 1335.
23 *Id.* at 1338.
24 *See Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008); *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000).

agencies interpret the statutes they administer. Judge Garland's fidelity to deference can be seen both in his opinions (for example, he has explicitly applied *Chevron* deference over his own interpretive preference[25]), and in a quantitative review of his split-panel cases. We identified 15 decisions in Judge Garland's record that divided over a question of administrative law, and Judge Garland sided with the agency in all 15.[26] These include seven of the 16 dissents Judge Garland has written in his entire career. When Judge Garland *has* ruled against agencies, it has more often been in favor of challenges brought in the interests of the environment, public health, or workers (as opposed to industry or management).[27]

In the labor law context, deference has led to favorable outcomes for unions and workers. Judge Garland has written 22 majority opinions involving challenges to NLRB decisions, and all 22 are at least mostly favorable to the union.[28] In 18 cases Judge Garland entirely upheld NLRB findings of unlawful employment practices; in two of the cases he upheld NLRB determinations favorable to the union and rejected NLRB findings favorable to management;[29] in one case, *Pioneer Hotel, Inc. v. NLRB*,[30] his ruling was mostly favorable to the union; and the one decision against the NLRB outright, *UFCW, Local 400 v. NLRB,* favored the union.[31] Judge Garland also dissented in three NLRB cases,[32] and in each case he dissented from a ruling that overturned NLRB findings of unlawful labor practices.

Beyond this quantitative analysis, a close reading of Judge Garland's labor opinions reveals a serious effort to consider the realities of the workplace and the real-world circumstances of American workers. This is of special importance given the extent to which such insight has been lacking on the Supreme Court. When the Supreme Court made it harder for employees to sue for workplace harassment in *Vance v. Ball State*,[33] Justice Ruth Bader Ginsburg's dissent blamed a conservative majority "blind to the realities of the workplace."[34] She levied a similar criticism when the Court raised the bar for proving unlawful retaliation,[35] and when it interpreted Title VII's limitations period in a way that immunized decades of unlawful gender

25 *See, e.g., Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292 (D.C. Cir. 2013).

26 *See* APPENDIX B.

27 *See, e.g., Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007) (ruling in favor of a commercial motor vehicle operators association, and invalidating a rule issued by the Federal Motor Carrier Safety Administration on the number of work hours permissible for long-haul truck drivers); *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004) (agreeing with Sierra Club that EPA was unauthorized to grant conditional approval of ozone state implementation plans); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2002) (finding that FCC approval of new communications towers failed to comply with National Environmental Policy Act and the Endangered Species Act); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (finding that the Fish & Wildlife Service violated the Endangered Species Act when it issued to a residential developer an "incidental take permit" for the endangered Delmarva fox); *UFCW, Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000) (finding additional unfair labor practices that the NLRB declined to find).

28 *See* APPENDIX C.

29 *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804 (D.C. Cir. 2007).

30 182 F.3d 939 (D.C. Cir. 1999).

31 222 F.3d 1030 (D.C. Cir. 2000).

32 *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009); *Ross Stores v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001); *Northeast Beverage Corp. v. NLRB*, 554 F.3d 133 (D.C. Cir. 2009).

33 133 S. Ct. 2434 (2013).

34 *Id.* at 2457 (Ginsburg, J., dissenting).

35 *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting) (accusing majority of interpreting Title VII in a way that "lacks sensitivity to the realities of life at work.").

discrimination.[36] It is true that in his legal career before the bench Judge Garland did not represent workers in labor disputes, but his record suggests he at least believes that the law's impact on real people is worthy of the Court's consideration.

Deference to the Environmental Protection Agency has also led to favorable outcomes for environmental interests. Two such cases are notable because they were later decided by the Supreme Court. In *American Trucking Association v. EPA*,[37] Judge Garland joined a dissent from a denial of rehearing *en banc* that was later vindicated by a unanimous Supreme Court (including Justice Scalia).[38] Judge Garland took the position, and the Supreme Court agreed, that the Clean Air Act had properly delegated to EPA the task of setting air quality standards. In *White Stallion Energy Center, LLC v. EPA*,[39] Judge Garland joined a per curiam decision (Judge Kavanaugh dissented) that upheld EPA's regulation of mercury emissions from coal and oil-fired power plants. The Supreme Court reversed in a 5-4 opinion, reasoning that EPA had not adequately considered the costs to industry before enacting the regulation.

iv | *National Security and Detainee Rights*

On the rights of detainees held at Guantanamo Bay, Judge Garland's decisions are mixed. He has not always ruled against detainees, but on the whole he has more often deferred to the government. Judge Garland has never voted in favor of a detainee on the merits of a habeas claim. Overall, we identified 13 cases in which Judge Garland voted on the merits of a Guantanamo detainee's petition for relief (whether grounded in habeas, a challenge to enemy combatant status under the Detainee Treatment Act, or appeal of a military commission conviction), and just once, in *Parhat v. Gates*,[40] did he substantially rule in favor of the detainee.[41] Importantly, Judge Garland is not an outlier in this respect; in only one of the 13 cases did the court divide on the merits.[42]

Judge Garland has also been part of numerous decisions that restrict detainees' access to judicial relief in federal court. Such rulings include overturning a district court grant of habeas,[43] finding that federal courts lack statutory jurisdiction to consider Guantanamo habeas petitions[44] (a decision with which the Ninth Circuit disagreed and the Supreme Court later overturned),[45] imposing pro-government evidentiary rules and

---

36 *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting) ("The realities of the workplace reveal why" the Court's decision is in error).

37 195 F.3d 4 (D.C. Cir. 1999).

38 *See* Kyle Barry, *On the Clean Air Act and the EPA, Justice Scalia Agreed with Judge Garland*, Justice Watch Blog (Apr. 21, 2016), http://www.afj.org/blog/on-the-clean-air-act-and-the-epa-justice-scalia-agreed-with-judge-garland.

39 748 F.3d 1222 (D.C. Cir. 2012).

40 *Parhat*, 532 F.3d 834.

41 *See* APPENDIX D.

42 *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).

43 *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011).

44 *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *overturned by Rasul v. Bush*, 542 U.S. 466 (2004).

45 *See Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

burdens of proof,[46] and upholding a security policy that required detainees to submit to invasive searches of their genital area before and after meeting with counsel.[47]

v | *FOIA*

Judge Garland's Freedom of Information Act opinions show that, in general, he has broadly applied FOIA to "inform citizens about 'what their government is up to.'"[48] That includes procedural decisions that protect requestors' access to fee waivers, expedited requests, and attorney's fees, as well as substantive decisions that narrowly apply FOIA exemptions and other doctrines that might limit disclosure. Judge Garland is more likely to defer to the government when information is withheld for national security reasons, but even then there are exceptions, and he has written important opinions requiring disclosure.

For example, in *ACLU v. CIA*,[49] Judge Garland wrote a unanimous and unusually pointed opinion favoring disclosure of information related to American drone strikes. The CIA took the position that it would not even confirm the existence of responsive records, let alone produce them. Judge Garland called this stance "indefensibl[e]," and sharply rebuked the Agency for playing coy with the court. "The defendant is, after all, the Central *Intelligence* Agency," he wrote. "And it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes[.]"[50] He added: "There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men and women. We are at that point with respect to the question of whether the CIA has any documents regarding the subject of drone strikes."[51]

vi | *Criminal Law*

A quantitative review of Judge Garland's criminal cases shows that, on the few occasions when there has been disagreement on the court, he has tended to favor the prosecution over criminal defendants. Judge Garland has participated in 14 split decisions involving criminal law (out of 206 total criminal cases), and in 11 of them Judge Garland's vote favored the government over the criminal defendant.[52] Judge Garland wrote dissents in four of the divided criminal cases, all of which came in cases where the majority opinions were favorable to criminal defendants.

For example, in *United States v. Spinner*,[53] Judge Garland dissented from the court's decision to reverse a conviction based on findings that (a) the government failed to prove that the AR-15 the defendant was accused of possessing was in fact a semiautomatic assault weapon as defined by statute, and (b) some of the evidence used by

---

46 *See, e.g., Awad v. Obama*, 608 F.3d 1, 7-11 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010).

47 *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014).

48 *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1194 (D.C. Cir. 2004) (Garland, J., dissenting in part) (quoting *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

49 710 F.3d 422, 425 (D.C. Cir. 2013).

50 *Id.* at 430 (emphasis in the original).

51 *Id.* at 431 (internal quotation marks and citation omitted).

52 *See* APPENDIX E.

53 152 F.3d 950 (D.C. Cir. 1998).

the government to tie the defendant to drug dealing was inadmissible under the rules of evidence. In *Valdes v. United States*,[54] Judge Garland's dissent argued that the court's narrow definition of what official acts fell within the scope of an anti-bribery statute had the potential to undermine the prosecution of other public corruption crimes. In *United States v. Watson*,[55] Judge Garland dissented from the court's decision to reverse the defendant's drug conviction based on the prosecutor's error during closing arguments, arguing that reversing a conviction in these circumstances should only be reserved for "the most egregious of cases."

In Fourth Amendment cases, Judge Garland has pursued a narrow approach that avoids expanding doctrine when not necessary to decide the case. For example, in *United States v. Johnson*,[56] the government urged the court to adopt a new rule that would have allowed police officers to conduct a *Terry* stop when reasonable suspicion was based solely on a parking violation and not a traffic violation. Judge Garland declined to adopt the rule, holding instead that the case presented other circumstances besides the parking violation that amounted to reasonable suspicion sufficient to support a *Terry* stop. And in *United States v. Bowman*,[57] Judge Garland declined to rule on the constitutionality of a police checkpoint, instead remanding the case back to the district court for additional fact finding.

Also on the Fourth Amendment, Judge Garland elicited a dissent from Judge Rogers in *United States v. Brown*[58] on whether police had reasonable suspicion to search the defendant, who was in a vehicle parked near where officers were conducting an investigation. Judge Garland upheld the search, but Judge Rogers criticized Judge Garland's reasoning, arguing that the circumstances showed only that the defendant was in the wrong place at the wrong time, not engaged in wrongdoing.[59]

On issues of substantive criminal law, Judge Garland addressed the interpretation of criminal statutes in several cases, at times siding with interpretations that made it harder to convict a defendant and at times siding with interpretations that made it easier to convict.[60] For example, in *United States v. Crowder*,[61] Judge Garland joined the court's majority opinion that interpreted the Federal Rules of Evidence to make it easier for the prosecution to introduce evidence of a defendant's past wrongdoing ("bad acts") during trial.

The majority of sentencing decisions Judge Garland has authored or joined have rejected defendants' challenges to their sentences, exhibiting a large degree of deference to the sentencing court that is not unusual at the appellate level.

---

54 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*).

55 171 F.3d 695, 704 (D.C. Cir. 1999) (Garland, J., dissenting).

56 519 F.3d 478 (D.C. Cir. 2008).

57 496 F.3d 685 (D.C. Cir. 2007).

58 334 F.3d 1161 (D.C. Cir. 2003).

59 *Id.* at 1176 (Rogers, J., dissenting).

60 *Compare United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010) (holding that proof of intent was required to establish liability under a statute that criminalized paying a government employee for doing official work), *with United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (*en banc*) (holding that no *mens rea* was required for weapons element of violent crime offense).

61 141 F.3d 1202 (D.C. Cir. 1998) (*en banc*).

Notwithstanding this general deference, Judge Garland has also sided with defendants when the lower court was clearly out of line. *In re Sealed Case*,[62] is a good example. The defendant in the case, a 56 year-old drug addict, pleaded guilty to heroin distribution and was sentenced to 132 months in prison. (A career-offender sentencing enhancement increased his original sentencing range from 24-30 months to 151-188 months.) The defendant appealed his sentence, arguing that the district court imposed a longer prison term by improperly treating imprisonment as a means of promoting rehabilitation. Judge Garland joined Judge Tatel's majority opinion vacating the defendant's sentence and remanding for resentencing.[63] The majority acknowledged a circuit split on the issue and endorsed the circuits that prohibit sentencing courts from imposing a longer prison term to promote rehabilitation.

vii | *Other Constitutional Issues: First Amendment, Second Amendment, Substantive Due Process, and Challenges to Federal Power*

This section covers the constitutional issues outside criminal procedure that appear in Judge Garland's record. These include the First Amendment, Second Amendment, Substantive Due Process and "new" constitutional rights, and challenges to federal Commerce Clause power.

Under Chief Justices William Rehnquist and John Roberts, the Supreme Court has scaled back Congress's power under the Commerce Clause to enact legislation addressing societal ills. Judge Garland has not followed that trend. In *Rancho Viejo, LLC v. Norton*,[64] Judge Garland held that the Endangered Species Act (ESA), enacted under Congress's Commerce Clause authority, could restrict a housing development project due to possible encroachment on an endangered species of toad. The housing development company argued that since the purpose of the ESA was not related to commerce, the provision in question could not be upheld. Judge Garland disagreed, noting plenty of other laws—in particular, Civil Rights legislation—where Congress legislated against "moral wrongs" but the Supreme Court nevertheless upheld the legislation as a proper exercise of Commerce Clause power. When the D.C. Circuit declined to rehear the case *en banc*, then-Judge Roberts filed a dissent arguing that the activity being regulated—the encroachment of a "hapless toad" habitat—had no effect on interstate commerce, and that other grounds should be considered instead to uphold the regulation.[65]

Judge Garland has also written outside of his judicial opinions to criticize judicial overreach in striking down economic regulations. In response to Questions for the Record submitted by Senator Chuck Grassley on Judge Garland's D.C. Circuit nomination, Judge Garland decried the *Lochner* era of the Supreme Court as a damaging period in the judiciary's history. Judge Garland also raised the specter of *Lochner* in his 1987 law review article, *Antitrust and State Action: Economic Efficiency and*

62 573 F.3d 844 (D.C. Cir. 2009).

63 *In re Sealed Case*, 573 F.3d 844, 846 (D.C. Cir. 2009).

64 323 F.3d 1062 (D.C. Cir. 2003).

65 *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

the Political Process.[66] Writing on the topic of using antitrust law to preempt state economic regulation, Judge Garland warned that allowing such misuse of antitrust law threatened non-economic regulations as well, and would result in swapping out *Lochner* for antitrust law as a means for judicial activism.

In the area of Substantive Due Process, Judge Garland was confronted with a fundamental right claim in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*.[67] The plaintiffs were terminally ill patients who argued they had a fundamental right to access experimental drugs and medical treatments that were not yet approved by the FDA. Judge Garland sided with the court's majority in determining that the plaintiffs were not asserting a fundamental right that was "deeply rooted" in the nation's history. Judge Rogers, in dissent, took a broader approach and argued that the right at stake was "the right to preserve life,"[68] which the Supreme Court had already held to be fundamental in other medical contexts.

Judge Garland has decided no Second Amendment cases. While Judge Garland voted for rehearing *en banc* in *Parker v. District of Columbia*[69]—the precursor to the Supreme Court's landmark *District of Columbia v. Heller*[70] decision—his vote tells us nothing about how he would have ruled on the merits of the case. The same could be said of another Second Amendment case, *Seegars v. Gonzales*,[71] where Judge Garland voted to deny rehearing *en banc* after a divided panel held that the plaintiffs lacked standing to challenge a pistol ban.[72] The only case tangentially related to gun rights that Judge Garland decided was *NRA of America, Inc. v. Reno*,[73] in which the court upheld DOJ rules that required information from gun background checks to be retained in an audit log for no more than six months. The Department of Justice under Attorney General John Ashcroft agreed that "[t]he court of appeals decision [in *Reno*] is correct."[74]

Finally, Judge Garland's approach to First Amendment rights varies with context. For example, in cases where the right of petition (*Initiative & Referendum Institute v. United States Postal Service*[75]) or the freedom of the press (*Lee v. DOJ*[76] and *Boehner v. McDermott*[77]) was at stake, Judge Garland wrote in strong defense of those rights. Judge Garland has been less willing to extend First Amendment rights to commercial speech, as demonstrated by *American Meat Institute v. U.S. Department of Agriculture*,[78] a case where Judge Garland upheld the forced disclosure of product information.

---

66 96 Yale L.J. 486 (1987).

67 495 F.3d 695 (D.C. Cir. 2007) (*en banc*).

68 *Id.* at 714 (Rogers, J., dissenting).

69 No. 04-7041, 2007 U.S. App. LEXIS 11029 *1 (D.C. Cir. May 8, 2007) (per curiam) (denial of petition for rehearing *en banc*).

70 554 U.S. 570 (2008).

71 413 F.3d 1 (D.C. Cir. 2005) (per curiam) (denial of petition for rehearing *en banc*).

72 *See Seegars v. Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005).

73 216 F.3d 122 (D.C. Cir. 2000).

74 Letter from Erwin Chemerinksy et al. to The Hon. Charles Grassley and The Hon. Patrick Leahy, (Mar. 31, 2016), http://www.acslaw.org/sites/default/files/Scholar%20Letter%20to%20Senate%20Judiciary%20Committee.pdf.

75 417 F.3d 1299 (D.C. Cir. 2005).

76 428 F.3d 299 (D.C. Cir. 2005).

77 484 F.3d 573 (D.C. Cir. 2007) (*en banc*).

78 *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).

In the context of campaign finance regulations, the Supreme Court's distinction between contributions and independent expenditures largely informs Judge Garland's decisions. Accordingly, Judge Garland joined the unanimous *en banc* opinion in *SpeechNow.org v. FEC*[79] that paved the way for Super PACs by striking down FEC rules limiting donations to independent expenditure-only political action committees. On the other hand, in *Wagner v. FEC*,[80] Judge Garland upheld campaign contribution bans on federal contract workers. Similarly, Judge Garland upheld lobbyist disclosure requirements in *National Association of Manufacturers v. Taylor*,[81] and in doing so, followed Supreme Court precedent that looks favorably on disclosure requirements as a means of campaign finance regulation.

79 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

80 793 F.3d 1 (2015) (*en banc*).

81 582 F.3d 1 (D.C. Cir. 2009).

CHIEF JUDGE GARLAND ON THE ISSUES

Access to Civil Justice

"Equal justice under law," engraved on the façade of the Supreme Court, is the great promise of our federal courts. Americans depend on the courts to apply the law fairly, without regard to wealth, social status, or political power. In court, distinct from the other branches of government, individuals can vindicate their rights against even the most powerful of wrongdoers, including governments and wealthy corporations. In *Marbury v. Madison*, Chief Justice John Marshall captured this judicial role when he wrote that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[82]

As the place where we "claim the protection of laws," courts give meaning to our legal rights, and without a judicial remedy for violations, rights are diluted and left ineffective. In many cases, then, the key question is whether a court will hear a claim in the first place, or whether, having found a rights violation, a court will provide a proper remedy. Barriers to court access take myriad forms, including procedural bars like statutes of limitations, motions to dismiss and motions for summary judgment, restrictions on class actions, and questions of justiciability—that is, whether a claim is appropriate for court resolution.

A defining feature of Justice Scalia's legacy is the role he played in closing the courthouse doors for everyday Americans, including employees and consumers. He wrote the 5-4 opinion in *Wal-Mart v. Dukes* that disbanded a nationwide class of women who alleged systemic gender discrimination in pay and promotions, and, going forward, left it far more difficult for workers to hold corporations accountable for widespread discrimination.[83] He also wrote the 5-3 decision in *American Express v. Italian Colors* (Justice Sotomayor recused), which held that corporate defendants can kick class claims out of court and into individual arbitration proceedings, even when there is no dispute that arbitration is, as Justice Kagan wrote in dissent, "a fool's errand."[84] The ruling allows corporations to avoid the civil justice system via binding arbitration clauses in the fine print of their contracts, meaning "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[85] In these cases and others,[86] Justice Scalia led a conservative majority that created new barriers to access, chipping away at that "very essence of civil liberty" for the benefit of powerful defendants who might otherwise face justice in court.

82 *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

83 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

84 *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013 (Kagan, J., dissenting).

85 *Id.*

86 *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

Below, we analyze Judge Garland's record on the range of access to civil justice issues that came before him on the D.C. Circuit. Notably absent are decisions that illuminate his views on class actions and the use of binding arbitration clauses in employee and consumer contracts—both critical access issues on which the Roberts Court has issued numerous decisions. On the whole, Judge Garland's record shows that he values fair and open courts, and takes seriously the vital role that courts play in providing equal justice and enforcing both statutory and constitutional rights. In divided opinions, he has shown reluctance to broaden doctrines that limit access to courts, and has safeguarded the Seventh Amendment right to a jury trial. Yet he also respects separation of powers and the limited role of the judiciary, carefully and thoroughly analyzing questions of justiciability to ensure that courts do not exceed their constitutional authority and encroach upon the executive and legislative branches.

Justiciability

Broadly defined, the category of "justiciability" includes issues like standing and mootness, political questions, and immunity from suit—particularly the sovereign immunity of the United States and foreign governments. All relate to the question of whether a claim or dispute is proper for judicial resolution.

Two split decisions, *Saleh v. Titan Corporation* and *Howard v. Chief Administrative Office of the U.S. House of Representatives*, illustrate how Judge Garland conducts rigorous analyses and demands specific justification before expanding immunity doctrines.

In *Saleh*,[87] Iraqi nationals sued two American military contractors, alleging torture and abuse in Abu Graib prison. A divided D.C. Circuit panel, in an opinion by Judge Laurence Silberman, held that the plaintiffs' tort claims were barred by the Federal Tort Claims Act (FTCA),[88] the statute that governs the federal government's waiver of sovereign immunity. While the FTCA generally waives immunity in this type of situation, the majority found that the Iraqis' tort claims were subject to an exception for "any claim arising out of the combatant activities of the military or armed services . . . during time of war," even though the FTCA excludes "contractors with the United States." Despite this caveat in the statute, the court held that "when a contractor's individual employees under a service contract are integrated into a military operation mission, the contractor should be regarded as an extension of the military for immunity purposes,"[89] and dismissed the plaintiffs' tort claims preempted by the FTCA.

The majority's holding expanded the Supreme Court's decision in *Boyle v. United Technologies Corporation.*[90] There, the family of a marine pilot who was killed in a helicopter accident brought a state tort claim against the contractor who designed the door of the helicopter. The Supreme Court held that an FTCA exception—the exception that maintains immunity for the performance of "discretionary

87 580 F.3d 1 (D.C. Cir. 2009).
88 *See* 28 U.S.C. § 2680.
89 *Saleh*, 580 F.3d at 5.
90 487 U.S. 500 (1988).

functions"—barred the tort action because the allegedly defective door was designed in accordance with Department of Defense specifications.

In *Saleh,* Judge Garland dissented and argued that "a straightforward application of *Boyle*" would not bar the Iraqis' claims. "[W]e should hesitate to extend *Boyle* beyond the scope of the discretionary function exception and [the] . . . rationale . . . relied upon in that case," he wrote.[91] Judge Garland distinguished the allegations in *Boyle*—where the tort action was in direct conflict with the performance of a government contract—from the "brutality the plaintiffs allege[d]" in *Saleh,* which was not "authorized or directed by the United States."[92] Finally, even if *Boyle* were properly extended to cover the "combatant activities" of government contractors, Judge Garland argued that the panel's decision in this case went too far: Any extension "must be carefully tailored so as to coincide with the bounds of the federal interest protected," and at a minimum contractors granted sovereign immunity should "be under the military's control," which wasn't true of those who allegedly abused and tortured Iraqi prisoners at Abu Graib.[93]

In *Howard,*[94] another 2-1 decision, Judge Garland joined the majority and rejected arguments that the Constitution's Speech or Debate Clause barred an employment discrimination suit against the Chief Administrative Officer of the House of Representatives (CAO). The Speech or Debate Clause creates immunity from liability for legislative acts,[95] and serves as an evidentiary privilege that bars inquiry into the motivations of or activities related to legislative acts. Yet the Clause "does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions, or because it is merely related to, as opposed to part of, the due functioning of the legislative process."[96]

The plaintiff in *Howard,* an African American woman and former Budget Director for the CAO, sued the CAO for allegedly demoting and later firing her because of race. In allowing the suit to proceed, Judge Harry Edwards (joined by Judge Garland) first explained that the CAO was not immune from liability because neither plaintiff's demotion nor termination were themselves "legislative acts." The court then drew a careful distinction between inquiring into the facts of legislative activities (which the Speech or Debate Clause prohibits), and assessing whether the proffered reasons for demotion and termination were mere pretext. The CAO had argued that the plaintiff was both demoted and fired for poor job performance, including duties related to legislative acts. The court conceded that the plaintiff was barred from proving that the poor performance evaluations were untrue (since that would require a probe into privileged activity), but held that she *could* attempt to prove that she was in fact demoted for entirely different, unlawful reasons. In other words, while the nature and quality of plaintiff's work were off limits, the CAO's true motive, and whether it differed from the one given, was not.

---

91 *Saleh*, 580 F.3d at 21 (Garland, J., dissenting).

92 *Id.* at 34.

93 *Id.* at 33.

94 *Howard v. Chief Admin. Officer of the U.S. House of Reps,* 20 F.3d 939 (D.C. Cir. 2013).

95 U.S. Const. Art. I, § 6, cl. 1.

96 *Fields v. Office of Johnson*, 459 F.3d 1, 10 (D.C. Cir. 2006).

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*,[97] Judge Garland denied immunity to a foreign sovereign accused of terrorism. After the United States conducted airstrikes over Tripoli in 1986, the Libyan-sponsored terror group Arab Revolutionary Cells (ARC) responded by purchasing American hostage Peter Kilburn from Hizbollah before torturing and killing him. In the resulting civil suit, Libya claimed immunity under the Foreign Sovereign Immunities Act, and argued that the "terrorism exception" to immunity did not apply because (a) Libya was not the "but for" cause of Kilburn's murder, and (b) it was not alleged that Libya directly funded ARC's purchase of Kilburn, only that Libya provided ARC with material support.

Writing for a unanimous panel, Judge Garland, as he did in both *Saleh* and *Howard*, rejected the invitation to broadly apply immunity. First he held that the terrorism exception to immunity does not require "but for" causation. He noted the hypothetical case "in which multiple foreign states claim to be providing only 'general support.' Such a case, in which application of a 'but for' standard to joint tortfeasors could absolve them all, is precisely the one for which courts generally regard 'but for' causation as inappropriate."[98] Next, Garland expressed doubt that the plaintiff was required "to allege . . . that Libya directly funded ARC's purchase, torture, and murder of Peter Kilburn," but noted that the issue need not be resolved. "The plaintiff does not allege that Libya merely provided material support to ARC," he wrote, "but rather that it specifically funded and directed Peter Kilburn's purchase and murder. Indeed, the plaintiff's claims rest not only on a theory of material support, but also on a theory of agency . . . that ARC was . . . an 'agent' of Libya."[99]

* * *

As with claims of immunity, Judge Garland carefully assesses challenges to standing to ensure that plaintiffs are not improperly denied judicial relief. With its heavy docket of administrative law cases, the D.C. Circuit plays a uniquely important role on the issue of standing, which is often a threshold issue in cases involving environmental protections, animal welfare, public health, and other challenges to agency action. In deciding these cases, the D.C. Circuit sets precedent that, while not binding, guides federal courts in other circuits around the country. A trio of split-panel decisions illustrate both the high stakes of the D.C. Circuit's standing jurisprudence, and Judge Garland's relatively permissive approach to the standing requirement.

In *Animal Legal Defense Fund v. Glickman*,[100] Judge Garland joined an *en banc* majority that found standing to challenge the Department of Agriculture's (USDA) regulation of animal exhibitors. The plaintiff alleged an "aesthetic injury" sustained during regular visits to an animal farm where he observed primates living under inhumane conditions. The plaintiff had complained about the conditions to the USDA on numerous occasions, but while the agency inspected the animal farm, it never found relevant regulatory violations and therefore never ordered compliance as the plaintiff requested.

97 376 F.3d 1123 (D.C. Cir. 2004).
98 *Id.* at 1129.
99 *Id.* at 1130.
100 154 F.3d 426 (D.C. Cir. 1998) (*en banc*).

Eventually the plaintiff filed suit, alleging that his "aesthetic injury" was caused by inadequate and unlawful USDA regulations that permitted the inhumane conditions. If the agency met its regulatory obligations, he argued, then the poor conditions would be prohibited and he would no longer suffer injury upon viewing the animals.

Judge Garland joined Judge Patricia Wald's opinion finding, over Judge David Sentelle's dissent, that the plaintiff satisfied all three elements of standing—injury in fact, causation, and redressability. While it is insufficient to claim injury based on an abstract interest in seeing the law enforced, the court recognized that the plaintiff "suffered his injury in a personal and individual way . . . by seeing with his own eyes the particular animals whose condition caused him aesthetic injury."[101] In dissent, Judge Sentelle tried to cabin aesthetic injuries to only those caused by the diminution of an animal population or natural resource (loss of quantity), as distinct from despoliation of environmental areas or deterioration of habitat conditions (loss of quality). The court rejected that distinction as illogical and without support in precedent: "it does not make sense, as a matter of logic, to suppose that people suffer aesthetic injury from government action that threatens to wipe out an animal species altogether, and not from government action that leaves some animals in a persistent state of suffering."[102]

The plaintiff established causation because he alleged an injury from observing conditions that the USDA regulations permitted: "the causation requirement . . . is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise."[103] Given that connection between the plaintiff's injury and the USDA regulations, redressability was met because "more stringent regulations, which prohibit the inhumane conditions . . . would necessarily alleviate [the plaintiff's] aesthetic injury during his . . . future trips to the Game Farm."[104] Judge Sentelle thought the concept of "inhumane conditions" too subjective, and the plaintiff's injury too "fuzzy," for this reasoning; he argued it was unknowable whether enhanced, lawful regulations would satisfy the plaintiff's aesthetic tastes.[105]

Glickman is perhaps most notable for ensuring that the concept of "aesthetic injury" was not artificially narrowed to limit access to judicial remedies. In addition to cases brought to protect animal welfare, environmental groups often rely on claims of aesthetic injury to establish standing. *Glickman* later found support in subsequent Supreme Court cases which recognized that "the mere esthetic interests of the plaintiff . . . will suffice" to establish an injury,[106] and in a 2003 D.C. Circuit opinion, written by Judge Raymond Randolph, explaining that "injury in fact can be found when a defendant adversely affects a plaintiff's enjoyment of flora or fauna."[107]

---

101 *Id.* at 433; *see also Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 886 (1990) (finding there was "no doubt" of an aesthetic injury for plaintiffs who challenged federal action that allegedly "threatened the aesthetic beauty and wildlife habitat potential" of a mountain area in Wyoming).

102 *Id.* at 438.

103 *Id.* at 440 (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)).

104 *Id.* at 443.

105 *Id.* at 454 (Sentelle, J., dissenting).

106 *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

107 *Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003).

In 2014, Judge Garland joined another decision divided on the issue of injury, and again Judge Sentelle dissented. In *Sierra Club v. Jewell*,[108] non-profit environmental and historical organizations challenged an agency decision to delist the Blair Mountain Battlefield in West Virginia from the National Register of Historic Places. Removing the Battlefield allegedly made it easier under state and federal law for coal companies to surface mine the area. After the district court dismissed for lack of standing, a three-judge panel divided on whether the plaintiffs had alleged injury to a "legally protected interest." In its 1992 decision *Lujan v. Defenders of Wildlife*,[109] the Supreme Court (in an opinion by Justice Scalia), explained that to have standing, a plaintiff's injury must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]"[110] Based on this language, an amicus West Virginia coal association—along with Judge Sentelle in dissent—argued that the plaintiffs in *Sierra Club* lacked standing because they had no legal entitlement to either view or enter the Battlefield.

The panel majority, in an opinion by Judge Sri Srinivasan that Judge Garland joined, rejected that narrow reading of "legally protected interest." The court first noted that plaintiffs could view the Battlefield from surrounding areas, and need not commit a trespass to suffer an injury if the Battlefield were replaced with a mining operation. Next, the court explained that circuit precedent already clarified the standard, and held that "when the *Lujan* 'Court used the phrase legally protected interest as an element of injury-in-fact, it . . . was referring only to a cognizable interest.'"[111] With that understanding, "there is no reason," the court said, "that the cognizability of aesthetic and associated interests in a particular site could turn on owning a legal right to enter or view the property."[112]

In 2015, Judge Garland and Judge Sentelle disagreed yet again on standing, this time on whether an organization could claim "associational standing" based on injuries to its individual members. In *Center for Sustainable Economy v. Jewell*,[113] the Center for Sustainable Economy (CSE), a non-profit membership organization, challenged a Department of the Interior program that set forth the size, timing, and location of leases for offshore oil and natural gas exploration. CSE alleged that the Interior's analysis was unreasonable, and failed to properly balance the various environmental, economic, and social considerations in offshore resource exploration, as required by law.

Writing for the panel, Judge Nina Pillard, joined by Judge Garland, held that CSE had standing because offshore resource exploitation might harm two of CSE's individual members' economic and aesthetic interests, and because the litigation subject was germane to CSE's organizational purpose of promoting "ecologically sound and

108 764 F.3d 1 (D.C. Cir. 2014).

109 504 U.S. 555 (1992).

110 *Id.* at 560 (internal citations and quotation marks omitted).

111 *Sierra Club*, 764 F.3d at 6 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 377, 375 (D.C. Cir. 2007)). In *Parker*, the D.C. Circuit found standing to challenge specific provisions of D.C. gun control laws, and explained that "the cognizable interest to which the Court referred [in *Lujan*] would distinguish . . . a desire to observe certain aspects of the environment from a generalized wish to see the Constitution and laws obeyed." *Parker*, 478 F.3d at 377.

112 *Sierra Club*, 764 F.3d at 6.

113 779 F.3d 588 (D.C. Cir. 2015).

economically sustainable principles."[114] The court explained: "This is not a case in which an organization seeks to litigate an issue about which it has little expertise and does not much care. CSE's specific expertise is in evaluating the environmental costs and benefits of pursuing various energy alternatives, with the objective of making sure that agencies' decisions accurately and rationally assess those alternatives' effects on natural resources."[115] In dissent, Judge Sentelle argued that it was not enough to show a connection between CSE's mission or expertise and the litigation. He would have required a direct link between CSE's own interests and the specific *injuries* that its members' alleged.[116]

Consistent with his rulings on standing in divided cases like *Glickman*, *Sierra Club*, and *Center for Sustainable Economy*, Judge Garland has also been careful not to prejudge the merits of plaintiffs' claims while deciding the prior question of standing.[117] And he has consistently followed D.C. Circuit precedent that allows the court to request that plaintiffs submit supplemental briefing to establish standing, at least when they have made an initial good faith effort to satisfy the pleading rules.[118]

Statutes of Limitations, Exhaustion, and other Procedural Bars

Statutes of limitations and other procedural rules—like rules that require the exhaustion of administrative remedies before bringing suit—are additional potential barriers to court access. Prisoners and other *pro se* litigants who lack legal counsel are especially vulnerable to such requirements. Statutes of limitations in particular are important in civil rights cases, especially when evidence of discrimination is difficult to uncover or when there is a legal dispute over when a limitations period begins to run. One such case is before the Supreme Court this term; in *Green v. Brennan*,[119] the Court will decide when the 45-day window to file a discrimination claim for constructive discharge begins to run, with the civil rights of countless American workers hanging in the balance. If the Court divides 4-4, then the lower court ruling barring the plaintiff's claim will remain in place.[120]

---

114 *Id.* at 597-98; *see also Humane Soc'y of United States v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988) (holding that germaneness for associational standing requires "pertinence between litigation subject and organizational purpose.").

115 *Jewell*, 779 F.3d at 597.

116 *See also PETA v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015), in which Judge Garland joined Judge Karen Henderson's opinion finding PETA had standing to challenge USDA inaction (failing to protect birds as required by the Animal Welfare Act). Judge Patricia Millett filed a "dubitante" opinion, writing, "If the slate were clean, I would feel obligated to dissent from the majority's standing decision. But I am afraid that the slate has been written upon, and this court's 'organizational standing' precedent will not let me extricate this case from its grasp." *Id.* at 1099 (Millett, J., dubitante). Judge Millett conceded that the panel decision "hews faithfully to precedential lines, as we must at this procedural juncture." *Id.*

117 *See, e.g., Schnitzler v. United States*, 761 F.3d 33 (D.C. Cir. 2014) (rejecting argument that prisoner lacked standing to challenge the required procedures to renounce his citizenship because his constitutional claims lacked merit); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012) (finding standing to sue the FDA after the district court improperly rejected standing based on merits of underlying claim); *Muir v. Navy Federal Credit Union*, 529 F.3d 1100 (D.C. Cir. 2008) (noting that certain questions might be relevant to the merits of a claim brought under the Fair Debt Collection Practices Act, but were not relevant to standing).

118 *See, e.g., Americans for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013); *Center for Sustainable Economy*, 779 F.3d at 598 ("As we said in *Americans for Safe Access*, "[i]f the parties reasonably, but mistakenly, believed that the initial filings before the court had sufficiently demonstrated standing, the court may—as it did here—request supplemental affidavits and briefing to determine whether the parties have met the requirements for standing.").

119 *Green v. Brennan*, No. 14-613 (S. Ct. cert granted Apr. 27, 2015).

120 *Green v. Donahoe*, 760 F.3d 1135 (10th Cir. 2014).

Beginning with questions of timeliness, Judge Garland's record evinces a concern for fairness over technicalities, and a willingness to thoroughly consider the nature of legal claims and factual allegations before dismissing a case as procedurally barred.

In *Anderson v. Zubieta*,[121] a Title VII wage discrimination case, Judge Garland found the plaintiffs' claims timely under a "continuing violation" theory, and wrote the unanimous opinion that Justice Ruth Bader Ginsburg later cited in her landmark *Lilly Ledbetter* dissent. Judge Garland held that employees who alleged national origin and race discrimination had properly filed their claims within the required 45 days of the alleged discriminatory event. Although the employees had not brought their claims within 45 days of the discriminatory pay policy's announcement, the court held that each resulting paycheck was another actionable event under Title VII.[122]

Yet in 2007, in the gender wage discrimination case *Lilly Ledbetter v. Goodyear Tire & Rubber Company*,[123] the Supreme Court rejected that approach and held that "pay setting," and not each subsequent paycheck, is the relevant act from which the time limit begins to run. In dissent, Justice Ginsburg chastised the majority for ignoring reality, and observed that, "[i]n tune with the realities of wage discrimination, the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination: Each paycheck . . . constitutes a cognizable harm."[124] Congress overturned *Ledbetter* with the Lilly Ledbetter Fair Pay Act of 2009, the first legislation that President Obama signed into law.

In 2011, Judge Garland declined to apply *Ledbetter* (a Title VII case) to claims raised under the Fair Labor Standards Act (FLSA). In *Figueroa v. D.C. Metropolitan Police Department*,[125] police officers brought FLSA claims alleging the miscalculation of overtime pay, and the district court dismissed the claims as untimely. On appeal, a unanimous D.C. Circuit panel reversed. Writing for the court, Judge Garland acknowledged the Supreme Court's *Ledbetter* holding—that when an act of intentional discrimination in a Title VII case occurs outside the statute of limitations, the fact that subsequent paychecks are affected does not establish continuing violations. But Judge Garland explained that such reasoning was inapplicable in *Figueroa*, because the FLSA, unlike Title VII, does not require proof of specific intent to discriminate. Therefore "[t]he underpayment is not the 'effect' of a prior violation; it is the violation itself."[126]

In two other cases, Judge Garland corrected district court legal error with respect to timeliness and hostile work environment claims. In *Singletary v. District of Columbia*, [127] the district court rejected the "continuing violation theory" of hostile work environment claims, and dismissed the claim as untimely. Judge Garland disagreed in his unanimous opinion:

---

121 180 F.3d 329 (D.C. Cir. 1999).
122 *Id.* at 335.
123 550 U.S. 618 (2007).
124 *Ledbetter*, 550 U.S. at 654 (Ginsburg, J., dissenting) (citing *Anderson*, 180 F.3d at 335).
125 633 F.3d 1129 (D.C. Cir. 2011).
126 *Id.* at 1135.
127 351 F.3d 519 (D.C. Cir. 2003).

> [H]ostile work environment claims are subject to a different limitations rule and, indeed, to the very rule rejected by the district court here: Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. . . . In order for the charge to be timely, the employee need only file a charge within ... 300 days *of any act that is part* of the hostile work environment.[128]

The same legal error was also corrected in *Steele v. Schafer*,[129] another unanimous opinion authored by Judge Garland.

In 2009, Judge Garland allowed a prisoner's *pro se* civil suit to proceed after the district court dismissed for failing to exhaust administrative remedies. In *Malik v. District of Columbia*,[130] a prisoner brought suit against the District of Columbia, a private prison contractor, and a private prison transporter, alleging that he and others were forced to travel on a 40-hour bus ride in shackles and chains. Because the shackles made it impossible for them to use the restroom, the prisoners were forced to urinate and defecate on themselves. The plaintiff also alleged that he was unable to use his asthma inhaler and was deprived of water. The district court dismissed the plaintiff's claims because he didn't exhaust his administrative remedies as required by the Prison Litigation Reform Act (the plaintiff filed a grievance with the private prison one day late under the company's policy). Reversing, Judge Garland wrote that the plaintiff's failure to exhaust was immaterial because no grievance procedure was actually available based on his allegations; to the contrary, the private prison company's policy stated that "institutional transfers . . . are not grievable matters."[131]

The relationship between administrative remedies and access to courts is also at the center of Title VII claims. In *Payne v. Salazar*,[132] Judge Garland wrote a unanimous opinion preserving the right of civil rights plaintiffs to challenge adverse rulings by the Equal Opportunity Employment Commission. In *Payne*, the plaintiff worked for the Department of the Interior. Before bringing suit, the plaintiff had filed two separate EEOC complaints against Interior, the first alleging religious discrimination and the second alleging retaliation. The EEOC consolidated the two complaints into one proceeding, and found that Interior had discriminated against the plaintiff based on her religion, but had not retaliated against her. The plaintiff then raised her Title VII retaliation claim—the one claim that she lost at the agency level—in a federal lawsuit against Interior. The district court granted Interior's motion to dismiss for failure to state a claim.

---

128 *Id.* at 526 (internal quotation marks omitted) (citing *AMTRAK v. Morgan*, 536 U.S. 101, 116 (2002)).

129 535 F.3d 689 (D.C. Cir. 2008).

130 574 F.3d 781 (D.C. Cir. 2009).

131 *Id.* at 785 (internal quotation marks and emphasis omitted). In *Malik*, Judge Garland also reversed the district court's decision that the plaintiff-prisoner had conceded summary judgment, as he failed to oppose the defendant's motion. Judge Garland cited well-established precedent that courts must provide imprisoned *pro se* litigants fair notice of the summary judgment rule. That precedent wasn't followed here, a case with "objectively confusing procedural history and subjective confusion that [the plaintiff] plainly manifested." *Malik*, 574 F.3d at 787.

132 619 F.3d 56 (D.C. Cir. 2010).

On appeal, Interior argued that challenges to EEOC decisions must be brought on an all-or-nothing basis, and therefore the plaintiff's decision to raise only her losing claim was fatal to her lawsuit. This argument rested on two legal authorities considered together: The language of Title VII itself, which provides that "an employee . . . aggrieved by the final disposition of his complaint . . . may file a civil action,"[133] combined with the Supreme Court's decision in *Chandler v. Roudebush*,[134] which held that Title VII claimants are entitled to a "trial de novo" on their employment discrimination claims.

Judge Garland rejected this argument, and found that nothing in the language of either Title VII or *Chandler* required such an "all-or-nothing" approach. "This circuit," Judge Garland wrote, "routinely hears cases brought under statutes authorizing suits by persons 'aggrieved by' agency action. Petitioners in such cases challenge only the parts of agency orders that continue to aggrieve them," and "we have never required such petitioners to also bring before us the parts of agency orders that they do not dispute."[135] Further, the promise of de novo review meant only that Title VII plaintiffs were entitled to a normal trial, as opposed to one governed by deferential review under the Administrative Procedure Act; it "does not mean that [a plaintiff] must sue on claims she has no interest in pursuing."[136]

Judge Garland also explained how Interior's position would imperil access to the courts:

> We note that the government's construction of the statute effectively gives it complete control over the scope of an employee's access to the courts. In this case, for example, [the plaintiff] filed two separate EEO complaints: the first asserting discrimination and the second asserting retaliation. Had the complaints remained separate, even the government's construction would have permitted [the plaintiff] to file a civil action limited to the retaliation complaint. It is only because the agency consolidated the complaints, and then issued a single disposition, that the government contends [the plaintiff] must sue on all her claims or none of them.[137]

Other cases encompass a number of disparate procedural doctrines, from the harmless error rule to a provision in D.C. law requiring expert testimony to prove the duty of care in certain negligence cases. While generalization among these cases is difficult, they do show that Judge Garland, while willing to strictly apply procedural rules when the law requires it, is reluctant to broaden such rules or extend them to new facts.

For example, Judge Garland's penchant for giving plaintiffs a fair opportunity to be heard is seen in his consistent application of *Chenery* principles, which hold that a court may not uphold agency action on a ground not raised by the agency itself—and which might be ignored by a court focused on easily dispensing with cases that

133 42 U.S.C. § 2000(e)-16(c).
134 425 U.S. 840 (1976).
135 *Payne*, 619 F.3d at 60.
136 *Id.* at 63.
137 *Id.* at 61 (internal citation omitted).

have an alternative ground for an agency to apply on remand.[138] And in *Peterson v. Archstone Communities, LLC*,[139] Judge Garland recognized that cases may not be dismissed for failure to prosecute absent express warning and an attempt to try less drastic remedies.

Finally, even in cases where Judge Garland applied a procedural bar, his opinions generally make clear that he took the underlying claims seriously, meticulously explaining why the claims are barred given the specific law and facts at issue, and, in some cases, noting the limits of his ruling so it is not broadly applied in future cases. In *Burke v. Air Service International, Inc.*,[140] Judge Garland affirmed summary judgment against a private security contractor and former British soldier who had been badly injured during an ambush in Afghanistan. Garland explained that the plaintiff failed to comply with a D.C. rule that requires expert testimony to establish the relevant standard of care (instead of an expert, the plaintiff relied on depictions of shootouts in "such films as *High Noon*"). But Judge Garland also added that "[w]e respect Burke's long military career and greatly regret the injuries suffered in the ambush, as well as the death of the helicopter pilot."[141]

In another case, Judge Garland agreed that citations issued by the Occupational Safety and Health Administration (OSHA) were time barred because the relevant statutory provision—which requires employers to record workplace injuries—could not reasonably be read to create a "continuing obligation" that would extend the limitations period.[142] But Judge Garland added that "[t]his does not mean . . . that the statute could not admit of a continuing violation theory under other circumstances,"[143] and he reiterated that "where a regulation (or statute) imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied, and the statute of limitations will not begin to run until it does."[144]

The Right to a Jury Trial

The Seventh Amendment provides a right to a jury trial in civil cases,[145] and it is the jury's role to resolve factual disputes between parties. Yet before a lawsuit proceeds that far, defendants can assert that there are insufficient facts in dispute, either by filing a Rule 12(b)(6) motion to dismiss the complaint, or, following discovery, a Rule 56 motion for summary judgment.[146] A motion to dismiss at the early stages of litigation can block plaintiffs from obtaining the discovery needed to prove their claim, an outcome that's especially problematic for individual plaintiffs who have been harmed by large corporations. In such cases it is often the corporation who possesses

138 *See, e.g., Lacson v. United States Dep't of Homeland Sec. & Transp. Sec. Admin.*, 726 F.3d 170 (D.C. Cir. 2013); *Jones v. Astrue*, 647 F.3d 350 (D.C. Cir. 2011).

139 637 F.3d 416 (D.C. Cir. 2011).

140 685 F.3d 1102 (D.C. Cir. 2012).

141 *Id.* at 1104.

142 *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012).

143 *Id.* at 759 (Garland, J., concurring).

144 *Id.*; *see also Ross Stores v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001) (Garland, J., dissenting) (arguing in dissent that NLRB charge of unfair labor practices was timely because it was "closely related" to other conduct within the limitations period).

145 U.S. Const., Amend. VII.

146 Fed. R. Civ. P. 12(b)(6); Fed. Civ. P. 56.

the relevant evidence, and the plaintiff can only obtain it through court-ordered discovery.

Judge Garland's record shows that he is careful not to usurp the jury's essential role by disposing of claims prematurely. As an appellate judge, he has safeguarded the right to a jury trial against district courts which might grant meritless summary judgment motions or motions to dismiss just "to alleviate their crowded dockets."[147] Consistent with his rulings on other access issues, Judge Garland has demonstrated a commitment to ensuring that factual disputes are resolved by juries, and that claims are fairly heard in accordance with the law. As demonstrated by the cases discussed below, this fidelity to the role of juries has been especially important for civil rights plaintiffs who depend on the courts to vindicate fundamental rights. (Though in one important exception, Judge Garland voted with an *en banc* majority to reverse a jury verdict in favor of an employee who had alleged disability discrimination, and Judge Edwards dissented.[148])

In *Sparrow v. United Airlines, Inc.*,[149] Judge Garland wrote the unanimous panel opinion reversing the district court, and holding that an employee who alleged racial discrimination had pleaded sufficient facts to defeat a motion to dismiss. The district court found that the plaintiff failed to establish a *prima facie* case of discrimination in his complaint, but the D.C. Circuit explained that such an exacting standard exceeded that of Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[150] Under the then-prevailing Supreme Court precedent, the lenient Rule 8 standard meant that claims should not be dismissed unless the plaintiff "can prove no set of facts" that would entitle him to relief.[151] Judge Garland closed the opinion with an admonishment for trial courts: "We understand why district courts may want to alleviate their crowded dockets by disposing quickly of cases that they believe cannot survive in the long run. But . . . this may not be accomplished by employing heightened pleading standards except in those cases specifically listed in [the Federal Rules]."[152]

In 2009, the Supreme Court announced a new, heightened pleading standard required to comply with Rule 8. The Court dispensed with the more lenient "no set of facts" standard, and held that, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[153] The Court acknowledged that determining whether a claim is "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[154]

In 2015, Judge Garland wrote a notable opinion reversing the dismissal of a Title VII retaliation claim under the new plausibility standard. The plaintiff in *Harris v. D.C.*

147 *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000).
148 *Duncan v. WMATA*, 240 F.3d 1110 (D.C. Cir. 2001).
149 *Id.*
150 Fed. R. Civ. P. 8.
151 *Conley v. Gibson*, 355 U.S. 41, 46 (1957).
152 *Sparrow*, 216 F.3d at 1118.
153 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
154 *Iqbal*, 576 U.S. at 679.

WASA[155] had worked for the D.C. Water and Sewer Authority (WASA) for sixteen years, earning commendations for his many contributions to the improvement of WASA's operations. In January 2011, the plaintiff wrote a letter to then-Mayor Vincent Gray complaining that WASA had been terminating black employees and replacing them with white employees. A month later, he wrote a similar letter to the D.C. City Council committee overseeing WASA. In October 2011, the plaintiff took a leave of absence to undergo surgery, and before he returned WASA informed him that his position had been abolished (though his job functions continued). WASA did not provide the plaintiff an opportunity to apply for another position. In response, the plaintiff filed suit under Title VII, alleging retaliatory termination for his opposition to discriminatory employment practices.

Based on these allegations, the district court dismissed the suit as implausible because the plaintiff did not allege a sufficient connection between his two letters and his termination. The D.C. Circuit unanimously reversed. Notably, not only did Judge Garland find that the plaintiff's complaint was sufficient to defeat a motion to dismiss, but "[m]ore than that, [the plaintiff's] complaint alleged facts that, if shown, may be . . . sufficient to survive summary judgment outright,"[156] and added that WASA's proffered reason for terminating the plaintiff "sounds like pretext."[157]

Similarly, in *Aka v. Washington Hospital Center*,[158] Judge Garland joined an *en banc* majority vacating summary judgment for the employer in an age and disability discrimination case. The court, with Judge Wald writing for the majority, conducted a detailed review of the Supreme Court's decision in *St. Mary's Homer Center v. Hicks*,[159] and concluded that "[u]nder *Hicks* and other applicable law, . . . a plaintiff's discrediting of an employer's stated reason for its employment decision is entitled to considerable weight."[160] The court "therefore reject[ed] any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer's stated explanation in order to avoid summary judgment."[161] With this understanding of the evidentiary burden, the court found that the plaintiff had proffered sufficient evidence to defeat summary judgment and reach a jury, and vacated the district court's summary judgment order.

The *en banc* decision in *Aka* generated two dissents. Judge Karen Henderson read *Hicks* to demand more of plaintiffs at the summary judgment phase; she argued that plaintiffs should be required to offer proof that the employer's stated reason for the challenged employment action is not just untrue, but that it was given to cover up the true, discriminatory motive.[162] Judge Silberman also dissented to lament that, given the majority's ruling, "plaintiffs will routinely be able to get to juries" on their discrimination claims without showing sufficient evidence.[163]

---

155 791 F.3d 65 (D.C. Cir. 2015).
156 *Id.* at 69.
157 *Id.* (internal quotation marks omitted).
158 156 F.3d 1284 (D.C. Cir. 1998).
159 509 U.S. 502 (1993).
160 156 F.3d at 1290.
161 *Id.*
162 156 F.3d at 1306 (Henderson, J., dissenting).
163 *Id.* at 1313 (Silberman, J., dissenting) (internal citations and quotation marks omitted).

Judge Garland's vote went the other way—voting to reverse a jury verdict in favor of the plaintiff—in *Duncan v. WMATA*,[164] an *en banc* decision from which Judge Edwards dissented. In *Duncan*, a former transit authority employee sued Washington Metropolitan Transit Authority (WMATA) for discharging him on account of his disability, and for failing to reasonably accommodate his disability in violation of the Americans with Disabilities Act (ADA). A jury found in the plaintiff's favor after a five-day trial. On appeal, the full D.C. Circuit, in an opinion by Judge Henderson (which Judge Garland joined), and with concurring opinions from Judges Randolph and David Tatel, found that the plaintiff failed to offer evidence that he was "disabled" under the ADA. Specifically, the plaintiff "offered no significantly probative evidence . . . of the number and types of positions available in his local job market so as to demonstrate that his back impairment substantially limits his ability to work."[165] According to the majority, lack of such evidence was crucial because a "disability" is an "impairment that substantially limits one or more of the major life activities," and the plaintiff alleged that his relevant "life activity" was "work."[166]

In dissent, Judge Edwards argued that the court improperly took this case away from the jury. "There was sufficient evidence in the record," he wrote, "for a reasonable jury to determine that, based on [the plaintiff's] education, training, work history, and efforts to find another job, [his] physical impairment substantially limited his ability to work."[167]

Class Actions

Class actions are often the only viable way for individuals to seek justice in the courts. Without the ability to band together, it can be impossible for people to hire a lawyer or otherwise acquire the resources necessary to pursue litigation. That's especially true when wrongdoing causes relatively small harm on an individual basis, but exacts enormous damage in the aggregate. In such cases, class actions are the only way—absent state enforcement—to address massive harm that is diffused across a large population.

As noted at the outset of this section, Judge Garland's record on class actions is too limited to definitively discern his views. Here we note one case—a unanimous decision by Judges Rogers, Garland, and Edwards—that shows the impact of the Supreme Court's *Wal-Mart v. Dukes* decision on how the lower courts apply Rule 23.[168] In *DL v. District of Columbia*,[169] the court decertified a class in light of *Wal-Mart*, making it harder for children with disabilities to access special education.

Under the Individuals with Disabilities Education Act (IDEA), localities receive federal funding to educate children with disabilities. To remain eligible for funding, localities must have "in effect policies and procedures to ensure" that all children

164 240 F.3d 1110 (D.C. Cir. 2001).
165 *Id.* at 1113.
166 *Id.* at 1114.
167 *Id.* at 1125 (Edwards, J., dissenting).
168 *Wal-Mart Stores, Inc.*, 564 U.S. 338 (2011); *see also* Fed. R. Civ. P. 23.
169 713 F.3d 120 (D.C. Cir. 2013).

who live there have access to a "free appropriate public education," and they must establish a "Child Find" program so that children in need of special education "are identified, located, and evaluated[.]"[170] A putative class of children alleged systemic failures in the District's compliance with IDEA—failures that cut across the District's various responsibilities to comply with the statute. The district court initially certified the class, finding that the plaintiffs had sufficient "commonality" under Rule 23(a)(2) because they "have a common injury, namely the denial of a [free appropriate public education] under the IDEA," and for all class members that injury resulted from "systemic failures within the District's education system."[171]

But after the initial class certification, the Supreme Court issued its *Wal-Mart* decision that dramatically narrowed the scope of Rule 23(a)(2) and announced a far more exacting "commonality" requirement. Under *Wal-Mart*, "[w]hat matters to class certification . . . is not the raising of common questions, . . . but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[172] It is not enough, then, for class members to merely allege violation of the same law (for laws can be violated in different ways); they must raise a "common contention" whose "truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke."[173] The Court's reasoning severely hamstrings the class action device, and in *Wal-Mart* it meant the end of a nationwide employment discrimination class action that had been approved by the lower courts.

Under the new *Wal-Mart* standard, the D.C. Circuit, in an opinion by Judge Rogers, held that "defining the class by reference to the District's pattern and practice of failing to provide [free appropriate public education] speaks too broadly because it constitutes only an allegation that the class members have all suffered a violation of the same provision of the law[.]"[174] The missing "glue" was the identification of one uniform policy or practice affecting all class members that, if corrected, would provide classwide relief in "one stroke." In light of this result, the court remanded for the district court to determine if the creation of "subclasses" could solve the commonality problem.

Remedies

Part and parcel of access to courts is access to adequate remedies. In one case, Judge Garland dissented from an *en banc* decision denying punitive damages under Title VII, and the Supreme Court subsequently granted cert and vindicated the dissent.[175]

---

170 *See* 20 U.S.C. § 1412(a)(1)(A), (a)(3)(A).

171 *Id.* at 123,125.

172 *Wal-Mart Stores, Inc.*, 564 F.3d at 350 (internal quotation marks omitted).

173 *Id.*

174 *DL*, 713 F.3d at 126 (internal quotation marks omitted).

175 In another case, Judge Garland dissented from a panel decision holding that the court lacked subject matter jurisdiction to consider claims for interest on attorney's fees under the Individuals with Disabilities Education Act (IDEA). *Akinseye v. District of Columbia*, 339 F.3d 970 (D.C. Cir. 2003). In his dissent, Judge Garland suggested that IDEA provides a federal cause of action to collect such interest as "part of the costs" of litigation, thereby creating a federal question within the court's jurisdiction. Judge Garland would have had the parties brief that issue. *Id.* at 972 (Garland, J., dissenting).

In *Kolstad v. American Dental Association*,[176] the full D.C. Circuit considered when a jury may consider an award of punitive damages under Title VII. The plaintiff alleged that the American Dental Association denied her a promotion because she is a woman, and brought a gender discrimination suit under Title VII. At trial, the jury found in plaintiff's favor and awarded back pay, but the district judge had refused to instruct the jury on punitive damages. Title VII provides that plaintiffs who prove "intentional discrimination" may recover compensatory and punitive damages;[177] a separate section of the statute limits punitive damages to cases where "the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the . . . rights" of the plaintiff.[178] Focused on this two-tier statutory structure and legislative history, the *en banc* majority concluded that "before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination."[179] Specifically, the court said that a defendant must have engaged in some "egregious" misconduct before punitive damages are available,[180] and on that basis affirmed the district court.

Judge Tatel filed a dissent that Judge Garland and three other judges joined. Judge Tatel criticized the majority's "amorphous" egregiousness standard as unworkable, without basis in the statute, and contrary to Supreme Court precedent. In his view, the text of Title VII made clear that recklessness or serious indifference to the rights of others are sufficient to award punitive damages, without the additional "egregious" factor.[181] The Supreme Court later agreed, concluding that "an employer's conduct need not be independently 'egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof."[182]

Yet Judge Garland has also vacated punitive damages in civil rights cases when the law requires it. The plaintiff in *Daskalea v. District of Columbia*[183] (also discussed in the section on Civil Rights) was a prisoner in the District of Columbia Jail who secured a jury verdict after suffering repeated sexual abuse and harassment. Writing for a unanimous panel, Judge Garland upheld a $350,000 award of compensatory damages, but vacated the jury's award of $5 million in punitive damages on the plaintiff's common law claims of negligent supervision and intentional infliction of emotional distress.

Judge Garland began by explaining that, in the context of constitutional claims under § 1983, the Supreme Court had held that "a municipality is immune from punitive damages"[184] absent "an extreme situation where the taxpayers are directly

176 139 F.3d 958 (D.C. Cir. 1998) (*en banc*).
177 42 U.S.C. § 1981a(a).
178 42 U.S.C. § 1981a(b)(1).
179 *Kolstad*, 139 F.3d at 961.
180 *Id.* at 965.
181 *Id.* at 971 (Tatel, J., dissenting).
182 *Kolstad v. ADA*, 527 U.S. 526, 546 (1999).
183 227 F.3d 433 (D.C. Cir. 2000).
184 *Id.* at 446 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981)).

responsible for perpetrating an outrageous abuse of constitutional rights."[185] He then noted that the D.C. Court of Appeals had a similar rule for state law claims, when it found that "as a general rule there can be no recovery of punitive damages against a municipality absent a statute expressly authorizing it"[186] or other "extraordinary circumstances[.]"[187] Judge Garland rejected the District's argument that it could *never* be liable for punitive damages, but found that the requisite "extraordinary circumstances" were not present in this case. "That is not, in any way, to minimize the offensiveness of the District's conduct here," he wrote, "[b]ut this is not a case . . . where a jurisdiction's taxpayers are directly responsible for perpetrating the policies that caused the plaintiff's injuries," nor "is this a case where the municipality . . . intentionally adopted the unconstitutional policy[.]"[188]

Civil Rights

This section analyzes Judge Garland's record applying civil rights statutes and other antidiscrimination laws. As an initial matter, most of Judge Garland's civil rights cases turn on whether the plaintiff could pursue the claim at all, not the merits of the claim or the scope of substantive civil rights. In other words, most of his civil rights cases raised one or more of the issues discussed in the Access to Justice section—like motions for summary judgment, statutes of limitations, or immunity—and did not otherwise require interpretation of civil rights statutes. Therefore a substantial part of Judge Garland's civil rights record is that he has protected the rights of plaintiffs to have their day in court, and has ensured that, in allowing courts to vindicate the rights of victims of unlawful discrimination, our civil rights laws function as Congress intended.[189]

Judge Garland's record on substantive civil rights is limited. His record consists mostly of statutory rather than constitutional civil rights claims, and most of the cases involve claims of employment discrimination under Title VII or other federal antidiscrimination laws such as the Americans with Disabilities Act (ADA) and the

185 *Id.* (quoting *Fact Concerts*, 453 U.S. at 267 n.29).

186 *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975).

187 *Id.*

188 *Daskalea*, 227 F.3d at 447.

189 *See, e.g.*, *Harris v. District of Columbia Water & Sewer Auth.*, 791 F.3d 65 (D.C. Cir. 2015) (reversing dismissal of Title VII retaliation claim because plaintiff alleged "plausible" claim to relief); *Howard v. Chief Admin. Office of U.S. House of Rep's*, 720 F.3d 939 (D.C. Cir. 2013) (reinstating claim that had been dismissed on immunity grounds); *Payne v. Salazar*, 619 F.3d 56 (D.C. Cir. 2010) (holding that Title VII plaintiffs are free to challenge only adverse EEOC determinations, and need not challenge every claim from the EEOC proceedings); *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) (reversing summary judgment against plaintiff alleging hostile work environment under Title VII because an issue of material fact existed as to date plaintiff met with Equal Employment Office); *Czelaski v. Peters*, 47 F.3d 360 (D.C. Cir. 2007) (reversing summary judgment on a Title VII gender discrimination claim because there was a factual dispute about whether the plaintiff suffered an adverse employment action, and whether the plaintiff had been reassigned to a new job for a discriminatory reason); *Singletary v. District of Columbia*, 351 F.3d 519 (D.C. Cir. 2003) (finding Title VII hostile work environment claim timely based on "continuing violation theory"); *Sparrow v. United Airlines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000) (reversing dismissal of Title VII race discrimination claim because plaintiff had pleaded sufficient facts to obtain discovery); *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999) (holding that Title VII wage discrimination claims were timely because each paycheck was an actionable event); *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998) (*en banc*) (reversing summary judgment on age and disability discrimination claims because a jury must determine weight of the evidence).

Age Discrimination in Employment Act (ADEA). Notably, none of the cases within our research parameters involved claims under the Religious Freedom Restoration Act.[190] Regardless of the particular statute or right at issue, however, Judge Garland's opinions reflect a thorough, methodical approach to statutory interpretation. They also embrace the broader view that, as the Supreme Court has explained, our civil rights laws must be understood and applied as "part of an ongoing congressional effort to eradicate discrimination in the workplace," as they "reflect[] a societal condemnation of invidious bias in employment decisions."[191]

This approach—thorough statutory analysis combined with recognition of the singular importance of civil rights laws—is perhaps most evident in the split-panel age discrimination case *Miller v. Clinton*.[192] In *Miller*, it was undisputed that the State Department terminated the plaintiff, a U.S. citizen employed as a safety inspector in Paris, because he turned 65 years old. Normally that would constitute blatant age discrimination in violation of the ADEA, but the State Department argued that another statute, the Basic Authorities Act, exempted the plaintiff from the ADEA and allowed the State Department to include a mandatory retirement clause in his contract. Concluding that the Basic Authorities Act can trump the ADEA, the district court granted the Department's motion to dismiss.

In a 2-1 opinion written by Judge Garland (Judge Rogers joined and Judge Kavanaugh dissented), the D.C. Circuit reversed. Judge Garland framed the opinion around the purpose and importance of the ADEA, noting that it is "one of the signature pieces of legislation prohibiting discrimination in the workplace," and that, quoting the Supreme Court, its "sweeping mandate 'broadly prohibits arbitrary discrimination in the workplace based on age.'"[193] Furthermore, "[t]he Act's protections for employees of the federal government are, if anything, even more expansive than those for workers employed in the private sector."[194]

Turning to the relatively obscure Basic Authorities Act, Judge Garland pointed out that the State Department was asking for an ADEA exemption based on "text of unusual opacity,"[195] and that "[g]iven the importance Congress ascribed to the ADEA, it would be surprising if it had enacted subsequent exemptions using ambiguous language."[196] The Department was not entitled to *Chevron* deference[197] in its reading because it had never issued any interpretation of the Basic Authorities Act outside the litigation documents in this case, let alone an authoritative interpretation. "Indeed," wrote Judge Garland, "there is no evidence that the current Secretary or any of her predecessors ever knew of the interpretation being advanced in their names."[198] On

190 *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), which holds that a prohibition on the sale of t-shirts on the National Mall did not violate the free exercise rights of evangelical Christians under RFRA, is excluded from our data set because it was unanimous and Judge Garland did not write.

191 *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352 (1995).

192 687 F.3d 1332 (D.C. Cir. 2012).

193 *Id.* at 1336 (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978)).

194 *Id.*

195 *Id.* at 1337.

196 *Id.* at 1352.

197 For a discussion of *Chevron* deference, see Part II.C, *infra*.

198 *Id.* at 1341.

its own terms, the best reading of the statute was that it merely enabled the State Department to hire workers outside the regulation that governs acquisition of supplies and services by government agencies.

Finding no support for the Department's position in the text or purpose of either the ADEA or the Basic Authorities Act, Judge Garland next pointed out the extreme implications of the Department's argument. "[T]he necessary consequence of the Department's position is that it is also free from any statutory bar against terminating an employee . . . solely on account of his race or religion or sex."[199] Thus the Department was asking the court to infer that, in passing the Basic Authorities Act, "Congress meant to exempt [a class of U.S. citizens] from the . . . entire edifice of its antidiscrimination canon."[200] And it was no answer to say that the Constitution would protect victims of discrimination in the absence of statutory rights, because that is precisely what Congress rejected in extending antidiscrimination laws to government workers in the first place.

"In the end," Judge Garland wrote, "this all comes down to one dispositive question: If Congress had intended to authorize the State Department to act without regard to the antidiscrimination laws, would it have done so using a string of forty-five words that has previously only been read to authorize a waiver of the regulatory and statutory provisions that govern federal contracting and procurement? We do not think so."[201] An elephant of that nature, Garland explained, would not be hidden by Congress in the mouse hole of the Basic Authorities Act.[202]

Judge Garland used similarly strong language in *Payne v. Salazar*.[203] *Payne* is primarily an access to courts decision holding that Title VII plaintiffs can challenge EEOC determinations without having to relitigate every claim decided in the EEOC proceedings. But one of the arguments raised by the defendant, the Department of the Interior, had ominous implications for the merits of civil rights claims. Interior argued its proposed "all-or-nothing" rule—requiring plaintiffs to sue on every claim from the EEOC proceedings, even those they won—should prevail because otherwise an agency might rule against even claims it believes to be meritorious. Judge Garland's response showed little patience for the argument:

> The government can find the answer to its question in the inscription outside the Attorney General's Office at the Department of Justice: "The United States wins its points whenever justice is done its citizens in the courts." The same is true of justice done its employees in the agencies. If an agency "believes it is liable" on a claim, Title VII requires it to rule in the complainant's favor without regard to tactical litigation considerations.[204]

199 *Id.* at 1335.
200 *Id.* at 1338.
201 *Id.* at 1352.
202 *Id.* (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).
203 619 F.3d 56 (D.C. Cir. 2010).
204 *Id.* at 64-65 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

In *Yesudian v. Howard University*,[205] Judge Garland wrote the split-panel decision that reinstated a jury verdict on a False Claim Act retaliation claim, and adopted a broader view of whistleblower protection than the district court or the dissenting opinion. The plaintiff was fired for insubordination after blowing the whistle on financial improprieties within the Howard University purchasing department. A jury found that Howard University had unlawfully retaliated against the employee for engaging in protected whistleblower activities, but the district court overturned the verdict.

On appeal, the central questions were (a) whether the plaintiff engaged in protected activity, and (b) whether Howard University was aware that the plaintiff had engaged in protected activity—two essential elements of a False Claims Act retaliation claim. Writing for the majority, Judge Garland (joined by Judge Wald) held that a reasonable jury could find both elements satisfied, and therefore the verdict must be reinstated. On the first question, Judge Garland wrote that "the district court was wrong in suggesting that [the plaintiff's] activity was unprotected because he had not initiated a private suit" or government investigation "by the time of his termination."[206] Instead, it was enough that the plaintiff had been investigating matters that could lead to a False Claims Act case, and whistleblower protection does not require communication with the government or anyone else outside the employer. Such a requirement, Judge Garland explained, "would bypass internal controls, damage corporate efforts at self-policing, and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers."[207]

The panel divided over whether Howard University had sufficient knowledge of the plaintiff's protected activities. In her dissent, Judge Henderson argued that the plaintiff must put his employer on notice not only that he is investigating fraud, "but also that the fraud is *against the government*" specifically.[208] Similarly, the district court overturned the verdict because the plaintiff never told his superiors that he planned to initiate a False Claims Act case, and never threatened to report his allegations to the government or anyone else outside Howard University. Judge Garland took a more permissive view of this element: All "the defendant must know is that [the] plaintiff is engaged in . . . activity that reasonably could lead to a False Claims Act case."[209] And since "there is no requirement that a plaintiff know his investigation could lead to a False Claims Act action, there can be no requirement that he suggest to [his employer] that he is contemplating such an action."[210]

Outside the employment context, Judge Garland has written notable opinions protecting the housing rights of low-income tenants, and upholding a jury verdict for a prisoner who suffered repeated sexual harassment.

205 153 F.3d 731 (D.C. Cir. 1998).
206 *Id.* at 741.
207 *Id.* at 742.
208 *Id.* at 748 (Henderson, J., dissenting).
209 *Id.* at 742.
210 *Id.*

In *Feemster v. BSA Limited Partnership*,[211] tenants brought suit against the property management company BSA for refusing to accept federal vouchers as payment for rent. In 2002, BSA decided to stop participating in the Section 8 rental assistance program, and began pressuring its tenants to leave. When landlords opt out of Section 8, tenants receive vouchers to cover the difference between their previous rent and the increased market-rate rent. When BSA refused to accept these vouchers, the tenants sued under the District of Columbia Human Rights Act,[212] which prohibits discrimination in property transactions based on "source of income."[213] BSA argued that it had not violated the Act because it did not have—and the tenants had not offered evidence to prove—discriminatory motive.

Writing for a unanimous panel, Judge Garland rejected this argument, and applied the same analytical framework for Title VII claims to claims brought under the D.C. Human Rights Act: "Just as it would constitute a facial violation of Title VII to discriminate in leasing on the basis of a renter's race—regardless of whether the landlord professed a 'benign' motive for so doing—it is a facial violation of the Human Rights Act to discriminate on the basis of the renter's source of income."[214]

In *Daskalea v. District of Columbia*,[215] Judge Garland and a unanimous panel upheld a jury verdict for a woman prisoner who alleged violations of her constitutional rights after suffering repeated sexual abuse at the District of Columbia Jail. The opening lines of Judge Garland's opinion are worth repeating here:

> Uncontradicted evidence at the trial of this case established the routine sexual abuse of women inmates by prison guards at the District of Columbia Jail. The plaintiff, Sunday Daskalea, suffered from a continuing course of such abuse, culminating in an evening during which "correctional" officers forced her to dance naked on a table before more than a hundred chanting, jeering guards and inmates. The District asks us to relieve it of all responsibility for this conduct, contending that the facts fail to establish the "deliberate indifference" necessary to sustain a municipality's liability for the acts of its employees. But "deliberate indifference" is precisely how any reasonable person would describe the District's attitude toward its women prisoners, and we therefore uphold in full the jury's award of $350,000 in compensatory damages.[216]

Among the evidence supporting the jury's finding of "deliberate indifference" was a recent judgment of § 1983 liability for repeated sexual abuse and harassment of women prisoners by D.C. correctional officers, the plaintiff's own letters complaining of such incidents, the open and notorious nature of the continued abuse, and the direct evidence that the director of the Department had not familiarized herself with the problems. The court also rejected the argument that a Department of

211 548 F.3d 1063 (D.C. Cir. 2008).

212 The tenants also raised federal claims on which the district court granted summary judgment in their favor.

213 D.C. Code § 2-1402.21.

214 548 F.3d at 1070.

215 227 F.3d 433 (D.C. Cir. 2000).

216 *Id.* at 436-437. As explained above in, while the court upheld the award of compensatory damages, it struck $5 million in punitive damages on the plaintiff's common law claims, because District of Columbia law did not permit punitive damages for municipalities in this case.

Corrections policy forbidding sexual harassment should insulate the District from municipal liability. Judge Garland explained that "a 'paper' policy cannot insulate a municipality from liability where there is evidence, as there was here, that the municipality was deliberately indifferent to the policy's violation."[217]

Administrative Law

Administrative law cases are a staple of the D.C. Circuit's docket, and this section provides a general overview of Judge Garland's record on the issue. It also includes Judge Garland's record on the environment, public health, labor law, and workplace safety, because the vast majority of such cases involve judicial review of agency action (or inaction, as the case may be).[218] Cases involving employment discrimination, however, are discussed in the sections on Access to Civil Justice and Civil Rights, respectively.

On the whole, Judge Garland's voluminous administrative law record shows a commitment to respecting the judiciary's limited role in the administrative state. Under Supreme Court precedent, judicial review of agency action is constrained by several types of deference. Under the "substantial evidence" rule, factual and evidentiary determinations can be overturned only "when the record is 'so compelling that no reasonable factfinder could fail to find' to the contrary."[219] When courts review agency action for procedural integrity, only action that is "arbitrary" or "capricious" can be set aside,[220] and courts must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[221] Finally, there is the familiar "*Chevron* deference" that applies when agencies interpret the statutes they administer. [222] Under *Chevron*, whenever a "statute is silent or ambiguous with respect to the specific issue" under review, "the court must defer to a reasonable interpretation made by the administrator of [the] agency,"[223] even if the agency's reading is not the most natural reading of the statute.

In his opinions, Judge Garland has explicitly applied *Chevron* deference even against his own interpretive preference. In *Gentiva Healthcare Corp. v. Sebelius*,[224] for example, he observed that "Gentiva may well be right that [its proposed statutory interpretation] would better effectuate Congress' apparent desire to give the Secretary more oversight . . . . But even a desirable statutory interpretation cannot trump an agency's reasonable interpretation under *Chevron*."[225] He has also shown sensitivity

217 *Id.* at 442 (citing *Ware v. Jackson County*, 150 F.3d 873, 882 (8th Cir. 1998)).

218 The few environment and labor cases that do not turn on questions of administrative law are categorized by the area of law at issue. For example, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), which involved a Commerce Clause challenge to the application of the Endangered Species Act to a development project in Southern California, is discussed in the Constitutional Law section. As is *Association of Bituminous Contrs. v. Apfel*, 156 F.3d 1246, 1253 (D.C. Cir. 1998), which addressed an as-applied Due Process challenge to the Coal Industry Retiree Health Benefit Act.

219 *Bally's Park Place v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (quoting *USW v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993)).

220 *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009).

221 *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

222 *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

223 *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

224 723 F.3d 292 (D.C. Cir. 2013).

225 *Id.* at 297.

to the president's role in overseeing executive agencies. In *National Association of Home Builders v. EPA*,[226] which involved a challenge to a reconsidered EPA policy, Judge Garland wrote:

> [T]here were in fact two . . . events of note . . . that go a long way toward explaining why EPA reconsidered [the policy in question]: namely, the inauguration of a new President and the confirmation of a new EPA administrator.
>
> And there's the rub. As then-Justice Rehnquist wrote in his separate opinion in *State Farm:* "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.[227]

Judge Garland's adherence to deference is also revealed to some extent from a quantitative review of his cases that resulted in split panels. In Garland's record, we found 15 decisions that divided over a question of administrative law, and Judge Garland sided with the agency in all 15.[228] These include seven of the 16 dissents Judge Garland has written in his entire career, with five dissents from decisions with two Republican-appointed judges on the panel, and two dissents from decisions by one Democratic and one Republican appointee.

On the other hand, given Judge Garland's many years on the bench and the D.C. Circuit's prodigious administrative caseload, a mere 15 split decisions shows how agency deference has led to overwhelming unanimity. With judicial review constrained on both legal and factual issues, upholding agency action is the presumption and anything else, regardless of the judge, is the exception.

Judge Garland's record does include such exceptions, showing that he has not equated deference with a rubber stamp. In *PSEG Energy Resources & Trade LLC v. FERC*,[229] for example, Judge Garland enforced the principle that "discretion must be exercised through the eyes of one who realizes she possess it."[230] He disagreed with the Federal Energy Regulatory Commission's (FERC) assertion that a statute was unambiguous and admitted of only one reading. Normally when a court finds that a statute is ambiguous it will ask only whether the agency's interpretation is reasonable. But Judge Garland did not reflexively apply *Chevron* deference in this case. Because FERC erroneously insisted that the language was unambiguous and declined to furnish an alternative rationale, he ordered remand to require the agency to reconsider and explain its reasoning.[231]

---

226 682 F.3d 1032 (D.C. Cir. 2012).

227 *Id.* at 1043 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting)).

228 *See* APPENDIX B.

229 665 F.3d 203 (D.C. Cir. 2011).

230 *Id.* at 209 (quoting *Transitional Hospitals Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000)).

231 *See also City of Idaho Falls v. FERC*, 629 F.3d 222, 231 (D.C. Cir. 2011) (vacating for lack of notice-and-comment rulemaking).

On the whole, Judge Garland has more often ruled against agencies when challenges are brought in the interests of the environment, public health, or workers (as opposed to industry or management),[232] including in cases where a regulation is challenged from both sides. In *U.S. Air Tour Association v. FAA*,[233] for example, both air tour operators and environmental organizations challenged an FAA rule that imposed a cap on the number of air tours allowed over Grand Canyon National Park. The air tour operators opposed the cap, while the environmental groups argued that the rule did not go far enough to protect natural quiet in the Park. Writing for a unanimous panel, Judge Garland rejected all the industry group challenges, but ordered remand on the environmental claims—in particular noting that the FAA's failure to consider non-tour aircraft (commercial, military, etc.) in its noise model was arbitrary and capricious.[234]

In the labor context, *Guard Publishing Co. v. NLRB*,[235] decided in 2009, follows a similar pattern. There, a labor union and company management each challenged an NLRB decision for lack of substantial evidence. Applying the required deference to each petition, a unanimous D.C. Circuit panel upheld the NLRB findings favorable to the employees and their union, but rejected findings favorable to the company, and recognized additional labor violations that the NLRB did not.

Yet Judge Garland has ruled against agencies in the interests of management when the law has required it. In *AKM LLC v. Secretary of Labor*,[236] Judge Garland joined Judge Janice Rogers Brown—an open skeptic of the regulatory state and agency deference[237]—to invalidate OSHA citations issued for failing to record workplace injuries. The Occupational Safety & Health Act requires OSHA to cite employers for violations of labor regulations within six months of the violation. In *AKM*, there was no dispute that OSHA issued the citations more than six months after the last unrecorded injury occurred, but the Secretary of Labor interpreted the relevant regulations to impose a "continuing obligation" that extended the time period. Judge Garland rejected that argument, finding that the regulations imposed a "discrete" rather than "continuing" obligation and could not reasonably be read otherwise.[238] The significance of this decision is not just that it went against the agency in favor of

232 *See Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007) (ruling in favor of a commercial motor vehicle operators association, and invalidating a rule issued by the Federal Motor Carrier Safety Administration on the number of work hours permissible for long-haul truck drivers); *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004) (agreeing with Sierra Club that EPA was unauthorized to grant conditional approval of ozone state implementation plans); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (finding that FCC approval of new communications towers failed to comply with National Environmental Policy Act and the Endangered Species Act); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (finding that the Fish & Wildlife Service violated the Endangered Species Act when it issued to a residential developer an "incidental take permit" for the endangered Delmarva fox); *UFCW, Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000) (finding additional unfair labor practices that the NLRB declined to find).

233 298 F.3d 997 (D.C. Cir. 2002).

234 *Id.* at 1019. *See also Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (rejecting company's petition for review and upholding NLRB findings of unfair labor practices, but granting union's petition and rejecting for lack of substantial evidence NLRB determinations against employee).

235 571 F.3d 53 (D.C. Cir. 2009).

236 675 F.3d 752 (D.C. Cir. 2012).

237 *See Id.* at 769 (Brown, J., concurring) ("I hope this Court will carefully consider why and when we are meant to defer before we endow an agency's mere invocation of *Chevron* with talismanic authority. We must steadfastly guard our prerogative to 'say what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. 1 (1803)).

238 *Id.* at 759 (Garland, J., concurring).

the employer, but that it rejected an agency's interpretation of its own regulation, a situation in which courts "owe heightened deference to an agency's construction."[239]

In other cases, Judge Garland has upheld agency action despite challenges from opposing interests. In another case involving air tours of the Grand Canyon, *Grand Canyon Air Tour Coalition v. FAA*,[240] four different groups (air tour operators, Clark County and Las Vegas officials, the Hualapai Indian Tribe, and environmental organizations) challenged an FAA noise reduction regulation. The environmental organizations argued that the rule did "too little, too late," while everyone else argued that the rule did "too much, too soon." Judge Garland, writing for a unanimous panel, rejected both lines of attack in favor of agency deference. In particular, the court deferred to FAA judgment over environmental concerns that the relevant statute required more to preserve natural quiet against aircraft noise pollution.[241]

Environment & Public Health

Just days before Justice Scalia died, on February 9, the Supreme Court made history when for the first time it stayed implementation of a federal regulation pending review in a circuit court of appeals.[242] Reversing a unanimous D.C. Circuit panel, a 5-4 Court temporarily blocked EPA's "Clean Power Plan," the new rule designed to dramatically reduce greenhouse gas emissions by regulating coal-fired power plants and creating incentives to increase production of wind and solar power. The D.C. Circuit will hear arguments on the merits of the case, which is brought by a coalition of mostly Republican states and fossil fuel interests, in early June 2016. At stake is not just domestic environmental policy, but also the landmark international climate change pact reached last December in Paris and signed by 175 countries on Earth Day, April 22, 2016.[243]

But for Justice Scalia's vote, the Clean Power Plan would be moving forward while the litigation proceeds in the background. Now the rule must wait, with its ultimate fate almost certainly to be decided by the Supreme Court. It is within this context—knowing that the Supreme Court in no small part controls the future existence of Earth—that Judge Garland's environmental record must be considered.

Unsurprisingly, Judge Garland's record on environmental cases reflects his overall record on administrative law. Because of agency deference most of his decisions favor environmental interests, but that is true of the entire D.C. Circuit, not just Judge Garland.

Even in cases where deference did not win out, Judge Garland still found consensus in some instances, including with his Republican-appointed colleagues. That was

---

239 *Eagle-Picher Industries, Inc. v. United States EPA*, 822 F.2d 132, 139 n.23 (D.C. Cir. 1987) (citing *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813-14 (D.C. Cir. 1981)).

240 154 F.3d 455 (D.C. Cir. 1998).

241 *Id.* at 476.

242 *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

243 *See generally*, Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, The New York Times (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.

true in *Sierra Club v. EPA*,[244] where Judges Garland, Sentelle, and Henderson agreed with the Sierra Club that EPA violated the Clean Air Act when it granted conditional approval to state ozone plans that lacked certain statutory requirements. In another unanimous decision, Judges Garland, Henderson, and Douglas Ginsburg ruled in favor of a public interest group and a motor vehicle operators association, and held that a rule regulating the number of hours long-haul truck drivers can work was arbitrary and capricious.[245]

In environmental and public health cases in particular, agency rules are often based on complicated scientific determinations, and Judge Garland has been clear that courts—which have no institutional scientific expertise—owe "particular deference where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise."[246] He has explained that "when EPA evaluates scientific evidence in its bailiwick, we ask only that it take the scientific record into account in a rational manner."[247] EPA "is not obligated to conclusively resolve every scientific uncertainty before it issues a regulation," and the agency "typically has wide latitude in determining the extent of data-gathering necessary to solve a problem."[248] The same deference applies to scientific determinations made by, for example, the Food and Drug Administration.[249]

With deference driving consensus in environmental and public health cases as it does in other areas of administrative law, disagreement comes only rarely and at the margins. To get a sense where these margins are and how Judge Garland differs from his D.C. Circuit colleagues—and from some of the justices on the Supreme Court—the remainder of this section discusses Judge Garland's few divided decisions in this area.

Two of Judge Garland's split environmental decisions eventually led to significant rulings from the Supreme Court. First, in *American Trucking Association v. EPA*,[250] Judge Garland joined a dissent from a denial of rehearing *en banc*, and the Supreme Court later endorsed his view in a unanimous opinion written by Justice Scalia. *American Trucking* involved a challenge to the Clean Air Act's requirement that EPA set air quality standards "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "reflect the latest scientific knowledge."[251] A divided panel (which did not include Judge Garland) had held that this requirement, along with EPA's lack of an "intelligible principle" to limit its own authority, improperly delegated legislative power to an agency.[252] Judge Tatel dissented from the panel decision and again from the denial of rehearing, filing the opinion that Judge Garland joined. Judge Tatel (joined by Garland) argued that the Clean Air Act limits EPA discretion in ways "far more specific than the sweeping delegations

244 356 F.3d 296 (D.C. Cir. 2004).

245 *Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007).

246 *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222, 1233 (D.C. Cir. 2014) (per curiam).

247 *Id.* at 1245 (internal quotation marks and revisions omitted).

248 *Id.* at 1245, 1247 (internal quotation marks omitted).

249 *See Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 8 (D.C. Cir. 2006) (finding that FDA adequately explained its methodology to determine the "bioequivalency" of new generics to already approved drugs, but remanding on other questions).

250 195 F.3d 4, 8 (D.C. Cir. 1999) (Tatel, J., dissenting).

251 42 U.S.C. § 7409(b)(1) and interpretive notes.

252 *American Trucking Assns., Inc. v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

consistently upheld by the Supreme Court for more than sixty years,"[253] and complained that "[n]ot only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence," it "stripped the [EPA] of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people."[254]

After the full D.C. Circuit denied rehearing, the Supreme Court granted certiorari and reversed. Writing for a unanimous court, Justice Scalia held that the "scope of discretion [the Clean Air Act] allows is in fact well within the outer limits of our nondelegation precedents,"[255] and explained that the Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[256]

More recently, *White Stallion Energy Center, LLC v. EPA*,[257] a case that made its way to the Supreme Court during the 2015 term, involved challenges to EPA's regulation of mercury emissions from coal and oil-fired power plants. The Clean Air Act directs EPA to identify sources of numerous "hazardous air pollutants," and to promulgate emissions standards for those sources. In 2012, EPA found that it was "appropriate and necessary" to regulate power plant emissions because mercury is "highly toxic," "a threat to public health and the environment," and power plants are the largest source of mercury emissions in the United States.[258] In response, various petitioners, including states, industry participants, labor organizations, and environmental groups challenged the rule in the D.C. Circuit.

A divided panel upheld the rule in a per curiam opinion from Judges Garland and Rogers; Judge Kavanaugh dissented in part. The point of contention, and the issue that the Supreme Court later reviewed, was whether EPA adequately considered the costs of compliance and weighed those costs against the expected environmental and public health benefits. The dispute was not over whether EPA had to consider costs *at all*—it unquestionably did, including a formal cost-benefit study finding that the rule would reduce illness and premature deaths, and produce benefits valued at nine times its costs—but whether cost was an essential factor at the earliest stages of rulemaking. Applying *Chevron* deference, the per curiam opinion held that EPA's reading of the Clean Air Act was "clearly permissible,"[259] and that the agency could initially list power plants as sources "appropriate and necessary" to regulate without considering costs.[260]

The Supreme Court reversed in a 5-4 decision.[261] Writing for the majority, Justice Scalia held that "it was unreasonable for EPA to read [the Clean Air Act] to mean

253 195 F.3d at 9-10 (Tatel, J., dissenting).
254 *Id.* at 13.
255 *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).
256 *Id.* at 474-475.
257 748 F.3d 1222 (D.C. Cir. 2014).
258 *Id.* at 1231.
259 *Id.* at 1238.
260 Notably, Judge Garland also upheld the EPA rule over objections from environmental groups. In particular, the court held that EPA reasonably interpreted the statute to allow emissions averaging across multiple power plants, and that—deferring specifically on a matter of technical expertise—EPA provided reasonable explanation for a number of technical decisions it made to implement the rule. *White Stallion*, 748 F.3d at 1252.
261 *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

that cost is irrelevant to the initial decision to regulate power plants. The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."[262] In dissent, Justice Kagan called the decision "a peculiarly blinkered way for a court to assess the lawfulness of an agency's rulemaking," noting that for "[o]ver more than a decade, EPA took costs into account at multiple stages and through multiple means as it set emissions limits for power plants."[263]

The Clean Air Act was also at issue in *American Corn Growers Association v. EPA*,[264] a 2002 case in which Judge Garland dissented from a decision that invalidated part of EPA's "Haze Rule." Through a series of Clean Air Act amendments beginning in the late 1970s, Congress repeatedly urged EPA to address visibility impairment in national parks and wilderness areas. In 1999, EPA issued a rule regulating regional haze that required states to develop a long-term strategy for achieving visibility improvement goals. The rule also required states to identify stationary sources eligible for Best Available Retrofit Technology—or "BART"—and to determine if the sources emit "any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility."[265] Industry groups challenged this portion of the rule based on one additional requirement: States had to make BART determinations on a regional or "area" basis rather doing so individually, source-by-source.

In a per curiam opinion, Judges Randolph and Edwards agreed with industry's argument and rejected this portion of the Haze Rule. Even under *Chevron* deference, the court held that the regional approach to BART determinations was contrary to the text and structure of the Clean Air Act, and that it interfered with the statute's preservation of state discretion: "The Haze Rule ties the states' hands and forces them to require BART controls at sources without any empirical evidence of the particular source's contribution to visibility impairment[.]"[266]

Judge Garland dissented on this point, exhibiting his usual respect for *Chevron* deference when agency interpretation is based on technical or scientific expertise. He chided the court for taking industry's view rather than deferring to EPA's reasonable judgment that it is impracticable to trace individual source emissions. EPA's scientific studies had found that "visibility impairment . . . is caused in large part by long-range transport of combined emissions from multiple sources," and therefore "reasonable progress was not possible without a collective approach."[267] He concluded that because "there is nothing in the Clean Air Act that bars the approach taken by EPA, and that to the contrary the Haze Rule rests on a reasonable interpretation of the statutory language, I would follow the Supreme Court's direction in *Chevron* and uphold the Rule."[268]

262 *Id.* at 2711.
263 *Id.* at 2714 (Kagan, J., dissenting).
264 291 F.3d 1 (D.C. Cir. 2002).
265 *Id.* at 5 (quoting 42 U.S.C. § 7491(b)(2)(A)).
266 *Id.* at 8.
267 *Id.* at 16 (Garland, J., dissenting in part).
268 *Id.* at 17 (Garland, J., dissenting in part).

It is one thing to find that an agency's statutory interpretation does not hold up under *Chevron*. It is quite another to impose the "extraordinary remedy"[269] of mandamus to compel agency action. That's what a divided D.C. Circuit panel did in *In re Aiken County*,[270] a case involving the potential use of Yucca Mountain in Nevada as a storage facility for nuclear waste. The Nuclear Waste Policy Act (NWPA) required the Nuclear Regulatory Commission (NRC) to evaluate a license application from the Department of Energy to store nuclear waste at the mountain. In 2011, Congress appropriated some funds for NRC to consider the application, but did not do so in 2012. Citing insufficient funds to make any "meaningful" progress in its review, NRC shut down its review process and eventually missed a statutory deadline to comply with the NWPA.

Relying in part on *dicta* from an earlier case that mandamus may be appropriate if NRC missed the deadline,[271] Judges Randolph and Kavanaugh (Judge Kavanaugh writing) held that NRC was "flouting the law" and issued a writ of mandamus requiring the agency to resume consideration of the Department of Energy's application. The court was not persuaded by the lack of congressional funding to actually complete the work, noting that "Congress speaks through the laws it enacts," and "[n]o law states that the Commission should decline to spend previously appropriated funds on the licensing process."[272]

Judge Garland dissented. He first noted that mandamus always remains within the court's discretion, and can be denied for equitable reasons, including that the remedy would be "useless."[273] Such was the case here, he argued, because both NRC and its Atomic Safety and Licensing Board had unanimously voted to suspend the application process until Congress appropriated sufficient funds, and the court is "not in a position—nor [does it] have any basis—to second-guess that conclusion."[274] "In short," he explained, "given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering [NRC] to spend part of those funds unpacking its boxes, and the remainder packing them up again. This exercise will do nothing to safeguard . . . separation of powers . . . [and] it is within our discretion not to order the doing of a useless act[.]"[275]

Labor Law and Workplace Safety

In the labor law context, Judge Garland's respect for agency deference has led to favorable outcomes for unions and workers. As first noted by *OnLabor*, the labor law blog by Harvard Law School professors Benjamin Sachs and Jack Goldsmith, Judge Garland has written 22 majority opinions involving challenges to NLRB decisions,[276] and all 22

269 *In re Aiken County*, 725 F.3d 255, 258 (D.C. Cir. 2013).
270 *Id.* at 255.
271 *See In re Aiken County,* 645 F.3d 428 (D.C. Cir. 2011).
272 *In re Aiken County*, 725 F.3d at 260.
273 *Id.* at 268-69 (quoting *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936)).
274 *Id.* at 270 (Garland, J., dissenting).
275 *Id.*
276 Hannah Belitz, *The Supreme Court Vacancy and Labor: Merrick Garland*, OnLabor Blog (Feb. 23, 2016), https://onlabor.org/2016/02/23/the-supreme-court-vacancy-and-labor-merrick-garland-2/.

are at least mostly favorable to the union.[277] In 18 cases Judge Garland entirely upheld NLRB findings of unlawful employment practices; in two of the cases he upheld NLRB determinations favorable to the union and rejected NLRB findings favorable to management;[278] in one case, *Pioneer Hotel, Inc. v. NLRB*,[279] his ruling was mostly favorable to the union—the court upheld four NLRB findings of unlawful employment practices, but rejected two others for lack of substantial evidence; and the one decision against the NLRB outright, *UFCW, Local 400 v. NLRB,* favored the union.[280] Judge Garland also dissented in three NLRB cases, *FedEx Home Delivery v. NLRB*,[281] *Ross Stores v. NLRB*,[282] and *Northeast Beverage Corporation v. NLRB*.[283] In each case Judge Garland dissented from a ruling that overturned NLRB findings of unlawful labor practices.

Beyond this quantitative analysis—which, again, is explained largely by agency deference—a close reading of Judge Garland's labor opinions reveals a serious effort to consider the realities of the workplace and the real-world circumstances of American workers. This is of special importance given the extent to which such insight has been lacking on the Supreme Court. When the Supreme Court made it harder for employees to sue for workplace harassment in *Vance v. Ball State*,[284] Justice Ruth Bader Ginsburg's dissent blamed a conservative majority "blind to the realities of the workplace."[285] She levied a similar criticism when the Court raised the bar for proving unlawful retaliation,[286] and when it interpreted Title VII's limitations period in a way that immunized decades of unlawful gender discrimination.[287] It is true that in his legal career before the bench Judge Garland did not represent workers in labor disputes, but his record suggests he at least believes that the law's impact on real people is worthy of the Court's consideration.

A few cases illustrate this point.

In *FedEx Home Delivery v. NLRB*,[288] the issue was whether FedEx delivery drivers were independent contractors rather than employees of FedEx. The NLRB found that the drivers were employees and therefore FedEx's refusal to bargain with a union was an unlawful employment practice. A divided D.C. Circuit panel reversed, and Judge Janice Rogers Brown's majority opinion emphasized how the drivers' position "presents the opportunities and risks inherent in entrepreneurialism" and offers "entrepreneurial potential."[289] She noted the drivers' ability to have multiple routes, hire and pay other drivers, and sell or trade their routes as indicia of entrepreneurialism unique to independent contractors.

---

277 *See* APPENDIX C.

278 *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804 (D.C. Cir. 2007).

279 182 F.3d 939 (D.C. Cir. 1999).

280 222 F.3d 1030 (D.C. Cir. 2000).

281 563 F.3d 492 (D.C. Cir. 2009).

282 235 F.3d 669 (D.C. Cir. 2001).

283 554 F.3d 133 (D.C. Cir. 2009).

284 133 S. Ct. 2434 (2013).

285 *Id.* at 2457 (Ginsburg, J., dissenting).

286 *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2547 (2013) (Ginsburg, J., dissenting) (accusing majority of interpreting Title VII in a way that "lacks sensitivity to the realities of life at work.").

287 *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting) ("The realities of the workplace reveal why" the Court's decision is in error).

288 563 F.3d 492 (D.C. Cir. 2009).

289 *Id.* at 497-98.

Judge Garland dissented. He argued first that the majority was wrong to turn the existence of entrepreneurial opportunities into a near single-factor test for distinguishing independent contractors from employees. Under Supreme Court precedent, he said, the court was bound to apply the common-law agency test, under which "the total factual context is assessed" and "no one factor [is] decisive."[290] Citing *Chevron*, he observed that "[a]lthough the NLRB may have authority to alter the test or at least alter its focus, this court does not."[291]

But more interesting is his charge that, in applying its standard, the court ignored the realities of how the job actually worked in practice. In Judge Garland's view, the court reversed the NLRB (and removed a class of workers from labor law protection) based on supposed opportunities that were "insubstantial and theoretical" rather than "significant and realistic."[292] "There is something more important at stake here," he wrote, than a mere factual disagreement "on the question of whether the drivers had entrepreneurial opportunity." In finding weak indicia of entrepreneurial opportunity in this case, the NLRB "emphasized that few [FedEx drivers] seized any of the opportunities that allegedly were available to them." Yet the court said that the "failure to actually exercise theoretical opportunities is 'beside the point.'"[293] Judge Garland rejected such reliance on theory over reality: While it "may not be necessary for workers to *regularly* exercise their right to engage in entrepreneurial activity for that factor to weigh in the balance," he wrote, "if a company offers its workers entrepreneurial opportunities that they cannot realistically take, then that does not add any weight to the Company's claim that the workers are independent contractors."[294]

In *Ceridian Corp. v. NLRB*,[295] a unanimous opinion upholding an NLRB finding of an unlawful employment practice, Judge Garland recognized how a company policy might uniquely affect workers with family responsibilities. In *Ceridian*, a union assembled a committee of workers to negotiate with the company in pursuit of a new collective bargaining agreement, but the company both refused to negotiate during nonworking hours, and denied the employees unpaid leave to attend bargaining sessions held during business hours. Instead, the company required employees to use accrued paid time off to attend the negotiations, a policy that forced some workers (indeed, more than half of the bargaining team) to drop off the committee. The NLRB ruled that this Catch-22 policy—denying time off while also refusing to negotiate outside business hours—unlawfully interfered with the workers' right to choose a bargaining representative.[296]

The D.C. Circuit upheld the NLRB decision in a unanimous opinion by Judge Garland that Judges Sentelle and Thomas Griffith joined. In assessing the company's policy,

---

290 *Id.* at 505 (Garland, J., dissenting) (citing *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968)).

291 *Id.* at 510 (Garland, J., dissenting) (citing *Chevron U.S.A. Inc.*, 467 U.S. at 842-43).

292 *Id.* at 517 (Garland, J., dissenting).

293 *Id.* at 516 (Garland, J., dissenting) (quoting Maj. Op. at 502).

294 *Id.* (Garland, J., dissenting) (quoting *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (emphasis noted in original)).

295 435 F.3d 352 (D.C. Cir. 2006).

296 *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (holding that, under the National Labor Relations Act, employees have a "fundamental right" to "select representatives of their own choosing for collective bargaining... without restraint or coercion by their employer.").

Judge Garland observed not just that some workers would be unable to participate in bargaining (for example, workers without enough accrued leave time would be ineligible *per se*), but that certain *types* of workers would be disproportionately excluded. He wrote that "[e]mployees who need their [paid time off] to accommodate substantial family responsibilities, for example, would not be able to serve. An employee who exhausted his annual [paid leave] allotment on bargaining meetings would have nothing left with which to meet his family responsibilities[.]"[297] Judge Garland noted that requiring "use of finite leave would chill participation by those with family or other responsibilities,"[298] and therefore it was reasonable for the NLRB to conclude that the policy interfered with workers' selection of bargaining representatives.

Next, in *Northeast Beverage Corporation v. NLRB*,[299] a case about whether certain worker conduct was "protected activity" under the NLRA, Judge Garland's dissent focused on the motives of management and the "particular exigencies of the case"—two factors that the majority ignored when it ruled in favor of management. In 2002, the beverage distributor Northeast Beverage decided to close one of its subsidiaries, Vetrano Distributors, and consolidate operations at another facility. The employees at Vetrano were represented by a union, and Northeast began union negotiations about the effects of the planned consolidation. A group of Vetrano employees, concerned about their employment status and unable to obtain more information from company management, left work for several hours to attend one of the bargaining sessions with Northeast. Northeast responded that it was improper for the employees to leave work, and discharged all but one of them. The union filed a complaint over the terminations, and an NLRB panel found that walking out to attend the negotiations was concerted activity for "'mutual aid' directly related to a labor dispute," and therefore protected under the NLRA.[300]

The D.C. Circuit, in an opinion by Judge Ginsburg and joined by Judge Henderson, rejected the NLRB's finding as unreasonable. The court found no ongoing "labor dispute" that could bring the walkout within the NLRA's protections. Instead, "the employees simply used working time to engage in union-related activity customarily reserved for non-working time."[301] According to the majority, the NLRA "do[es] not protect employees who leave work to seek information from their union or their employer. The Board therefore erred in treating the employees' mere quest for information as a 'labor dispute.'"[302]

In dissent, Judge Garland said he found this a "difficult question," but was persuaded by the "particular exigencies of the case"[303] and the ordeal that Vetrano employees faced with the closing of their facility. Such exigencies included, for example, how "the incident at issue . . . occurred during a particularly vulnerable time for employees who are caught up in the transition to a new employer"; "the employees . . .

297 *Ceridian*, 435 F.3d at 357.
298 *Id.*
299 554 F.3d 133 (D.C. Cir. 2009).
300 *Northeast Bev. Corp.*, 554 F.3d at 137.
301 *Id.* at 140.
302 *Id.*
303 *Id.* at 141 (Garland, J., dissenting).

were not getting answers to critical questions regarding whether they would retain employment"; and "the obvious urgency of the [employees'] need for the information regarding whether they would continue to be employed."[304] In addition, the employees' absence from work caused little or no disruption. "Together," Judge Garland wrote, "these circumstances reasonably support the Board's determination 'that the [employees'] conduct was protected activity as it was 'mutual aid' directly related to a labor dispute—the anticipated closing of the [employees'] work facility and the associated effects-bargaining.'"[305]

Judge Garland also found substantial evidence to support the NLRB's finding that Northeast's stated reason for discharging the workers—that they left work to attend union negotiations—was mere pretext for the actual reason: To avoid employing a significant number of union-represented employees at the consolidated facility.[306] Judge Ginsburg's majority opinion did not mention this particular finding, and offered no view on management's motive. Thus a crucial distinction between the majority and Judge Garland, in addition to the scope of deference, was Judge Garland's willingness to consider the actual dynamic between the workers and management in this particular case.

Finally, in *Shamrock Foods Company v. NLRB*,[307] another unanimous decision, Judge Garland's analysis of what constitutes unlawful interrogation of union activities evinces a sensitivity to the realities of workplace relations, and in particular the relations between managers and lower level employees. After the NLRB found that a company night manager unlawfully interrogated a warehouse worker about organizing activity, the company argued to the D.C. Circuit that, even assuming the alleged conversations took place, they did not amount to unlawful interrogation. Judge

Garland easily dispensed with this argument by looking to the context in which the conversations took place:

> Here, in the midst of a heated union campaign, a [company] manager twice approached [the employee]—who was not an open union supporter—and questioned him about the activities of a union organizer, eliciting a promise from the employee that he would keep his "eyes open." The questioning was unaccompanied by any assurance against reprisal, took place when [the employee] was alone, and had no apparent legitimate purpose.[308]

* * *

The remainder of this section summarizes the split-panel cases from Judge Garland's labor law record, including *Ross Stores*, which is the one other case in which Judge Garland dissented (in addition to *FedEx Home Delivery* and *Northeast Beverage*).

---

304 *Id.*
305 *Id.* (quoting *Northeast Bev. Corp.* 349 N.L.R.B. No. 1166, 1166 (2007)).
306 *Id.* at 141-42 (Garland, J., dissenting).
307 346 F.3d 1130 (D.C. Cir. 2003).
308 *Id.* at 1137.

Ross Stores v. NLRB.[309] In *Ross Stores*, the court divided over the timeliness of an NLRB charge under the exception for "closely related" charges. "The NLRB has long construed [the NLRA], with judicial approval, to permit prosecution of an alleged violation that was not timely charged if it is 'closely related' to the allegations in a timely filed charge."[310] In this case, a company supervisor in June 1993 admonished an employee against posting pro-union posters and other union solicitation, and in August 1993 the employee was fired. The NLRB found that both incidents were unfair labor practices, and that, while the admonishment occurred outside the limitations period, the charge was "closely related" to the employee's firing for engaging in union activities. On appeal, Judges Henderson and Randolph rejected the NLRB finding on the timeliness question, saying that "closely related" means more than arising out of the same organizing campaign and occurring close in time and location.[311]

In his dissent, Judge Garland identified an additional factor that connected the two incidents: According to the NLRB, one was the motive for the other. "The Board's opinion makes clear that the two allegations are closely related. Indeed, the Board expressly used the earlier incident—in which [the employee's] supervisor caught him posting union literature and admonished him against doing so—as part of the basis for its finding that [the employee] was discharged because of anti-union animus. The incident underlying the untimely charge (the unlawful admonishment) was thus closely related to the incident underlying the timely charge (the unlawful discharge)[.]"[312]

Secretary of Labor v. Excel Mining, LLC.[313] *Excel Mining*, an important coal mine safety case, involved an industry challenge to the Secretary of Labor's methodology for testing miners' exposure to coal dust. Judge Garland wrote the majority opinion that upheld the Secretary's interpretation of the Mine Safety Act under *Chevron* deference. Judge Sentelle dissented, arguing both that deference was unwarranted, and that the Secretary's interpretation was unreasonable.

For decades, the Secretary of Labor tested for compliance with standards that limit miners' exposure to respirable coal dust by averaging multiple dust samples taken over a single shift. In 1999, the Secretary issued three citations to Excel Mining for violating the respirable dust standard, and in each case the Secretary averaged single-shift samples and found respirable dust concentration well in excess of the governing standard. On appeal in the D.C. Circuit, Excel Mining argued that the Secretary's methodology violated the Federal Mine Safety and Health Act, and that the only lawful method to test for compliance was to average multiple samples taken over multiple shifts (not multiple samples from one shift). The United Mine Workers union filed an amicus brief in support of the Secretary.

Judge Garland's opinion (joined by Judge Rogers) upheld the Secretary's interpretation under a two-pronged *Chevron* analysis. First, under typical *Chevron* reasoning,

309 235 F.3d 669 (D.C. Cir. 2001).
310 *Id.* at 672.
311 *Id.* at 674-75.
312 *Id.* at 680 (Garland, J., dissenting).
313 334 F.3d 1 (D.C. Cir. 2003).

the court found that the statute was ambiguous and that the Secretary's interpretation was reasonable. But the court was careful to point out that part of Excel Mining's argument was less a challenge to statutory interpretation than to the wisdom of policy, an important distinction for judicial review. Excel Mining argued that single-shift samples are an "especially unreliable" indicator of respirable dust levels and therefore relying on them is "ill-advised." Citing *Chevron*, Judge Garland responded that the court "lack[s] the authority to" resolve that methodological dispute. When "a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[314] Therefore the court "decline[d] to second-guess the Secretary's longstanding view that taking multiple samples over both single and multiple shifts is a reasonable and effective means of effectuating the purpose of the Mine Act."[315]

In dissent, Judge Sentelle conceded that "the Secretary is pursuing the laudable goals set forth by Congress," but said that "the congressional motivation in a statute, no matter how exemplary, does not issue to the administrative agency 'a roving commission to achieve [any] laudable goal.'"[316] He concluded that, in this case, "the Secretary . . . has overstepped [her] statutory empowerment."[317]

Kiewit Power Constructors Company v. NLRB.[318] The issue in *Kiewit* was whether certain employee complaints against company policy crossed the line from intemperate outbursts to physical threats. After a Kiewit manager warned its electricians that their breaks were too long and in violation of a new company policy, two of the electricians responded that if they were disciplined things would "get ugly" and the supervisor "better bring [his] boxing gloves."[319] Both employees were fired for the comments, but the NRLB reinstated them after finding that, in context, the statements were not physical threats but figures of speech made in the course of a protected labor dispute.

There was no dispute that complaining about the break policy and its enforcement was protected activity; indeed, the union had told workers that it opposed the new break policy in question. There was also no dispute that employees have "some leeway for impulsive behavior" when engaged in a labor dispute. The issue, rather, was whether their conduct "was so unreasonable as to warrant denying protections that the [NLRA] would otherwise afford."[320] The majority deferred to the NLRB, finding that the Board was not unreasonable in concluding that the employees' statements were not actual physical threats, and therefore remained within the sphere of protected activity. Judge Griffith (joined by Judge Garland), wrote: "Once we acknowledge that the employees were speaking in metaphor, the NLRB's interpretation is

---

314 *Excel Mining*, 334 F.3d at 11 (quoting *Chevron*, 467 U.S. 837, 866 (1984)).

315 *Id.* 11-12. *See also Secretary of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005) (Upholding Department of Labor citation issued against a mine operator for violating regulations that require a "preshift examination" before miners can be sent underground).

316 *Id.* at 14-15 (Sentelle, J., dissenting) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001)).

317 *Id.* at 15 (Sentelle, J., dissenting).

318 652 F.3d 22 (D.C. Cir. 2011).

319 *Id.* at 24.

320 *Id.* at 27.

not unreasonable. It is not at all uncommon to speak of verbal sparring, knock-down arguments, shots below the belt, taking the gloves off, or to use other pugilistic argot without meaning actual fisticuffs."[321] Judge Henderson dissented, concluding that "[t]he Board's reinstatement—seconded by my colleagues—of employees who openly challenge by threatening language lawful decisions of their employer compels me to observe: 'So much for industrial peace.'"[322]

SeaWorld of Florida, LLC v. Perez.[323] In *SeaWorld* Judge Garland joined a majority opinion that upheld a Department of Labor citation against SeaWorld for exposing its whale trainers to recognized hazards during performances. On February 24, 2010, a killer whale at SeaWorld's Orlando, Florida, theme park killed its trainer during a live performance by violently thrashing her around and, ultimately, drowning her. After an OSHA investigation, the Secretary of Labor cited SeaWorld for violating the General Duty Clause of the Occupational Safety and Health Act. That clause requires employers to provide a place of employment free from recognized hazards that are likely to cause death or serious physical harm.

In an opinion by Judge Rogers, the court upheld the citation under a straightforward deferential standard of review, asking whether the Secretary's action was arbitrary or capricious, and whether factual determinations were supported by substantial evidence. Among other elements, a General Duty violation requires the Secretary to show that "a feasible means to eliminate or materially reduce the hazard existed."[324] Here, the court held that "the Secretary . . . could reasonably conclude that the danger to SeaWorld's trainers during performances from killer whales can be prevented by use of physical barriers and distance" from the whales,[325] and that such remedies would not alter the "essential nature" of SeaWorld's business.[326] Responding to the dissent's complaint that whale shows are inherently dangerous and therefore inappropriate for regulation, the court noted substantial evidence that "close trainer contact with killer whales is not integral to SeaWorld's workplace."[327]

Judge Kavanaugh dissented and argued that the Secretary had ventured into unchartered territory by regulating an inherently dangerous entertainment show—drawing comparisons to other spectator events like football, air shows, and the circus, over which the Department of Labor "has not traditionally tried to stretch its general authority under the Act."[328] Judge Kavanaugh argued that this case turns on a fundamental policy question:

> When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing

321 *Id.* at 28.
322 *Id.* at 36 (Henderson, J., dissenting).
323 748 F.3d 1202 (D.C. Cir. 2014).
324 *Id.* at 1207.
325 *Id.* at 1210.
326 *Id.*
327 *Id.* at 1213.
328 *Id.* at 1218 (Kavanaugh, J., dissenting).

> participants? And most importantly for this case, who decides that the risk to participants is too high?[329]

In Judge Kavanaugh's view, the Secretary's decision to impose safety requirements on whale shows while disclaiming authority over analogous activities showed that the citation was arbitrary and capricious.

National Security and Detainee Rights

After holding in 2008 that the right to petition for habeas relief extends to aliens held as enemy combatants at Guantanamo Bay,[330] the Supreme Court has largely abandoned the issue of detainee rights.[331] Instead, the Court has tasked the D.C. Circuit with defining the contours of habeas proceedings for Guantanamo prisoners, and ensuring that the "habeas court . . . ha[s] sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."[332] As law professor Stephen Vladeck observed, "ever since the summer of 2004, the D.C. District Court and D.C. Circuit have exercised a de facto form of exclusive jurisdiction over any and all claims arising out of Guantánamo."[333] Given the D.C. Circuit's unique and important role in this regard, we examined all of Judge Garland's Guantanamo-related decisions—including those where he joined a unanimous panel but did not write an opinion.

Judge Garland's record reflects a cautious jurist, unwilling to quickly swing the pendulum from a regime in which judicial oversight of the executive was carefully circumscribed,[334] to one in which alien detainees enjoy due process rights on par with criminal defendants. Judge Garland's decisions are mixed in that he has not always ruled against detainees, but on the whole he has more often deferred to the government, and has been part of numerous decisions that restrict detainees' access to judicial relief in federal court.

Judge Garland has never voted in favor of a detainee on the merits of a habeas claim. Overall, we identified 13 cases in which Judge Garland voted on the merits of a Guantanamo detainee's petition for relief (whether grounded in habeas, a challenge to enemy combatant status under the Detainee Treatment Act, or appeal of a military commission conviction), and just once, in *Parhat v. Gates*,[335] did he substantially rule in favor of the detainee.[336] Importantly, Judge Garland is not an outlier in this

---

329 *Id.* at 1217 (Kavanaugh, J., dissenting).

330 *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

331 *See generally* Dorothy Samuels, *Certiorari Denied: Remembering the Roberts Court's Shameful Abandonment of Torture Victims*, The Huffington Post Blog (Sept. 29, 2015), http://www.huffingtonpost.com/dorothy-samuels/certiorari-denied-bush-era-torture-victims_b_8213456.html.

332 *Boumediene*, 553 U.S. at 783.

333 Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 Seton Hall L. Rev. 1451, 1452 (2011).

334 *See Parhat v. Gates*, 532 F.3d 834, 839 (D.C. Cir. 2008) (discussing limited judicial review under the Detainee Treatment Act, and the prohibition on habeas relief under the Military Commissions Act of 2006).

335 *Parhat*, 532 F.3d 834.

336 *See* APPENDIX D.

respect; in only one of the 13 cases did the court divide on the merits.[337] (In another, Judge Sentelle dissented to argue the court lacked jurisdiction over the claim entirely.[338])

These merits decisions do not include cases in which the court denied *en banc* review and Judge Garland declined to join colleagues who argued for more robust habeas protections. That was the case in *Abdah v. Obama,*[339] when the full court declined to review a prior decision that foreclosed challenges to transfers from Guantanamo to places where habeas is unavailable and the detainees may face torture or other physical harm.[340] Judge Griffith filed a dissent joined by Judge Rogers and Judge Tatel, arguing that the court wrongly "gave the Executive permission to spirit away a detainee without warning, thereby denying him the protections of an essential component of the Great Writ and making the right to habeas corpus 'subject to manipulation by those whose power it is designed to restrain.'"[341] Judge Garland voted to deny review.

But these 13 cases also do not include Judge Garland's dissent in *Saleh v. Titan Corporation,*[342] also discussed in the Access to Civil Justice section, where he forcefully argued that federal courts should not immunize private military contractors from civil liability for their role in the abuse and torture of Iraqi nationals at Abu Graib prison. Judge Garland's *Saleh* dissent is a significant disquisition defending the ability of alien detainees to seek justice in federal court. But it is categorically distinct from the Guantanamo line of cases, both because it involved claims sounding in tort law rather than habeas, and because the dispute was between detainees and private contractors, not the Executive. Indeed, a fundamental premise of Judge Garland's *Saleh* opinion was the lack of evidence "that the brutality the plaintiffs allege was authorized or directed by the United States."[343] His views in *Saleh*, therefore, say relatively little about his views on the constitutional limits of executive power in national security matters.

Throughout a series of decisions, Judge Garland has been part of the D.C. Circuit's trend toward narrowing detainees' access to habeas and other judicial relief:

- In 2003, Judge Garland joined a unanimous panel holding that federal courts lack jurisdiction over Guantanamo habeas claims.[344] Writing for the Court, Judge Randolph said that the detainees "cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them."[345] Nine months later, the Ninth Circuit reached the opposite conclusion—specifically, that federal courts *did* have statutory jurisdiction over habeas petitions

337 *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).
338 *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012).
339 639 F.3d 1047 (D.C. Cir. 2011) (denying *en banc* review).
340 *See Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).
341 *Abdah*, 639 F.3d at 1015 (quoting *Boumediene*, 553 U.S. at 766).
342 580 F.3d 1, 21 (D.C. Cir. 2009) (Garland, J., dissenting), *see also* n.84, *supra*, and accompanying text.
343 580 F.3d at 34 (Garland, J., dissenting).
344 *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *overturned by Rasul v. Bush*, 542 U.S. 466 (2004).
345 *Id.* at 1145.

brought by alien detainees held at Guantánamo.[346] In 2004, the Supreme Court overruled the D.C. Circuit in *Rasul v. Bush*.[347]

- In several cases Judge Garland has imposed evidentiary rules that ease the government's burden and make it harder for detainees to establish a right to relief—in particular, the court has repeatedly held that hearsay is admissible (and that only "unreliable hearsay" will be excluded), and that the government's burden of proof is a "preponderance of the evidence"—that is, "more likely than not"—rather than the more demanding standard of "clear and convincing" evidence.[348]

- In declining to hear a case *en banc*, Judge Garland and the full court permitted precedent to stand that precludes challenges to transfer or repatriation orders from Guantanamo Bay, even when the transfer is to a location where habeas is unavailable and the detainee fears torture.[349] Judge Griffith dissented from the denial, noting that a longstanding element of habeas corpus is challenging transfers beyond the reach of the writ, to prevent "the King's officers from sending prisoners away to evade habeas jurisdiction."[350] He further argued that the Supreme Court cases requiring deference to the executive on transfers do not oblige courts to "bar the courthouse door" when detainees challenge the legality of such transfers.[351] Judge Tatel and Judge Rogers joined the dissent.

- Judge Garland wrote the unanimous panel decision in *Khan v. Obama* that affirmed the denial of habeas relief based on evidence that neither the petitioners nor their counsel were permitted to see.[352] Judge Garland wrote that the court's *in camera* review of the material in question "constitut[ed] an 'effectiv[e] substitute for unredacted access' that ensure[d] [petitioner] the 'meaningful review of both the cause for detention and the Executive's power to detain' required by *Boumediene*."[353] As reported in *The New York Times*, the government has seemingly disclaimed the credibility of the information it initially withheld, as it has since provided unspecified information to the detainee's counsel and voluntarily repatriated the detainee to Afghanistan.[354]

- In *Hatim v. Obama*,[355] Judge Garland joined a unanimous decision that overturned the district court, and upheld new security policies that required invasive searches of detainees' genital area before and after meeting with counsel. Differing from the district court, the D.C. Circuit applied the highly-deferential

---

346 *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

347 542 U.S. 466. Congress responded to *Rasul* by passing the Detainee Treatment Act and amending the federal habeas statute to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo[.]"

348 *See Awad v. Obama*, 608 F.3d 1, 7-11 (2010) (Garland joining Silberman and Sentelle); *Al Odah v. United States*, 611 F.3d 8 (2010) ("*Al Odah II*") (Garland joining Rogers and Sentelle); *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012) (Garland writing opinion joined by Kavanaugh and Ginsburg).

349 *Abdah*, 630 F.3d 1047.

350 *Id.* at 1049 (Griffith, J., dissenting).

351 *Id.* at 1053 (Griffith, J., dissenting).

352 655 F.3d 20 (D.C. Cir. 2011).

353 *Id.* at 30 (quoting *Al Odah*, 559 F.3d at 547-48).

354 *See* Charlie Savage, *Merrick Garland Often Deferred to Government in Guantánamo Cases*, The New York Times (March 18, 2016), http://www.nytimes.com/2016/03/19/us/merrick-garland-often-deferred-to-government-in-guantanamo-cases.html.

355 760 F.3d 54 (D.C. Cir. 2014).

standard set forth in *Turner v. Safley* to assess a challenge to conditions of confinement.[356] Under *Turner*, "courts are to uphold prison regulations that 'impinge on inmates' constitutional rights" as long as those regulations are "reasonably related to legitimate penological interests."[357] Here, the court afforded Guantanamo administrators "wide-ranging deference in the adoption and execution of policies and practices that *in their judgment* are needed to preserve internal order and discipline and to maintain institutional security."[358] And further, the court explained that, under Supreme Court precedent, the burden is on the *prisoner* to *disprove* the validity of prison regulations.

- In *Al Bahlul v. United States*,[359] Judge Garland joined an *en banc* majority finding that a detainee convicted of conspiracy to commit war crimes in a military commission had waived his Ex Post Facto claim, thereby reducing judicial review of that claim to "plain error." Three of the seven participating judges (Judges Rogers, Brown, and Kavanaugh) would have reviewed the claim de novo, and one, Judge Rogers, would have vacated the conspiracy conviction as violating the Constitution's Ex Post Facto Clause.[360]

- In *Uthman v. Obama*,[361] Judge Garland joined a unanimous panel (with Judges Kavanaugh and Griffith) reversing the district court's grant of habeas relief and order to release the detainee. Applying D.C. Circuit precedent established between the district court's order and the detainee's appeal, the court shifted "the key question" from whether "an individual receives and executes orders from the enemy force's combat apparatus" to a more "functional" approach that examines on a case-by-case basis whether someone may "properly be considered part of" a terrorist organization.[362] Under this standard, the court found that the detainee-petitioner "more likely than not was part of al Qaeda."[363]

As noted above, Judge Garland's strongest case supporting judicial review of Guantanamo detention is *Parhat v. Gates*,[364] which involved review of a Combatant Status Review Tribunal (CSRT) determination. Parhat was a Guantanamo detainee who petitioned for review after the CSRT determined that he was an "enemy combatant" and therefore lawfully held. Parhat was an ethnic Uighur who was not a member of Al Qaeda or the Taliban and had never participated in a hostile action against the United States or its allies. The CSRT's determination was based on his "affiliat[ion]" with a Uighur independence group that itself was "associated" with the Taliban.[365] Parhat argued that such evidence was insufficient to classify him as an enemy combatant under the Department of Defense's own definition, and in any case that the DOD definition was so broad that it exceeded the detention authority under the Authorized Use of Military Force (AUMF).

---

356 482 U.S. 78 (1978).
357 *Hatim*, 760 F.3d at 58 (quoting *Turner*, 482 U.S. at 84-85, 89).
358 *Id.* at 59 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).
359 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).
360 *Id.* at 50 (Rogers, J., concurring in part and dissenting in part).
361 637 F.3d 400 (D.C. Cir. 2011).
362 *Id.* at 403 (internal quotation marks omitted).
363 *Id.* at 407.
364 532 F.3d 834 (D.C. Cir. 2008).
365 *See id.* at 835-36.

Judge Garland granted Parhat's petition in a unanimous panel opinion joined by Judge Sentelle and Judge Griffith. He wrote that to "affirm the Tribunal's determination under such circumstances would be to place a judicial imprimatur on an act of essentially unreviewable executive discretion."[366] In particular, Judge Garland refused to simply take the government's word about evidence reliability, and was deeply skeptical of unsourced statements in classified documents. "[T]he government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. *See* Lewis Carroll, The Hunting of the Snark 3 (1876) ('I have said it thrice: What I tell you three times is true.') In fact, we have no basis for concluding that there are independent sources for the documents' thrice-made assertions."[367] Because the evidence was insufficient to classify Parhat as an enemy combatant under the DOD definition, the court did not decide whether that definition exceeded AUMF authorization.

But despite the lack of evidence, the court did not grant Parhat's release because it could not "know whether the government has additional evidence that would cure the reliability issues[.]"[368] Judge Garland recognized Parhat's legitimate fear "of endless do-overs" and said the case for release would be stronger if the government falls short after a second CSRT.[369] He also explained that, given the Supreme Court's decision in *Boumediene*, Parhat could pursue habeas relief, and that in such a "proceeding, he will be able to make use of the determinations we have made today regarding the decision of his CSRT, and he will be able to raise issues that we did not reach."[370]

Freedom of Information Act (FOIA)

As the Supreme Court has explained, the Freedom of Information Act "ensure[s] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[371]

Judge Garland's FOIA opinions show that he recognizes such lofty value in government transparency and accountability, and that in general he has broadly applied FOIA to "inform citizens about 'what their government is up to.'"[372] That includes procedural decisions that protect requestors' access to fee waivers, expedited requests, and attorney's fees, as well as substantive decisions that narrowly apply FOIA exemptions and other doctrines that might limit disclosure. Judge Garland is more likely to defer to the government when information is withheld for national security reasons, but even then there are exceptions, and he has written important opinions requiring disclosure.

---

366 *Id.* at 836.
367 *Id.* at 848-49.
368 *Id.* at 850.
369 *Id.*
370 *Id.* at 851.
371 *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
372 *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1194 (D.C. Cir. 2004) (Garland, J., dissenting in part) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

Beginning with procedural matters that facilitate access to records, Judge Garland wrote an instructive opinion expanding access to fee waivers in *Cause of Action v. Federal Trade Commission*.[373] Under FOIA, agencies may impose fees to cover the costs of reviewing, duplicating, and searching for records. In *Cause of Action*, the court considered two statutory bases for requesting fee waivers: (1) "disclosure of the information is in the public interest";[374] and (2) the requestor is "a representative of the news media."[375] Noting the sparse case law applying these provisions, Judge Garland used his opinion to clarify the law and reject the more restrictive approach to waivers advanced by the FTC and the district court. Of particular interest, the court explained that the "news media" is broad enough to include "public interest advocacy organization[s]" who are not "organized especially around dissemination" of their work to an audience.[376]

Similarly, Judge Garland joined a split-panel decision holding that a law firm representing itself is eligible for attorney's fees under FOIA's fee-shifting provision.[377] And on an issue of first impression, Judge Garland wrote a unanimous opinion holding that "a district court must apply de novo review to agency denials of expedited processing under FOIA"[378]—a particularly notable outcome given Judge Garland's general disposition toward agency deference.

Substantive FOIA questions typically involve one or more of the nine exemptions to the statute's general presumption of mandatory disclosure.[379] In two cases, Judge Garland wrote separately to argue for a limited application of the exemption at issue, staking out a more disclosure-friendly position than others on the court.

McDonnell Douglas Corporation v. United States Air Force is a "reverse" FOIA case in which McDonnell Douglas sued to block the Air Force from releasing government contract pricing information to one of McDonnell's competitors, Lockheed Martin. At issue was whether certain prices that the Air Force paid to McDonnell fell within FOIA's Exemption Four, which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[380] The panel majority held that Exemption Four applied because disclosure to Lockheed would "likely cause McConnell Douglas substantial competitive harm."[381]

In dissent, Judge Garland argued that the majority came "perilously close to a per se rule that line-item prices—prices the government agrees to pay out of appropriated funds for goods or services provided by private contractors—may never be revealed to the public through a Freedom of Information Act (FOIA) request."[382] He also

373 799 F.3d 1108 (D.C. Cir. 2015).
374 5 U.S.C. § 552(a)(4)(iii).
375 *Id.* § 552(a)(4)(A)(ii)(II).
376 *Cause of Action*, 799 F.3d at 1125.
377 *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 324 (D.C. Cir. 2006).
378 *Al-Fayed v. CIA*, 254 F.3d 300, 311 (D.C. Cir. 2001).
379 5 U.S.C. § 552(b)(1)-(9).
380 *Id.* § 552(b)(4).
381 *McDonnell Douglas Corp.*, 375 F.3d at 1190 (applying *National Parks & Conservation Assoc. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)).
382 *McDonnell Douglas Corp.*, 375 F.3d at 1194 (Garland, J., dissenting in part).

pointed out that the majority "stands the burden of proof on its head" by wrongfully requiring the Air Force to *disprove* competitive harm, when the burden to establish harm should be on the opponent of disclosure.[383] And after finding that the majority erred in its "competitive harm" analysis, Judge Garland questioned whether that was the right standard to apply in the first place. He urged the court "to think hard about whether it makes sense to regard prices actually paid by the government as . . . confidential commercial or financial information 'obtained from a person' under Exemption Four of FOIA,"[384] noting that "it is indeed [strange] to regard an agency's agreement to expend a specified amount of public funds as a corporate secret rather than a governmental decision."[385]

In *Public Citizen Health Research Group v. FDA*,[386] Judge Garland concurred to advocate judicial restraint and to lament the court's unnecessary decision strengthening Exemption Four. There, Public Citizen made a FOIA request for FDA documents relating to drug applications that had been abandoned for health or safety reasons; the FDA denied the request, claiming the responsive records included confidential commercial information and that disclosure would cause "substantial competitive harm" to a drug company that submitted the applications. The D.C. Circuit ruled largely in favor of disclosure, but it also rejected Public Citizen's argument that any competitive harm caused by disclosure should be weighed against the public interest in safeguarding human health. The court rejected this "consequentialist approach" as "inconsistent with the 'balance of private and public interests' the Congress struck in Exemption Four."[387]

In a concurrence, Judge Garland said the court should not have decided whether Exemption Four allows for such balancing, both because it was not necessary to resolve the case, and because it was not fully briefed and argued by the parties. Judicial restraint is all the more important, he argued, given the dramatic implications of excluding broader public interest concerns from the Exemption Four analysis: "This means that even if disclosure were the only way to prevent the loss of human life, that would count for nothing as against a showing by the company that disclosure would cause substantial harm to its competitive position. This is an important issue, and the kind that should be decided only after full briefing and argument."[388]

In the national security context, Judge Garland wrote a unanimous and unusually pointed opinion favoring disclosure of information related to American drone strikes. In January 2010, the ACLU submitted a FOIA request to the CIA seeking "records pertaining to the use of . . . 'drones' . . . B[]y the CIA and the Armed Forces for the purpose of killing targeted individuals."[389] The CIA responded with a so-called "*Glomar* response," which means the agency declines to either confirm or deny the existence of any responsive records. In the D.C. Circuit, the CIA argued that such a

383 *Id.* at 1196.
384 *Id.* at 1203.
385 *Id.* at 1204 (Garland, J., dissenting in part).
386 185 F.3d 898 (D.C. Cir. 1999).
387 *Id.* at 904 (quoting *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 872 (D.C. Cir. 1992)).
388 *Id.* at 907 (Garland, J., concurring) (internal citations omitted).
389 *ACLU v. CIA*, 710 F.3d 422, 425 (D.C. Cir. 2013) (internal citations omitted).

response was necessary to protect information about whether the CIA in particular operated drones. Judge Garland was not persuaded: "The CIA proffered no reason to believe that disclosing whether it has any documents at all about drone strikes will reveal whether the Agency itself—as opposed to some other U.S. Entity such as the Defense Department—operates drones."[390]

Nor was he persuaded that the CIA needed to protect the existence of its own "intelligence interest" in a U.S. drone operation. Judge Garland pointed to the wide range of officials, including President Obama, who had officially acknowledged a U.S. drone program:

> Given these official acknowledgments that the United States has participated in drone strikes, it is neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes. The defendant is, after all, the Central *Intelligence* Agency. And it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself.[391]

Judge Garland concluded with strong words not just about the CIA's "indefensibl[e]" position, but about the role of courts in ensuring that FOIA's core purpose—and its general presumption in favor of disclosure—are fully realized:

The *Glomar* doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. In this case, the CIA asked the courts to stretch that doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men and women. We are at that point with respect to the question of whether the CIA has any documents regarding the subject of drone strikes.[392]

The court therefore reversed the district court's grant of summary judgment for the CIA, and remanded so the CIA could create an index asserting specific exemptions to the disclosure of any responsive documents.

In other national security cases, though, Judge Garland has upheld agency denials of information. For example, in *Judicial Watch, Inc. v. U.S. Department of Defense*,[393] Judge Garland affirmed the Defense Department's decision to withhold post-mortem photographs of Osama bin Laden after he was killed by U.S. Forces in Abbottabad, Pakistan. The court applied FOIA's Exemption One based on CIA affiants' claims that releasing the photographs, which had been properly classified as Top Secret, would threaten to foment anti-American violence throughout the world.

---

390 *Id.* at 428.
391 *Id.* at 430 (emphasis in the original) (internal citations omitted).
392 *Id.* at 431 (internal quotation marks and citations omitted).
393 715 F.3d 937 (D.C. Cir. 2013).

Likewise, in *Students Against Genocide v. Department of State*,[394] Judge Garland wrote a unanimous opinion permitting the State Department to withhold "agency records relating to human rights violations committed by Bosnian Serb forces in Bosnia during the summer of 1995."[395] The court held that the government did not waive its right to withhold records under FOIA when it presented them to the United Nations Security Council. The court recognized legitimate foreign policy reasons for presenting such records to the U.N., while at the same withholding them from other countries and the general public.[396]

Criminal Justice

The ability to deprive a person of liberty (and in some cases, life) through criminal prosecution is the zenith of governmental power. As a check on that power, the Constitution provides a bulwark of protections for criminal defendants in the form of rights found in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. These rights are meant to safeguard against abuses by the state when its prosecuting power is brought to bear upon an individual accused of a crime.

Under Chief Justice Earl Warren, the Supreme Court gave meaning to these rights in several landmark decisions. From the right to counsel to protections from unlawful searches and seizures, the Warren Court modernized criminal law and protected individual Americans from the coercive power of the state. Along with Chief Justice Warren, Justices William Douglas, William Brennan (for whom Judge Garland clerked), and, later, Thurgood Marshall, led the charge in this endeavor.

But the subsequent appointment of more conservative justices, beginning with four appointments by President Nixon, has eroded many of these constitutional protections. Combined with policies like the war on drugs and mandatory minimum sentences, these changes have had a devastating impact on some of the most vulnerable members of our society, including the poor and people of color, who are disproportionately targeted for criminal prosecution.

If confirmed to the Supreme Court, Judge Garland is likely to decide the future of many of these important precedents in criminal law. Below we look at Judge Garland's D.C. Circuit record for insight into how he may deal with challenges to these precedents and other questions of criminal law.

Overall D.C. Circuit Record

We begin with a quantitative analysis of Judge Garland's voluminous record on criminal law.[397]

---

394 257 F.3d 828 (D.C. Cir. 2001).

395 *Id.* at 830.

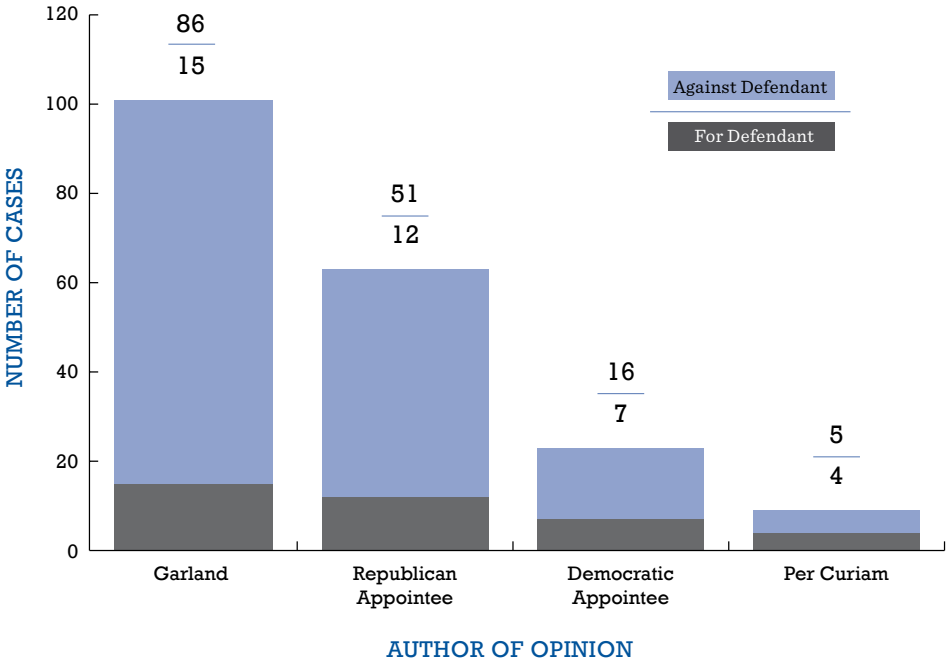
396 *Id.* at 837.

397 In this section we accounted for cases where the court was unanimous and Judge Garland did not write the court's opinion. This allows for a more complete quantitative analysis of Judge Garland's record in the area of criminal law.

In total, Judge Garland has participated in 196 criminal-related cases that have resulted in published opinions by a three-judge panel, and 10 *en banc* criminal-related cases.[398] This universe of cases includes: (a) direct appeals challenging convictions and sentences on Fourth Amendment grounds, evidentiary issues, interpretation of criminal statutes, and other procedural and trial errors; (b) petitions for collateral relief including habeas; and, (c) challenges to parole determinations.

Out of the 196 three-judge panel decisions, the large majority (158 cases, or 81 percent) were decided against criminal defendants. Only 38 cases (19 percent) came out in favor of criminal defendants either in whole or in part. For the most part, this proportion is fairly consistent regardless of the judge writing the majority opinion for the panel. For example, Judge Garland wrote the majority opinion in 101 cases, and of these 15 (15 percent) were decided in favor of criminal defendants and 86 (85 percent) were decided against criminal defendants. Likewise, when a Republican-appointed judge wrote the majority opinion (63 cases), 12 cases (19 percent) were decided in favor of criminal defendants and 51 (81 percent) were decided against. The percentage of decisions in favor of criminal defendants went up, however, when another Democratic-appointed judge on the panel wrote the majority opinion: in 23 such cases, seven (30 percent) were in favor of criminal defendants and 16 (70 percent) were against criminal defendants.[399]

Outcome of Criminal Cases, by Opinion Author



398 Many criminal cases are decided via unpublished opinions. Because these opinions set no precedent for the court and are often unsigned, we did not include them in the universe of cases we reviewed.

399 Nine per curiam decisions round out the remainder of the 196 panel decisions. Of these per curiam decisions, four were decided in favor of criminal defendants and five were decided against.

Another variable is the composition of each panel. Even then, the overall proportions remain fairly consistent. Judge Garland sat with two Republican-appointed judges in 86 cases. These panels issued 17 opinions in favor of criminal defendants (20 percent) and 69 opinions against criminal defendants (80 percent). Judge Garland sat with one Republican-appointed judge and one-Democratic appointed judge in 94 cases; of these, 19 (20 percent) came out in favor of criminal defendants and 75 (80 percent) against. Finally, Judge Garland sat with two other Democratic-appointed judges in 16 cases; of these, two (13 percent) came out in favor of criminal defendants and 14 (87 percent) came out against.

The most significant picture to emerge from these cases is the consensus across judges. Of the 196 panel opinions, only eight elicited dissents and only 14 elicited one or more separate concurring opinions. The remaining 174 majority opinions were unanimous. Impressively, Judge Garland authored 95 of those unanimous opinions; only one of his 101 majority opinions elicited a dissent, and only five others elicited a separate concurrence.

The flip side of this consensus is that any disagreement is more pronounced. In addition to the eight dissents in panel decisions, six *en banc* cases elicited one or more dissents. Of these 14 divided decisions, Judge Garland voted in favor of the government 11 times.[400] In total, Judge Garland wrote three dissents in panel decisions and one dissent in an *en banc* case. All four of Judge Garland's dissents were in cases where the majority ruled in favor of criminal defendants in whole or in part.

For example, in *United States v. Spinner*, the court's majority reversed the defendant's convictions for possession of a semiautomatic assault weapon and possession with intent to distribute crack cocaine.[401] The majority found that the government failed to prove that the AR-15 the defendant was accused of possessing was in fact a semiautomatic assault weapon as defined by statute, and that some of the evidence used by the government to tie the defendant to drug dealing was inadmissible under the rules of evidence. Judge Garland's dissent disagreed with both conclusions and would have upheld both convictions.[402]

In *Valdes v. United States*, Judge Garland dissented from the *en banc* court majority's decision to overturn a D.C. police detective's conviction under an anti-bribery statute.[403] Judge Garland argued that the majority's narrow definition of what official acts fell within the scope of the statute had the potential to undermine the prosecution of other public corruption crimes.[404] In another case, *United States v. Watson*, Judge Garland dissented against the court's decision to reverse the defendant's drug conviction based on an error the prosecutor committed during closing arguments.[405]

---

400 *See* APPENDIX E.
401 *United States v. Spinner*, 152 F.3d 950, 952 (D.C. Cir. 1998).
402 *Id.* at 962 (Garland, J., dissenting in part).
403 *Valdes v. United States*, 475 F.3d 1319, 1320–21 (D.C. Cir. 2007) (*en banc*).
404 *Id.* at 1333 (Garland, J., dissenting).
405 *United States v. Watson*, 171 F.3d 695, 697 (D.C. Cir. 1999).

Judge Garland argued that reversing a conviction in these circumstances should only be reserved for "the most egregious of cases."[406]

Finally, in *United States v. Wilson*, Judge Garland dissented and voted in favor of upholding the defendant's sentence.[407] The case involved a circuit split over the application of a sentencing enhancement for bank fraud. In his dissent, Judge Garland agreed that the majority of circuits and argued for a broader interpretation of the enhancement than the D.C. Circuit panel adopted.[408]

Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures by law enforcement. The Exclusionary Rule is a remedy for Fourth Amendment violations and allows a criminal defendant to suppress evidence obtained in violation of his or her Fourth Amendment rights from being used by the prosecution to obtain a conviction. Over time, the Supreme Court has carved out many exceptions to the Exclusionary Rule. Thus, courts are often tasked with determining not only whether a Fourth Amendment violation has occurred, but also whether the illegally obtained evidence may nevertheless be admitted against the defendant at trial.

Judge Garland has had to rule on Fourth Amendment issues in about three dozen cases. In only one of those cases did the court, sitting *en banc*, grant relief to a defendant based on a Fourth Amendment violation; Judge Garland joined the majority opinion, authored by Judge Edwards, in part.[409]

The case, *United States v. Askew*, arose after the defendant was subjected to a *Terry* stop on suspicion of armed robbery. After an initial frisk produced no weapons or contraband, officers attempted to unzip the defendant's jacket for a "show-up" but were stopped by the defendant after they hit a hard object around his waist. After a witness failed to identify the defendant as the suspected robber, officers took the defendant away and fully unzipped the defendant's jacket to reveal a gun. The defendant was arrested and charged with possession of a firearm by a convicted felon.

The defendant moved to suppress the gun before trial, but the district court denied the motion. On appeal, a divided panel of the D.C. Circuit affirmed the district court's decision, but the full court decided to rehear the case *en banc*. The *en banc* majority reversed primarily on two grounds: (1) under Supreme Court precedent, attempting to unzip the defendant's jacket constituted a search and the officers lacked the requisite level of suspicion to conduct such a search;[410] and (2) even if *dicta* from Supreme Court precedent might allow officers to unzip a suspect's jacket to facilitate a show-up, that *dicta* only applies if officers have a reasonable basis for believing that doing so would help to establish whether the suspect is connected to the crime

406 *Id.* at 704 (Garland, J., dissenting).
407 *United States v. Wilson*, 240 F.3d 39, 47 (D.C. Cir. 2001).
408 *Id.* at 51–52 (Garland, J., concurring in part and dissenting in part).
409 *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (*en banc*).
410 *Id.* at 1132–33.

under investigation.[411] Judge Garland joined the latter, narrower holding, which arguably gives law enforcement officers more leeway in conducting searches than the other portion of the majority's opinion, but which ultimately leaves the legal issue unresolved.

This limited approach to dealing with prickly Fourth Amendment issues is seen in other cases as well. For example, in *United States v. Johnson,* the court could have adopted a new rule to expand officers' ability to stop and search people they believe to be engaged in criminal activity.[412] Under Supreme Court precedent, an officer may conduct a *Terry* stop of a vehicle if the officer witnesses the driver commit a traffic violation, regardless of any other suspicious behavior (or lack thereof) the officer may observe. In this case, police officers stopped the defendant not because he had committed a traffic violation, but because he was illegally double parked on the street and exhibited suspicious behavior. The government argued that regardless of the suspicious behavior, the officers were entitled to conduct a stop based solely on the defendant's parking violation. In other words, the government argued for extending the default rule of conducting *Terry* stops for traffic violations to include parking violations as well, as several other circuits had endorsed.

Judge Garland declined to decide this issue; instead, he applied the normal totality of the circumstances test for *Terry* stops and concluded that the officers' stop could be justified based on the other suspicious behavior they observed.[413]

In *United States v. Williams*, the defendant raised several Fourth Amendment challenges to evidence obtained by officers during a search of his vehicle.[414] In particular, the defendant argued that the act of activating a key fob that alerted officers to the location of his vehicle constituted a search. Judge Garland's unanimous opinion declined to reach the merits of the novel Fourth Amendment question, finding that the defendant had either waived or forfeited that argument by failing to raise it before the district court.[415] In *dicta*, Judge Garland noted that there was no controlling precedent on whether activating a key fob constitutes a search, and that no circuit had held that it did constitute a search, "let alone an unconstitutional one."[416]

In another case, *United States v. Bowman,* the defendant challenged his conviction on the basis that the evidence used against him was obtained from an illegal police roadblock.[417] The roadblock was set up by the D.C. Metropolitan Police Department (MPD) to check driver's licenses and vehicle registrations. When the defendant stopped at the roadblock, officers noticed a cup containing beer in the defendant's lap. A subsequent search of the defendant and his vehicle turned up a gun and some bags of crack cocaine. The defendant moved to suppress the evidence, arguing that the roadblock violated the Fourth Amendment, but the district court denied the motion.

---

411 *Id.* at 1140–41.
412 *United States v. Johnson*, 519 F.3d 478(D.C. Cir. 2008).
413 *Id.* at 482.
414 *United States v. Williams*, 773 F.3d 98, 104 (D.C. Cir. 2014).
415 *Id.* at 105–06.
416 *Id.* at 105.
417 *United States v. Bowman*, 496 F.3d 685 (D.C. Cir. 2007).

On appeal, Judge Garland declined to rule on the constitutionality of the roadblock based on a lack of evidence establishing its purpose. Supreme Court precedent allows the police to set up roadblocks for only a limited number of approved purposes, such as immigration checkpoints.[418] D.C. Circuit precedent also allows roadblocks to check driver's licenses and vehicle registrations.[419] But when the primary purpose of a roadblock is general crime control or to interdict drugs, the roadblock is unconstitutional.[420] This is to protect against dragnet operations that could potentially subject a large number of people to searches without individualized suspicion of wrongdoing.

Judge Garland ruled that the district court had failed to make sufficient findings of fact on the primary purpose of the roadblock in this case,[421] and remanded the issue for further proceedings.

Judge Garland also ordered remand in *United States v. Goree*, another case in which the factual record was insufficient to support the district court's denial of a motion to suppress.[422] The defendant argued that a gun discovered on top of his refrigerator was unlawfully seized without a warrant.[423] The government argued that the search and seizure of the gun was valid under the exigent circumstances exception to the warrant requirement. In particular, the government pointed out that the police officers were responding to a report of domestic violence and that the defendant was freely walking around the apartment.

But Judge Garland noted conflicting evidence highlighted by the defendant that raised questions about the exact circumstances that the police were facing.[424] For example, there was conflicting testimony by officers about the size of the apartment and the extent to which the defendant was either restrained or free to move about. Thus, Judge Garland concluded that the record was inadequate to establish "whether sufficient potential danger remained . . . to create an exigency justifying the warrantless search" and remanded the case to the district court.[425]

The one criminal law opinion authored by Judge Garland that elicited a dissent was a Fourth Amendment case. In that case, *United States v. Brown*, Judge Rogers disagreed with Judge Garland's decision to uphold a search of the defendant's vehicle that produced firearms.[426] The case involved officers who were responding to late night reports of shots fired at an apartment building. A witness directed the officers to the occupants of a white Cadillac as possible suspects. While the officers questioned those occupants, they noticed another vehicle, a black Cadillac, parked fifteen to twenty feet away and also occupied. One of the occupants of the black vehicle exited the car and began watching the officers in a "peculiar" manner as they questioned the occupants of the white vehicle. Eventually that man walked away down an alley.[427]

---

418 *Id.* at 691.
419 *Id.* at 691–92.
420 *Id.* at 692 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000)).
421 *Id.* at 695.
422 *United States v. Goree*, 365 F.3d 1086, 1087 (D.C. Cir. 2004).
423 *Id.* at 1090.
424 *Id.* at 1094.
425 *Id.*
426 *United States v. Brown*, 334 F.3d 1161 (D.C. Cir. 2003).
427 *Id.* at 1163.

After they finished questioning the occupants of the white vehicle, the officers decided to approach and question the people inside the black car. According to their testimony, the officers believed the people in the black car had either "been involved with" or "observed" the earlier shooting.[428] When they approached, the officers observed—through tinted windows—shuffling inside the car. After knocking on the window with no response, one officer decided to open the rear-passenger door and immediately saw the defendant with his hand right next to a pistol on the floor of the car. The defendant was pulled out of the vehicle and handcuffed. After searching the interior of the vehicle, the officers decided to also search the trunk where they found an AR-15 and several magazines of ammunition.

Judge Garland ruled that the officers' decision to open the black car's door was lawful under *Terry*, finding several circumstances that supported the reasonableness of the officers' suspicion of criminal activity and fear of danger.[429] Judge Garland also ruled that the officers had probable cause to search the vehicle's trunk for the presence of additional firearms.[430] Judge Rogers took issue with both conclusions. As to the *Terry* analysis, Judge Rogers disagreed with the facts relied upon by Judge Garland:

> Cobbling together innocent circumstances, and drawing inferences in favor of the government that are unsupported by the evidence, . . . the court concludes that because Brown (who was in a different car than the one identified by the complainant for the police) was in the wrong place (the parking lot behind the complainant's apartment building) at the wrong time (late at night several hours after a shooting), the police had articulable suspicion that he was engaged in criminal wrongdoing.[431]

In particular, Judge Rogers took issue with Judge Garland's reliance on the fact that the neighborhood was generally known for "a lot of drug activity" as a circumstance supporting the officers' particularized suspicions of the defendant.[432]

Judge Rogers also rejected Judge Garland's conclusion that the officers had probable cause to search the vehicle's trunk for more firearms. "This case is not like those in which there are indicia of multiple firearms or other contraband," Judge Rogers explained.[433] Instead,

> the evidence in the instant case shows only that Brown was in possession of a single handgun in a lawfully parked car late at night several hours after a shooting in the same area. There was no evidence that the police had reason to think that more than one gun was involved in the earlier shooting or that the gun seized was a different type of gun than the one that was used in the shooting.[434]

428 *Id.*
429 *Id.* at 1165.
430 *Id.* at 1170–71.
431 *Id.* at 1176 (Rogers, J., dissenting) (citations omitted).
432 *Id.* at 1175.
433 *Id.* at 1180.
434 *Id.*

Another significant divided opinion is the *en banc* case *United States v. Powell*.[435] At issue was whether officers could perform a warrantless search incident to arrest before an actual arrest occurred. Judge Garland joined the majority opinion answering the question in the affirmative.[436] The lone dissent, from Judge Rogers, argued that allowing a search incident to arrest to occur before the arrest undermined the reasons for this exception to the warrant requirement. The reason for the exception, Judge Rogers explained, was to ensure officer safety at the time of arrest, not to use a future arrest, and thus a future threat to officer safety, to retroactively justify a search.[437] Judge Rogers further warned that "[b]y authorizing the *post hoc* ratification of unconstitutional conduct, the court's approach encourages law enforcement officers to use minor pretextual arrestable offenses—ones for which, in practice, an offender would rarely be arrested—to justify fishing expeditions for evidence unrelated to the offense for which the officer originally had probable cause to arrest."[438]

Plea and Trial Errors

Beyond Fourth Amendment violations, there are many grounds on which a defendant may challenge his or her conviction on appeal. These challenges tend to fall into four basic categories: (1) trial court errors (e.g., evidentiary rulings including the admissibility of statements under *Miranda*, instructions to the jury, interpretation of criminal statutes); (2) prosecution errors (e.g., *Brady* violations, speedy trial, double jeopardy); (3) sufficiency of the evidence supporting conviction; and (4) ineffective assistance of counsel.

In cases where the defendant alleged ineffective assistance of counsel, Judge Garland has consistently followed circuit precedent in ordering remand for evidentiary hearings when the claim is first raised on appeal, even in cases where ultimate success on the merits is unlikely.[439]

Judge Garland did address the substance of an ineffective assistance of counsel claim in one case, *United States v. Hanson*, in the context of a motion to withdraw a guilty plea.[440] In that case, the defendant pleaded guilty to a drug offense. Before sentencing, however, the defendant moved to withdraw his guilty plea because his counsel had misinformed him of his exposure under the Sentencing Guidelines. The district court denied the motion and the defendant appealed. Judge Garland ruled that while the defendant's counsel's performance was constitutionally deficient for miscalculating the defendant's sentencing range, the error was not prejudicial because the defendant did not show that but for the error he would not have pleaded

435 *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007) (*en banc*).

436 *Id.* at 839.

437 *Id.* at 844 (Rogers, J., dissenting).

438 *Id.* at 845.

439 *See, e.g.*, *United States v. Gray-Burriss*, 791 F.3d 50 (D.C. Cir. 2015) (characterizing defendant's conflict of interest claim as an ineffective assistance of counsel claim and remanding for evidentiary hearing); *United States v. Jones*, 642 F.3d 1151 (D.C. Cir. 2010) (remanding for evidentiary hearing on claim that defendant's counsel was ineffective for failing to request placement in drug abuse program); *United States v. Shabban*, 612 F.3d 693 (D.C. Cir. 2010) (remanding for evidentiary hearing on defendant's ineffective assistance of counsel claim in line with the court's "general practice").

440 *United States v. Hanson*, 339 F.3d 983 (D.C. Cir. 2003).

guilty and gone to trial instead.[441] Thus, Judge Garland affirmed the denial of the defendant's motion to withdraw his guilty plea.

Twice Judge Garland authored unanimous opinions overturning a defendant's conviction based on insufficient evidence. In *United States v. Gaskins*, Judge Garland overturned the defendant's conviction for conspiracy to distribute narcotics.[442] Judge Garland detailed the dearth of evidence connecting the defendant with the conspiracy at issue and concluded that simply "[n]ot one piece of evidence put Gaskins together with drugs, or conversations about drugs, involved in the conspiracy."[443] What was worse, according to Judge Garland, was that by the time the court heard the defendant's appeal, the defendant had already been incarcerated for almost eight years.[444] Because the defendant's conviction was clearly insupportable, the court took the unusual step of issuing an order just days after oral argument that reversed the defendant's conviction and directed the district court to enter a judgment of acquittal in the case.[445]

In *United States v. Shmuckler*, the court overturned one of the defendant's convictions because the prosecution had failed to prove that the defendant committed the specific crime charged in the indictment.[446] The jury had convicted the defendant of bank fraud and possessing and uttering a counterfeit security for depositing multiple checks falsely listing him as the payee. The defendant argued on appeal, however, that the evidence at trial showed that he had only "falsely altered" the checks, not "falsely made or manufactured" the checks as charged in the indictment.[447] Writing for the unanimous panel, Judge Garland agreed and reversed the defendant's conviction on that charge.[448]

Judge Garland has also overturned a defendant's conviction on collateral review because the defendant was actually innocent of the charged crime. The defendant in *United States v. Caso* was a former congressional staffer who was charged with conspiracy to commit honest-services wire fraud.[449] The charge arose after the staffer failed to disclose a source of income for his wife that created a conflict of interest in his work. The staffer negotiated a plea agreement and was sentenced to probation. But shortly after he was sentenced, the Supreme Court decided a case that limited the scope of the statute that the staffer was convicted under and essentially made him innocent as a matter of law.

Despite the staffer's actual innocence, the district court denied the staffer's motion to vacate his conviction and sentence. The district court held that under Supreme Court precedent, because the government had foregone prosecuting him on the more serious charge of making a materially false statement to the government in exchange

441 *Id.* at 990.
442 *United States v. Gaskins*, 690 F.3d 569 (D.C. Cir. 2012).
443 *Id.* at 572.
444 *Id.* at 576.
445 *Id.*
446 *United States v. Shmuckler*, 792 F.3d 158 (D.C. Cir. 2015).
447 *Id.* at 161.
448 *Id.* at 164.
449 *United States v. Caso*, 723 F.3d 215 (D.C. Cir. 2013).

for his guilty plea, the staffer had to prove he was *also* actually innocent of that more serious charge before he could obtain relief. On appeal, Judge Garland held that rule did not apply in this case because the false statement charge was not "more serious" than the honest services charge the defendant pleaded guilty to. Whereas the district court (at the government's urging) focused on the statutory maximum for each offense, Judge Garland reached a different outcome by looking to the applicable sentencing guidelines for each charge. As Judge Garland explained, this was the better approach to determine the seriousness of each charge because of the realities of plea bargaining and the central role that the sentencing guidelines play in determining a defendant's potential punishment.[450]

Judge Garland interpreted criminal statutes in several other cases, at times siding with interpretations that made it harder to convict a defendant and at times siding with interpretations that made it easier to convict. For example, in *United States v. Project on Government Oversight*, Judge Garland held that proof of intent was required to establish liability under a statute that criminalized paying a government employee for doing official work.[451] The defendants were a non-profit organization and a Department of the Interior employee who assisted the non-profit with a project. The project consisted of identifying oil companies that underpaid oil-extraction royalties to the federal government for purposes of a qui tam suit. At the end of the project, the non-profit gave the employee a monetary award for his assistance. They were both subsequently prosecuted for violating the statute in question. During the trial, the district court rejected the defendants' request for a jury instruction on intent—specifically, to instruct the jury that the defendants could not be held liable unless they intended the payment to be compensation for official work.

Writing for the majority, Judge Garland reversed the district court's ruling, relying on the presumption that criminal statutes include a *mens rea* requirement absent clear indication otherwise. Judge Garland ruled that the defendants could not be convicted unless the prosecution proved that the payment to the government employee was intended to be compensation for official work, as opposed to a reward for work performed apart from the employee's official duties.[452] Because the trial court had failed to instruct the jury on the intent requirement, Judge Garland reversed the convictions and remanded for a new trial.[453]

In another case, however, Judge Garland ruled against imposing a *mens rea* requirement in a prosecution for a weapons charge. In the *en banc* decision *United States v. Burwell*, Judge Garland joined Judge Brown's opinion holding that the government did not need to prove that the defendants knew that the AK-47s they used in a string of bank robberies were capable of firing automatically.[454] The nature of the weapons mattered because it subjected the defendants to more stringent penalties under a criminal statute with a mandatory minimum sentence of 30 years. The court's majority acknowledged that a *mens rea* requirement is usually inferred to avoid using criminal law to regulate otherwise lawful conduct. But in this case, the court argued

450 *Id.* at 223–24.
451 *United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010).
452 *Id.* at 556.
453 *Id.* at 560.
454 *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (*en banc*).

that there was no such danger because the basic offenses with which the defendants were charged (bank robberies) already had a *mens rea* requirement.

Judge Kavanaugh's dissent, joined by Judge Tatel, focused on how the type of weapon influenced the severity of punishment under the statute. Using an automatic weapon as opposed to a semi-automatic weapon increased a defendant's mandatory minimum sentence from 10 years to 30 years. That distinction, the dissent argued, should be a factor that weighs heavily in favor of applying a *mens rea* requirement. Instead, "[t]he majority opinion gives an extra 20 years of mandatory imprisonment to a criminal defendant *based on a fact the defendant did not know*."[455]

Judge Garland dissented in a different *en banc* case where the majority interpreted a corruption statute as not applying to the defendant's actions. In *Valdes v. United States*, the majority reversed the conviction of a D.C. police detective who received payments from an FBI informant to run license plate checks for outstanding warrants.[456] The defendant was convicted of receiving an illegal gratuity "for or because of an[] official act." Judge Williams, writing for the majority, interpreted the statute as prohibiting payment in exchange for a government official's misuse of influence in decision-making, as opposed to the mere misuse of resources. Under this definition, the court held that the defendant's actions did not fall under the scope of the statute and reversed the conviction. Judge Garland filed a dissent joined by Judges Sentelle, Henderson, Randolph, and Brown, arguing that the defendant's actions should be characterized as a police investigation and thus an official act. Judge Garland's dissent argued further that the majority's narrow interpretation of "official acts" endangered bribery prosecutions in general that relied on statutes with similar language.[457]

In the area of trial errors, two cases stand out where Judge Garland's position favored the prosecution. In *United States v. Watson*, the court's majority reversed the defendant's conviction for a drug offense based on the prosecutor's error during closing arguments.[458] Specifically, the court found that the prosecutor misquoted and misrepresented testimony regarding the strength of the defendant's connection to the vehicle where the police had discovered drugs. The court ruled that because the case was "close" with respect to the defendant's innocence or guilt and the defendant's connection to the vehicle was a central issue in the case, a new trial was required.[459]

In dissent, Judge Garland wrote that reversing a conviction in these circumstances should only be reserved for "the most egregious of cases."[460] Judge Garland downplayed the prosecutor's error and argued that there was more than enough evidence to support the conviction otherwise. While prosecutors can sometimes make mistakes, he argued, "[w]e have always relied on the self-corrective nature of the adversary system, combined with instructions from the court, to police all but the most egregious of these kinds of errors."[461]

---

455 *Id.* at 528 (Kavanaugh, J., dissenting).
456 *Valdes v. United States*, 475 F.3d 1319, 1320–21 (D.C. Cir. 2007) (*en banc*).
457 *Id.* at 1333 (Garland, J., dissenting).
458 *United States v. Watson*, 171 F.3d 695, 697 (D.C. Cir. 1999).
459 *Id.* at 702.
460 *Id.* at 704 (Garland, J., dissenting).
461 *Id.* at 709.

In the *en banc* case *United States v. Crowder*, Judge Garland joined the majority opinion that interpreted the Federal Rules of Evidence to make it easier for the prosecution to introduce evidence of a defendant's past wrongdoing ("bad acts") during trial.[462] The defendants were convicted of possession with intent to distribute narcotics. At trial, they offered to stipulate the intent element of their crimes so that their trials could focus on the element of possession, and so that the prosecution would not have to introduce evidence of their past drug offenses. The trial court rejected the stipulations and admitted the bad acts evidence, and the defendants appealed.

The original *en banc* decision reversed the trial court, holding that the defendants' proposed stipulations rendered the bad acts evidence inadmissible under the rules of evidence because the only purpose of the evidence would be to prove the defendants' propensity for crime, which is explicitly prohibited by Rule 404(b).[463] The Supreme Court granted cert in the case, vacated the original *en banc* decision, and remanded the case for reconsideration in light of its intervening decision in *Old Chief v. United States*. In *Old Chief*, the Court held that a defendant charged with felon-in-possession of a firearm could stipulate to his prior felony conviction, and thereby avoid unduly prejudicing the jury with the facts about his prior crime.[464]

On remand to the D.C. Circuit in this case, the *en banc* majority upheld the trial court's decision to admit the bad acts evidence despite the defendants' stipulation offers. The majority rejected the original *en banc* opinion's per se rule that a stipulation renders bad acts evidence inadmissible because it would only go to character. Instead, the majority held that a trial court must consider whether the bad acts evidence would be relevant for any purpose other than to show a defendant's propensity for crime, irrespective of the defendant's stipulation offer. If the trial court found that the evidence would be relevant for a different purpose, then it would proceed to weigh whether the evidence would unduly prejudice the defendant under Rule 403. Not until the trial court proceeded to this Rule 403 analysis would a defendant's stipulation offer factor into the admissibility determination.

Judge Tatel's dissent accused the majority of "[s]ubstituting its own policy judgment for Congress'" and "convert[ing] Rule 404(b) from a requirement that courts inquire into the purposes of character evidence . . . into a question of relevance."[465] Judge Tatel argued that the majority's decision strengthened the government's ability to let in evidence that Rule 404(b) was meant to exclude:

> Bad acts evidence is so prejudicial that by using it, the government is more likely to convict, even with the burden of proving all [] elements of the crime, than if it need prove only [one element] but cannot use the evidence. Let's not kid ourselves, . . . the reason the government seeks to introduce [404(b) evidence] is because it's prejudicial.[466]

462 *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998) (*en banc*).
463 Fed. R. Civ. P. 404(b).
464 *Old Chief v. United States*, 519 U.S. 172 (1997).
465 *Id.* at 1212 (Tatel, J., dissenting).
466 *Id.* at 1215 (quotation marks omitted) (last alteration in original).

Finally, while Judge Garland does not have a substantial record applying *Miranda*, he did author one unanimous opinion upholding the admission of a defendant's statement under *Miranda*'s "public safety" exception.

In *United States v. Jones*,[467] the arresting officer asked the defendant whether he had "anything on" him, and the defendant responded: "I have a burner in my waistband." Another officer then recovered a loaded firearm from the defendant's waistband, and the defendant was charged with both gun and drug crimes. The defendant moved to suppress his statement because the officer's inquiry—"do you have anything on you?"—came before the defendant was informed of his *Miranda* rights, including the right to remain silent.

After closely examining all of the facts surrounding the defendant's arrest and statement, Judge Garland (and a unanimous panel) concluded that the statement was properly admitted under *Miranda*'s "public safety" exception, as established by the Supreme Court in *New York v. Quarles*.[468] Under *Quarles*, *Miranda* does not apply when "police officers ask questions reasonably prompted by a concern for the public safety," or for the safety of the arresting officers.[469] Based on the totality of the circumstances, that standard was met here because the defendant was wanted for first degree murder and the officers had reason to believe that he possessed multiple firearms; the arrest took place in a "dangerous drug market" in Northeast D.C.; the defendant led police on a chase in a crowded area, during which the officers heard gunshots; the defendant was ultimately arrested in a dimly-lit stairwell where children were recently present; and the defendant wore a bulky jacket that could conceal a firearm.[470] Under these circumstances, the court had little trouble concluding that objective public safety concerns justified the officer's question.

Sentencing

The overwhelming majority of criminal defendants who are prosecuted in federal court never go to trial, choosing instead to negotiate a guilty plea that can potentially reduce their sentence. Thus, for most defendants, their sentencing hearing is when they truly have their "day in court." The sentencing court must evaluate not only the offense the defendant committed, but also the defendant's criminal background and personal history, all in an effort to ensure that the punishment fits the crime and the person who committed the crime. Often, the stakes are higher at sentencing than at any other point in a criminal prosecution.

The majority of decisions Judge Garland has authored or joined in this area of criminal law have rejected defendants' challenges to their sentences, exhibiting a large degree of deference to the sentencing judge that is not unusual at the appellate level.

---

467 567 F.3d 712 (D.C. Cir. 2009).
468 *New York v. Quarles*, 467 U.S. 649 (1984).
469 *Id.* at 656-59.
470 567 F.3d at 715.

For example, in *United States v. Kaufman*, Judge Garland granted the defendant a hollow victory by allowing him to appeal his sentence despite a waiver in his plea agreement, but nevertheless upheld the sentence the district court imposed.[471] The defendant, who was convicted of embezzlement, argued that the district court used the wrong loss calculations in determining the appropriate sentencing range under the Sentencing Guidelines. Under the district court's calculations, the defendant's sentencing range was 24–30 months. The defendant argued that his sentencing range should have been between 18–24 months using the loss calculations he proposed.

Judge Garland found a way to affirm the sentence without resolving the legal question. As Judge Garland explained, the district court sentenced the defendant to 24 months in prison—a term of imprisonment that both sentencing ranges encompassed—and explicitly stated at sentencing that it would have imposed the same sentence even if it accepted the defendant's loss calculations. Thus, resolving the legal question of the correct loss calculations was futile because the outcome would still be the same.[472] Further, because the sentence imposed was within the Guidelines range either way, it was entitled to a presumption of reasonableness on appeal, and Judge Garland found that the defendant had failed to rebut that presumption.[473]

In *United States v. Wilson*, Judge Garland did reach the merits of a legal question over a sentencing enhancement and, in dissent, sided with the interpretation used by the district court.[474] At issue was how to determine if criminal activity is "otherwise extensive" for purposes of a sentencing enhancement for a defendant found to be "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The district court had used a totality of the circumstances approach to evaluate whether the defendant's criminal activity was "otherwise extensive" and determined that the enhancement was merited. On appeal, however, the D.C. Circuit reversed by a vote of 2-1. Acknowledging a circuit split on the issue, the court's majority adopted the minority view that primarily looked at the number of persons involved in the criminal activity to apply the enhancement.[475] Judge Garland's dissent argued for a broader interpretation of the enhancement, one that took into account the totality of the circumstances and considered the scale of the criminal activity beyond the number of people involved.[476]

Notwithstanding this general deference to the sentencing court, Judge Garland has also sided with defendants when the lower court was clearly out of line. *In re Sealed Case*,[477] is a good example. The defendant in the case, a 56 year-old drug addict, pleaded guilty to heroin distribution and was sentenced to 132 months in prison. (A career-offender sentencing enhancement increased his original sentencing range from 24-30 months to 151-188 months.) The defendant appealed his sentence,

---

471 *United States v. Kaufman*, 791 F.3d 86 (D.C. Cir. 2015). Judge Garland found that the appeal waiver in the defendant's plea agreement did not bar his appeal because the waiver was contradicted by the district court's statements during the plea hearing, thus nullifying the waiver. *Id.* at 88.

472 *Id.* at 89.

473 *Id.* at 90.

474 *United States v. Wilson*, 240 F.3d 39 (D.C. Cir. 2001).

475 *Id.* at 47.

476 *Id.* at 51–52 (Garland, J., concurring in part and dissenting in part).

477 573 F.3d 844 (D.C. Cir. 2009).

arguing that the district court imposed a longer prison term by improperly treating imprisonment as a means of promoting rehabilitation.

Judge Garland joined Judge Tatel's majority opinion vacating the defendant's sentence and remanding for resentencing.[478] The majority acknowledged a circuit split on the issue and sided with the circuits that prohibit sentencing courts from imposing a longer prison term to promote rehabilitation. And even though there was a circuit split on the issue, the majority held that the district court's decision was still "plain error" because of the clear statutory language supporting the majority's reading.

United States v. McCoy is another decision in which Judge Garland ruled in favor of the defendant on a complex sentencing issue.[479] The case broadly dealt with the scope of resentencing after a remand from the court of appeals. The defendant was sentenced by the district court for false statement and perjury offenses. At this initial sentencing, an obstruction of justice enhancement was added to both offenses, but the defendant only objected to the enhancement with respect to the false statement offenses. Her failure to object to the enhancement with respect to the perjury offense would be fateful. As the appeals court explained, a note in the Sentencing Guidelines appears to bar applying an obstruction of justice enhancement to the defendant's perjury offense, so an objection would have been merited. But the objection would have arguably been pointless because, even if the district court had granted the objection, the sentencing range would not have changed.

In her initial appeal, the defendant persuaded the appeals court to throw out a different sentencing enhancement and remand the case for resentencing. At this point, under the new calculations on resentencing, the obstruction of justice enhancement on the perjury offense now mattered, as removing the enhancement would affect the defendant's sentencing range. Thus, the defendant raised the objection for the first time before her resentencing hearing. The district court did not address the defendant's objection, however, and instead limited itself to resentencing the defendant without the enhancement that the appeals court threw out in the defendant's initial appeal.

In her second trip to the appeals court, the question was whether circuit precedent or any other rule barred the defendant's objection at resentencing. After the panel divided on the question, the court took the case *en banc*. Judge Garland joined the majority opinion authored by Judge Williams holding that the defendant should have been able to raise her objection at resentencing as long as she showed "good cause" for failing to make the objection during her initial sentencing.[480] The majority laid out several factors relevant to the good-cause determination, including the fact that "[a] person's liberty is at stake."[481] But the majority argued that its ruling would not result in a windfall for criminal defendants because good-cause inquiries should also account for specific and systemic adverse effects on opposing parties and the

478 *In re Sealed Case*, 573 F.3d 844, 846 (D.C. Cir. 2009).
479 *United States v. McCoy*, 313 F.3d 561 (D.C. Cir. 2002) (*en banc*).
480 *Id.* at 565.
481 *Id.* at 566.

judiciary. Judge Henderson's dissent expressed a different view. She warned that the majority's ruling would "inundate" district judges with good-cause claims during resentencing and lamented that "[s]o begins the era of *de novo* resentencing in the D.C. Circuit."[482]

Two other sentencing decisions by Judge Garland stand out. In *United States v. Riley*, Judge Garland addressed a statute passed by Congress that changed the appellate standard of review for certain sentencing challenges.[483] Prior to the enactment of the statute, the court reviewed a district court's decision to depart from the Sentencing Guidelines for abuse of discretion. The new law, however, instructed courts of appeals to review departures de novo. The defendant argued that it was not proper to apply the law's new standard "retroactively" to his case, in which the district court had departed downwardly. But Judge Garland explained that "retroactivity" was not an issue here because the law did not make previously legal conduct illegal. Rather, the new law merely changed how punishments for already illegal acts should be reviewed.[484]

In assessing the district court's downward departure under the new de novo standard, Judge Garland concluded that the district court's stated rationale did not support a downward departure. Over Judge Rogers's dissent, Judge Garland concluded that a remand to the district court for further fact-finding would be futile.[485] Judge Rogers argued that it would be better for the district court, "which has an institutional benefit over appellate courts that do not see nearly as many Guidelines cases," to first make that determination instead.[486]

Finally, *Daniel v. Fulwood* is a civil case brought by D.C. prisoners that raised a sentencing challenge.[487] The plaintiffs all had violated D.C. law prior to March 3, 1985. Their complaint argued that the U.S. Parole Commission violated the Ex Post Facto Clause by applying its 2000 guidelines rather than the guidelines in place at the time of their offenses for determining parole. Unlike the previous guidelines, the 2000 guidelines added a range of months beyond when a prisoner is eligible for parole that must be served before being deemed suitable for parole. The district court dismissed the plaintiffs' complaint for failure to state a claim.

Judge Garland and a unanimous panel reversed the district court's dismissal, holding that the plaintiffs plausibly alleged that the application of the 2000 guidelines created a significant risk of prolonging their incarceration.[488] The crux of the issue, Judge Garland explained, was that the 2000 guidelines increased a recommended period of time that inmates should be deemed unsuitable for parole and thus increased the risk of prolonged incarceration.[489]

---

482 *Id.* at 573 (Henderson, J., dissenting).
483 *United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004).
484 *Id.* at 1165.
485 *Id.* at 1172.
486 *Id.* at 1173 (Rogers, J., concurring in part and dissenting in part) (quotation marks omitted).
487 *Daniel v. Fulwood*, 766 F.3d 57 (D.C. Cir. 2014).
488 *Id.* at 58.
489 *Id.* at 62.

Other Constitutional Issues: First Amendment, Second Amendment, Substantive Due Process, and Challenges to Federal Power

Due Process and Commerce Clause Challenges to Federal Power

Unlike the broad legislative powers of state governments, the powers of the federal government are limited to those enumerated in the Constitution. The exercise of federal power is further constrained by individual rights protected in the Bill of Rights. During the early 20th century, the Supreme Court struck the balance between the exercise of federal power and its constraints in favor of constraint. Most famously in *Lochner v. New York,*[490] which struck down a state regulation on the number of hours employees could be forced to work, the Court recognized a robust liberty of contract that trumped Congress's attempts to regulate in the economic sphere. This eventually gave way during the Great Depression as President Roosevelt's New Deal policies pushed to expand the reach of the federal government in order to bring the country out of the depths of the depression. The Court repudiated an unfettered right to contract and expanded the scope of Congressional action that it found to be consistent with Congress's enumerated powers.

The Supreme Court maintained this posture for over half a century until the 1990s when a majority of justices gave voice to new conservative arguments aimed at limiting the powers of Congress. Based on these arguments, the Court struck down, for the first time since the New Deal era, an act of Congress as an unconstitutional exercise of Congress's Commerce Clause power.[491] More recently, these arguments took center stage as part of a conservative attack on President Obama's signature policy achievement, the Affordable Care Act. While Chief Justice Roberts provided the crucial fifth vote to uphold the law as a constitutional exercise of Congress's taxing power, he also sided with the other four conservative justices who said that the law exceeded Congress's Commerce Clause authority and therefore could not be sustained on that basis.[492]

Judge Garland's own jurisprudence shows a resistance to accede to further restraints on the Commerce Clause and Congress's ability to regulate economic activity. Two cases in particular demonstrate this. First, in *Rancho Viejo, LLC v. Norton,* Judge Garland upheld a portion of the Endangered Species Act (ESA) as a lawful exercise of Congress's Commerce Clause power.[493] The plaintiff was a real estate development company that wanted to construct a housing development in San Diego County, California. The Fish and Wildlife Service (FWS) reviewed the company's development plan pursuant to the ESA and determined that the development would threaten the habitat of an endangered species, the arroyo southwestern toad. Going forward with the development plan unmodified, then, would constitute an "illegal taking" under the ESA. The FWS proposed an alternative plan, but the company

490 198 U.S. 45 (1905).
491 *See United States v. Lopez,* 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990).
492 *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566 (2012).
493 *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003).

instead filed suit to challenge the constitutionality of the ESA as it applied to its development plan.

Judge Garland upheld the "taking" provision of the ESA as proper under the Commerce Clause power. The company argued that recent Supreme Court precedent—namely, *United States v. Lopez*[494] and *United States v. Morrison*[495]—had contracted the sphere of acceptable regulations under the Commerce Clause. Specifically, the company argued that the Supreme Court had limited using an aggregate-effects rationale to regulate noneconomic activities. But as Judge Garland explained, what was being regulated in this case was housing construction, a plainly commercial activity, not the endangered toads. "The ESA does not purport to tell toads what they may or may not do," Judge Garland wrote, noting that the penalties under the "taking" provision of the ESA "apply to the persons who do the taking, not to the species that are taken."[496]

Judge Garland also rejected the company's argument that a statute properly enacted pursuant to the Commerce Clause must be motivated primarily by a need to regulate economic activity. To the contrary, Judge Garland pointed to Supreme Court precedent that endorsed Congress's use of its Commerce Clause power to enact civil rights and public safety laws. As Judge Garland explained, "the fact that Congress passed [a] statute to attack the moral outrage of racial discrimination did not lead the Supreme Court to find it unconstitutional. . . . [T]he fact that Congress was legislating against moral wrongs . . . render[ed] its enactments no less valid."[497] Thus Congress's intent to protect endangered species is not relevant to whether the ESA is a lawful exercise of the Commerce Clause power.

The development company petitioned to rehear the case *en banc*, but a majority of the court voted against the petition. In a dissent from the denial of rehearing *en banc*, then-Judge John Roberts argued that Judge Garland's opinion took the wrong analytical approach to the Commerce Clause issue:

> The panel's opinion in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so. Thus, the panel sustains the application of the [ESA] in this case because Rancho Viejo's commercial development constitutes interstate commerce and the regulation impinges on that development, not because the incidental taking of arroyo toads can be said to be interstate commerce. . . . The panel's approach in this case leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating "Commerce . . . among the several States."[498]

494 514 U.S. 549 (1995).

495 529 U.S. 598 (2000).

496 *Rancho Viejo, LLC*, 323 F.3d at 1072.

497 *Id.* at 1075 (quotation marks omitted).

498 *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*).

Roberts found this approach to be inconsistent with Supreme Court precedent. Instead, Roberts argued that the case should be reheard *en banc* to find an alternative ground to uphold the ESA that would not conflict with Supreme Court precedent or with the holding of another circuit in a similar case.[499]

In another case, *Association of Bituminous Contractors v. Apfel*,[500] Judge Garland voted to uphold a federal benefits program—enacted pursuant to Congress's Commerce Clause power—against a Due Process challenge. At issue was a new federal health and retiree benefits fund that was created for coal mine workers. The administrator of the new fund determined that the Association of Bituminous Contractors must contribute to the fund because many of the association's past retired workers received benefits from an old fund that the association never paid into. In other words, the administrator determined that, under the regulations, the association should be held retroactively liable for past benefits received by being forced to contribute to the new fund.

The association challenged this decision, arguing that the retroactive liability rationale violated the Due Process Clause. Specifically, the association argued that because the economic impact of the retroactive liability was severe and disproportionate, it was unconstitutional for the government to impose the liability.

Judge Silberman's unanimous opinion for the court, joined by Judge Garland, rejected the association's arguments. The court held that economic legislation was to be accorded a "presumption of constitutionality that can be overcome only if the challenger establishes that the legislature acted in an arbitrary and irrational way."[501] "Even legislation with a retroactive effect may satisfy due process," the court explained, "if the retroactive application of the legislation is itself justified by a rational legislative purpose."[502] The rational legislative purpose in this case, the court found, was the fact that the association and its retirees received benefits in the past without cost. Thus, it was reasonable for the government to attempt to recoup some of its past losses from the association.

In addition, the court distinguished a case presenting similar facts that the Supreme Court had recently decided. Justice Kennedy's opinion (concurring in the judgment and dissenting in part) in *Eastern Enterprises v. Apfel*[503] argued that the retroactive liability aspect of a new benefits fund contravened the Due Process Clause. But the court noted that this aspect of Justice Kennedy's opinion was not joined by any other justice and thus was not controlling.[504] Further, the court noted that Justice Kennedy's own opinion in *Eastern Enterprises* admonished that using the Due Process Clause to invalidate economic legislation should be reserved for only "the most egregious of circumstances," and the court concluded that this case did not meet such extremes.[505]

---

499 *Id.*
500 *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998).
501 *Id.* at 1255 (quotation marks omitted).
502 *Id.* (quotation marks omitted).
503 524 U.S. 498 (1998).
504 *Ass'n of Bituminous Contractors*, 156 F.3d at 1254–55.
505 *Id.* at 1257 (quoting *E. Enters.*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part)).

Judge Garland's extra-judicial writings also demonstrate his preference for judicial deference in reviewing economic regulations. When Judge Garland was nominated to his current seat on the D.C. Circuit, he responded to Senator Chuck Grassley's Questions for the Record in writing. One question asked Judge Garland to comment on "episodes showing the damage that judicial activism can do to the independence of the judiciary . . . and the respect for democratic principles and the rule of law." Judge Garland responded by pointing to the *Lochner* era, a period when the Supreme Court was inclined to assert its will to strike down social welfare legislation on the basis of a fundamental liberty of contract: "Many historians believe that one such episode was the way in which the activism of the *Lochner* Court led to President Roosevelt's court-packing plan," he wrote, "which represented one of the most serious threats to the independence of the judiciary in the nation's history."[506]

Judge Garland also raised the specter of *Lochner* in his 1987 law review article, *Antitrust and State Action: Economic Efficiency and the Political Process*.[507] Judge Garland drew comparisons to *Lochner* to argue that courts should not use federal antitrust laws to preempt state economic regulations in the name of protecting greater economic efficiency. Judge Garland warned that a "revisionist antitrust court" could easily employ the same rationales used by the *Lochner* court to focus on the anti-competitive effects of economic regulations and ultimately pass judgment on the desirability of those regulations. And what's to stop a court from using antitrust law to patrol an array of regulations, Judge Garland asked:

> If antitrust concepts developed for private restraints are applied to state action, regulations as disparate as zoning and occupational licensing, exclusive franchises and rent control[,] minimum wages and minimum hours could all be overturned. This should hardly be surprising, as most such regulations were not intended to correct market inefficiencies, but to serve other social values. Whether the trade-offs such regulations represent are intelligent ones is, of course, open to debate; but whether federal courts should make that determination is a debate the Court thought it had ended in the 1930s.[508]

In the end, Judge Garland endorsed the Supreme Court's post-*Lochner* admonition that the federal judiciary does not sit as a "superlegislature to weigh the wisdom of legislation."[509]

Judge Garland has also ruled to uphold Congress's power under the Spending Clause to condition the receipt of federal funds on the waiver of states' sovereign immunity. In *Barbour v. WMATA*, an employee sued the Washington Metropolitan Area Transit Authority (WMATA), alleging that he was wrongfully terminated from his job due to his mental disability, in violation of the Rehabilitation Act.[510] WMATA argued that as a state agency it was immune from suit for money damages under the Eleventh Amendment. The district court rejected WMATA's argument and the agency appealed.

---

506 Merrick Garland's responses Questions for the Record from Senator Charles Grassley.
507 96 Yale L.J. 486 (1987).
508 *Id.* at 510 (footnote omitted).
509 *Id.* (quoting *Ferguson v. Skrupa*, 372 U.S. 726 (1963)).
510 *Barbour v. Wash. Met. Area Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004).

Judge Garland affirmed the denial of WMATA's immunity claim. Judge Garland explained that amendments to the Rehabilitation Act made it clear that by accepting federal funds, a state or state agency waived its immunity from suit for violations of the Rehabilitation Act.[511] Judge Garland also rejected WMATA's argument that its waiver was ineffective because it did not knowingly waive its immunity. Instead, Judge Garland determined that accepting federal funds on a clear condition constituted an objective manifestation of knowledge.[512] Finally, Judge Garland summarily rejected WMATA's argument that Congress lacked power under the Spending Clause to condition the receipt of federal transportation funds on a waiver of immunity. As Judge Garland noted, every circuit that considered the issue found that Congress's exercise of its Spending Clause power was proper.[513]

New Constitutional Rights

The Supreme Court developed the substantive due process doctrine to protect rights and liberties not explicitly enumerated in the Constitution. Under the doctrine, the level of scrutiny that the Court applies to an alleged rights violation depends on whether the asserted right is "fundamental." Thus, often the key issue in such cases is how to define the right at stake.

An example of this debate recently played out in the Supreme Court's landmark decision in *Obergefell v. Hodges*, which struck down same-sex marriage bans across the country. On the one hand, opponents of these bans argued that the right at issue was simply the fundamental right to marriage, to enter into a legal union that has been recognized by the state since time immemorial. Proponents of the bans, on the other hand, sought to zoom in on the right at stake. They argued that gays and lesbians sought recognition not of a right to marriage generally, but of a right to enter into a same-sex union specifically, a type of union that had never been recognized in our nation's history.

Judge Garland participated in a similar debate in an *en banc* decision regarding terminally ill patients' access to experimental medical treatments and ultimately sided with a more narrow formulation of the relevant right. The case, *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, arose after the FDA rejected a proposal from Abigail Alliance, an organization of terminally ill patients and their supporters.[514] The proposal would have granted terminally ill patients earlier access to treatments that were experimental and did not comply with the approval standards of the Federal Food, Drug, and Cosmetic Act. The FDA already had in place very limited avenues that allowed patients with life-threatening diseases to access new drugs and treatments before the completion of clinical trials, but the plaintiffs viewed these exceptions as inadequate. The plaintiffs argued that having to wait for the outcome of clinical trials for experimental treatments may be "fatal" for terminally ill patients.

---

511 *Id.* at 1164.
512 *Id.* at 1167.
513 *Id.* at 1168.
514 *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (*en banc*).

The *en banc* court wrestled with how to define the right at the center of the plaintiffs' claims. Judge Rogers, in dissent, took a broader approach and argued that the right at stake was "the right to preserve life, a corollary to the right to life enshrined in the Constitution."[515] The majority opinion, authored by Judge Griffith and joined by Judge Garland, pointed to Supreme Court precedent that required describing asserted fundamental rights carefully. Thus, the court's majority defined the right as the "right for persons in mortal peril to try to save their own lives, even if the chosen means would otherwise be illegal or involve enormous risks."[516]

The court determined that the plaintiffs were not asserting a fundamental right. After recounting the long history of drug regulation, the court found that the plaintiffs' asserted right to access experimental drugs was not "deeply rooted" in the nation's history.[517] The court also rejected the plaintiffs' argument that three common law principles—the doctrine of necessity, the tort of intentional interference with rescue, and the right to self-defense—supported finding that the asserted right was fundamental. In particular, the court disagreed with the plaintiffs' analogy of their asserted right to the right of abortion—specifically, the concept that the right of abortion included the self-defense right to abort a fetus for the preservation of a woman's life or health. The court found the concept in the abortion context to be entirely distinct from the plaintiffs' desire to assume enormous risks in pursuit of drugs that have no proven therapeutic effect.[518]

After noting that other courts had also rejected the plaintiffs' asserted constitutional right, Judge Griffith concluded that the FDA's limitations on access to experimental treatments withstood rational basis review.[519]

Second Amendment

No other constitutional right has undergone quite as dramatic a change in the last decade as the Second Amendment. Much of that credit goes to Justice Scalia and his legacy-defining opinion in *District of Columbia v. Heller*,[520] which for the first time in the nation's history interpreted the Second Amendment as protecting an individual's right to bear arms.

Heller originated in the D.C. Circuit, and much has been made of the fact that after the original panel voted 2-1 to strike down D.C.'s decades-old handgun ban—based on a reading of the Second Amendment that had yet to be endorsed by the Supreme Court (but would soon be in a 5-4 decision)—Judge Garland and three other judges, including Republican-appointee Judge Randolph, voted to rehear the case *en banc*.[521] The majority of judges, however, voted to deny rehearing *en banc* and the

515 *Id.* at 714 (Rogers, J., dissenting).
516 *Id.* at 703 (quotation marks omitted).
517 *Id.*
518 *Id.* at 709–10.
519 *Id.* at 712.
520 554 U.S. 570 (2008).
521 *Parker v. District of Columbia*, No. 04-7041, 2007 U.S. App. LEXIS 11029 *1 (D.C. Cir. May 8, 2007) (per curiam) (denial of petition for rehearing *en banc*).

case instead went on to the Supreme Court. Judge Garland and the dissenting judges did not write anything to explain the reasons for their vote in support of *en banc* review. His and Judge Randolph's vote could have simply reflected their view that the case was so important that it should be decided by the full D.C. Circuit. Since Judge Garland never heard the case, we cannot know how he would have ruled on the merits of the case.

The same could be said of another Second Amendment case where Judge Garland voted to deny rehearing *en banc* without a statement as to the reason for his vote. In *Seegars v. Ashcroft*, a divided panel of the D.C. Circuit held that the plaintiffs in the case lacked standing to challenge a pistol ban.[522] The plaintiffs alleged that but for the legal prohibition they would seek to purchase and own pistols. The panel majority found that because there was no evidence of imminent prosecution or high probability of enforcement, the plaintiffs did not satisfy the standing requirements.[523] The plaintiffs requested that the case be reheard *en banc* but they failed to garner the votes of a majority of the judges, including Judge Garland's.[524]

Judge Garland did participate in ruling on the merits of a challenge to a DOJ regulation related to background checks. At issue in *NRA of America, Inc. v. Reno* were rules that required information from background checks to be retained in an audit log for no more than six months.[525] According to the National Rifle Association, the Brady Act required that information obtained during background checks associated with lawful gun purchases be immediately destroyed and forbade the government from keeping such records, even for a limited time.

Judge Garland joined Judge Tatel's majority opinion upholding the DOJ rules. Interpreting the statute's text and legislative history, the court found that the Brady Act's requirement that records of gun purchases be destroyed did not unambiguously require that such records be destroyed *immediately*. Instead, the court held that the prohibition on keeping such records could reasonably be interpreted in a way that does not apply to the DOJ's audit log.[526] The court further held that the Attorney General's interpretation of the Brady Act was reasonable and was thus deserving of *Chevron* deference.[527]

Judge Sentelle, in dissent, disputed the majority's interpretation of the Brady Act, and in particular the law's provisions that prohibit the federal government from retaining records of gun ownership. Judge Sentelle found that there was nothing ambiguous about the law and that any attempts by the government to retain records relating to gun ownership for any period of time directly contravened the law: "By its clear words, this statute establishes that Congress has unambiguously told the Attorney General that she shall not do what she is doing in the regulations . . . She is doing it anyway."[528]

---

522 396 F.3d 1248 (D.C. Cir. 2005).
523 *Id.* at 1256.
524 *Seegars v. Gonzales*, 413 F.3d 1 (D.C. Cir. 2005) (per curiam) (denial of petition for rehearing *en banc*).
525 216 F.3d 122 (D.C. Cir. 2000).
526 *Id.* at 127–28.
527 *Id.* at 137.
528 *Id.* at 141 (Sentelle, J., dissenting).

First Amendment

Judge Garland's approach to First Amendment rights varies with context. For example, in cases where the right of petition (*Initiative & Referendum Institute v. United States Postal Service*), right of association (*LaRouche v. Fowler*), or the freedom of the press (*Lee v. DOJ* and *Boehner v. McDermott*) was at stake, Judge Garland wrote in strong defense of those rights. Judge Garland has not been as willing to extend First Amendment rights under the doctrine of commercial speech, as demonstrated by *American Meat Institute v. U.S. Department of Agriculture*, a case regarding the forced disclosure of product information. Under Supreme Court precedent, commercial speech is generally entitled to less exacting protection, so it is not surprising that Judge Garland joined the majority opinion upholding the disclosure requirements.

In *Initiative & Referendum Institute v. United States Postal Service*,[529] Judge Garland wrote in strong defense of the right to petition in a case about a USPS regulation that prohibited individuals from collecting signatures for petitions on sidewalks and other exterior areas of post offices. The plaintiffs filed suit arguing that the regulation was an unconstitutional limit on their right to petition.

Assuming that the areas affected by the regulation were public spaces, Judge Garland agreed with the plaintiffs, noting the importance of the right at issue. Judge Garland quoted Supreme Court precedent establishing that petition signature gathering is "at the core of our electoral process and of the First Amendment freedoms—an area of public policy where protection of robust discussion is at its zenith."[530]

Judge Garland concluded that the regulation restricted more speech than was necessary to achieve the government's interest in ensuring people can access post offices with only minimal disruption. Judge Garland also pointed to other regulations that already dealt with disruptive behavior to demonstrate how a flat-out ban on signature gathering was unnecessary. Importantly, Judge Garland rejected the Postal Service's argument that the regulation was necessary to shield people who simply wanted to conduct postal business from having to engage in charged political discussion. As Judge Garland explained:

> But the ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded. . . . Speech is often provocative and challenging. . . . That is why [it is] . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[531]

In the end, Judge Garland ordered a remand for factual findings on how much public space would be limited by the Postal Service's regulation, which would be the final determinative factor as to constitutionality.[532]

---

529 417 F.3d 1299 (D.C. Cir. 2005).
530 *Id.* at 1305 (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).
531 *Id.* at 1309–10 (citations and quotation marks omitted).
532 *Id.* at 1318.

In *LaRouche v. Fowler*, Judge Garland defended a political party's right under the First Amendment to determine who may be associated with the party.[533] The case arose during the 1996 presidential elections. That year, Lyndon LaRouche attempted to run as a candidate for the Democratic Party's nomination for president. But his efforts were thwarted by the party. Prior to the first primary elections, the chair of the Democratic National Committee determined that, pursuant to party rules, LaRouche was ineligible to compete for the party's nomination. The chair cited LaRouche's past record and political beliefs as demonstrating that he was not "faithful to, or has at heart, the interests, welfare and success of the Democratic Party."[534] LaRouche filed suit against the party and party leaders, alleging violations of the Voting Rights Act and his First Amendment rights.

Judge Garland remanded the Voting Rights Act claim to the district court but ruled in favor of the Democratic Party on the First Amendment claim. Judge Garland assumed without deciding that the Democratic Party could be sued as a state actor for purposes of § 1983, but noted that the Democratic Party had recognizable First Amendment interests in the case as well:

> [E]ven if a political party could be considered a state actor, it is at the same time clothed with strong First Amendment protections against intrusion by the state. . . . The [Supreme] Court's cases have made clear that the very actions at issue here—the Party's decisions about who can be nominated as delegates and even about who can be considered a Democrat—are themselves clothed in First Amendment protection.[535]

This circumstance led Judge Garland to conclude that LaRouche's First Amendment claim was best reviewed under the rational basis test instead of strict scrutiny.[536] Applying rational basis review, Judge Garland upheld the Democratic Party's actions in excluding LaRouche from its nomination process. In ruling for the party, Judge Garland emphasized that "[h]ere, the associational rights of the Democratic National Party are at their zenith. The Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself."[537] Quoting Supreme Court precedent, Judge Garland held that "[f]reedom of association . . . means . . . that a political party has a right to identify the people who constitute the association . . . and to select a standard bearer who best represents the party's ideologies and preferences."[538]

In *Lee v. DOJ*, a case dealing the reporter's privilege to keep sources confidential, Judge Garland wrote a dissent from the denial of rehearing *en banc* that emphasized the public's interest in maintaining a free and robust press.[539] The issue arose in the context of a Privacy Act suit where a former government employee sued several

533 152 F.3d 974 (D.C. Cir. 1998).
534 *Id.* at 976.
535 *Id.* at 992.
536 *Id.* at 995.
537 *Id.* at 996.
538 *Id.* (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)) (quotation marks omitted).
539 *Lee v. DOJ*, 428 F.3d 299 (D.C. Cir. 2005).

government agencies claiming that they had improperly disclosed personal information about him to journalists during the course of an espionage investigation. In the litigation, the former employee subpoenaed the journalists in order to discover who leaked his personal information. The journalists refused to reveal their sources by claiming the reporter's privilege and they were held in contempt of court.

A panel of the D.C. Circuit upheld the contempt orders against the journalists, finding that the former employee's vindication of his privacy interests outweighed the journalists' interests in protecting their sources. The journalists petitioned to rehear the case *en banc*, but the petition was denied.

Judge Garland authored a dissent from the denial of rehearing *en banc*. He argued that the panel applied the wrong analysis to resolve the issue. The panel looked only at whether the plaintiff sought information that was important to his case, and whether the plaintiff had exhausted all other avenues in finding the information. As Judge Garland explained, in whistleblower cases like this one, looking at only those two criteria will almost always require disclosure and would render the reporter's privilege meaningless. D.C. Circuit precedent, Judge Garland argued, required the opposite:

> [W]hen striking the balance between the civil litigant's interest in compelled disclosure and the public interest in protecting a newspaper's confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press. . . . If the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.[540]

In another case, *Boehner v. McDermott*, Judge Garland joined a dissent that favored a congressman's First Amendment right to disclose information that was of public concern.[541] The case arose out of a secret recording of then-Representative John Boehner discussing then-Speaker Newt Gingrich, who was the subject of an ethics investigation. Among other things, the recorded conversation revealed that Gingrich had violated his settlement agreement with the Ethics Committee. The couple that recorded the conversation was later prosecuted for violating federal law, but not before they turned the tape over to Representative Jim McDermott, who at the time was the ranking Democrat on the Ethics Committee. McDermott gave the tape to the press, which published stories regarding its content.

Boehner sued McDermott for violating 18 U.S.C. § 2511(1)(c), which prohibits anyone from intentionally disclosing the contents of a recorded conversation that they know or had reason to know was illegally recorded. McDermott's First Amendment defense in the case was the subject of D.C. Circuit's rehearing *en banc*.

The *en banc* majority held that McDermott did not have a First Amendment right to disclose the tape to the media. The majority relied primarily on the fact that McDermott was a member of the Ethics Committee at the time and the duties that

540 *Id.* at 303 (Garland, J., dissenting from the denial of rehearing *en banc*) (quoting *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981)).

541 *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007) (*en banc*).

come with that position. As the majority explained, "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information."[542]

Judge Garland joined Judge Sentelle's dissent. Judge Sentelle argued that when it came to matters of public concern, the First Amendment protects the right of a person to publicize information, even if the information comes from an unlawful source. Judge Sentelle rejected as a non sequitur the majority's conclusion that McDermott's duties as a member of the Ethics Committee limited his First Amendment rights. Judge Sentelle argued that while the Ethics Committee's rules could constitutionally place limits on speech, the rules could not deprive all speech of all First Amendment protection. It may be a different case, Judge Sentelle explained, if the Ethics Committee's rules were at issue in the case, but the focus here was on a federal statute, not those rules.[543] Finally, Judge Sentelle noted ambiguity as to what the rules required of McDermott and if they were at all applicable to McDermott's conduct here. Judge Sentelle took issue with the majority's reliance on the "spirit" of the rules as a lawful restraint on McDermott's First Amendment rights. As Judge Sentelle explained, "[a]brogating Representative McDermott's First Amendment protections because he violated the 'spirit' of a rule contravenes the well-established principle that vague restrictions on speech are impermissible because of their chilling effect."[544]

In contrast with Judge Garland's strong defense of the right to petition and freedom of the press, Judge Garland has upheld government regulations that burden commercial speech over the objections of corporate interests. In *American Meat Institute v. U.S. Department of Agriculture*, Judge Garland joined Judge Williams's *en banc* majority opinion that upheld a USDA country-of-origin food labeling regulation against a First Amendment challenge.[545] The case, decided *en banc* in 2014, was the latest salvo in a controversy within the D.C. Circuit over the proper interpretation and application of a key Supreme Court commercial speech case, *Zauderer v. Office of Disciplinary Counsel*.[546]

In *Zauderer*, the Supreme Court upheld a state regulation that required attorney advertisements to disclose how costs are handled in contingent fee cases.[547] To do so,

542 *Id.* at 579.

543 *Id.* at 589 (Sentelle, J., dissenting).

544 *Id.* at 590.

545 *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).

546 471 U.S. 626 (1985). Around this time period, the D.C. Circuit heard several cases regarding disclosure requirements imposed on different industries by various agencies. In 2012, a divided panel of the court struck down an FDA rule that would have required graphic warnings on cigarette packs. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). The majority opinion, written by Judge Brown, took a narrow view of the *Zauderer* test and held (over Judge Rogers's dissent) that it was not applicable for evaluating the rule. *Id.* at 1213–14. In early 2014, another divided panel held that *Zauderer* was inapplicable in reviewing and striking down an SEC rule that would have required firms to disclose if any parts of production used conflict minerals. *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014). Departing from the reasoning of both of these decisions, the original panel in *American Meat Institute* held *Zauderer* to be applicable to evaluating the USDA regulations at issue in the case and, in a footnote, suggested that the case be taken *en banc* to resolve the *Zauderer* issue. *Am. Meat. Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1073 n.1 (D.C. Cir. 2014). The D.C. Circuit obliged.

547 *Zauderer*, 471 U.S. at 652–53.

the Court applied a lower standard of review to the disclosure requirement than the standard it normally applied to restrictions on commercial speech under its four-part *Central Hudson*[548] test. The Court justified this distinction by explaining that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[549] In its holding, the Court articulated its lower standard of review as follows: "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[550]

The question before the *en banc* court in *American Meat Institute* was whether the *Zauderer* test applied to the USDA's country-of-origin disclosure requirements. The plaintiffs challenging the USDA regulation argued that disclosure requirements generally should only be reviewed pursuant to *Zauderer* if the government's interest in requiring disclosure is preventing consumer deception—the interest that the Supreme Court explicitly acknowledged in *Zauderer*.

The court's majority opinion—written by Judge Williams and joined by Judge Garland—rejected the plaintiffs' argument and held that *Zauderer* could be applied to disclosure requirements motivated by government interests other than consumer deception.[551] But in a twist, the court characterized *Zauderer* as merely an "application" of the *Central Hudson* test.[552] Applying the case here, the court upheld the regulation because it mandated disclosure only of "purely factual and uncontroversial information" and the disclosure was not unduly burdensome in a way that chills protected commercial speech.[553]

The majority's characterization of *Zauderer* and overall holding elicited several separate opinions. Judge Rogers, concurring in part, distanced herself from the majority's statement that *Zauderer* is an "application" of the *Central Hudson* test.[554] Judge Rogers argued that the Supreme Court put forward principled reasons for establishing separate standards for restrictions on commercial speech versus mandatory disclosures, and criticized the majority for unnecessarily "blurring the lines" between the two standards.[555] Judge Brown's dissent, on the other hand, opposed the majority's decision to extend *Zauderer* beyond instances where the government's reason for requiring mandatory disclosures is its interest in preventing consumer deception.[556]

In the context of campaign finance regulations, the Supreme Court's distinction between contributions and independent expenditures largely informs Judge Garland's decisions. For example, the Supreme Court has considered independent expenditures to hew closer to the core of political and free speech than direct contributions

548 *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).
549 *Zauderer*, 471 U.S. at 651.
550 *Id.*
551 *Am. Meat Inst.*, 760 F.3d at 22.
552 *Id.* at 27.
553 *Id.*
554 *Id.* at 28 (Rogers, J., concurring in part).
555 *Id.* at 28–29.
556 *Id.* at 37–38 (Brown, J., dissenting).

to campaigns. Accordingly, Judge Garland joined the unanimous *en banc* opinion in *SpeechNow.org v. FEC* that struck down the FEC rules limiting donations to independent expenditure-only political action committees. On the other hand, in *Wagner v. FEC*, Judge Garland reviewed and upheld campaign contribution bans on federal contract workers. Similarly, Judge Garland upheld lobbyist disclosure requirements in *National Association of Manufacturers v. Taylor*, and in doing so, followed Supreme Court precedent that looks favorably on disclosure requirements as a means of campaign finance regulation.

In *SpeechNow.org*, Judge Garland joined the unanimous *en banc* opinion authored by Judge Sentelle that paved the way for the creation of Super PACs.[557] As many commentators have explained,[558] the outcome in *SpeechNow.org* was largely compelled by the Supreme Court's decision in *Citizens United v. FEC*.[559] Prior to *Citizens United* and the D.C. Circuit's decision in *SpeechNow.org*, a group that wanted to pool individuals' money and engage in express advocacy exclusively through independent expenditures—i.e., that wanted to spend money in support of a political candidate without coordinating with that candidate's campaign—was required by the FEC to register as a political action committee (PAC) and comply with the rules governing PACs, including limits on how much individuals could contribute to the group's coffers.

But *Citizens United* struck down limits on independent expenditures, including those made by corporations, on the grounds that they "do not give rise to corruption or the appearance of corruption."[560] Thus, in *SpeechNow.org*, the D.C. Circuit concluded that since no campaign contribution limits could ever be attached to independent expenditures, the FEC could not apply contribution limits to independent expenditure-only groups like SpeechNow.org.[561] As a result, these groups—eventually coined "Super PACs"—could raise unlimited amounts of money from individuals (including corporations, thanks to *Citizens United*) in support of a political candidate as long as they did not "coordinate" with that candidate.

More recently, Judge Garland, writing for the unanimous *en banc* court, upheld a federal ban on political campaign contributions by individual federal government contractors. In *Wagner v. FEC*, Judge Garland held that the anticorruption concerns that motivated the ban in the first place still existed and that the ban did not unnecessarily abridge associational freedoms.[562] At the outset, Judge Garland rejected the plaintiffs' pleas to apply strict scrutiny to evaluate the contribution ban. As Judge Garland explained, Supreme Court precedent clearly established that a lower, yet still rigorous, level of scrutiny applied to laws regulating contributions, regardless of whether the regulation constituted a complete ban or mere limits, and that strict scrutiny was reserved for regulations of independent expenditures.[563]

---

557 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

558 *See, e.g.*, Rick Hasen, *Should Progressives Worry that Judge Garland Voted to Help Create Super PACS?*, Election Law Blog (Mar. 16, 2016, 8:38 AM), http://electionlawblog.org/?p=80929.

559 558 U.S. 310 (2010).

560 *Id.* at 357.

561 *SpeechNow.org*, 599 F.3d at 695.

562 *Wagner v. FEC*, 793 F.3d 1 (2015) (*en banc*).

563 *Id.* at 6.

In reviewing the contribution ban, Judge Garland acknowledged two important interests advanced by the government. First was the interest in preventing *quid pro quo* corruption or the appearance of corruption. The second was the government's interest in protecting the merit-based administration of government. Moreover, Judge Garland cited recent corruption scandals to bolster the ban's continued importance.[564] Judge Garland wrote, "the record offers every reason to believe that, if the dam barring contributions were broken, more money in exchange for contracts would flow through the same channels already on display."[565]

In another campaign finance case, *National Association of Manufacturers v. Taylor*,[566] Judge Garland upheld disclosure requirements for lobbyists. At issue was a statute that required every registered lobbyist to disclose any organization that "actively participates in the planning, supervision, or control of" its lobbying activities.[567] The National Association of Manufacturers (NAM) argued that the statute was unconstitutionally vague and violated the First Amendment because it would deter its members from participating in public policy initiatives. Under its policy, NAM kept its membership list confidential, allowing members to choose whether to disclose their affiliation. NAM argued that the statute would force it to disclose the names of its members that it would otherwise keep confidential.

Although Judge Garland declined to rule definitively on the appropriate level of judicial scrutiny, he concluded that the disclosure requirements could pass muster even under strict scrutiny. Importantly, Judge Garland distinguished this case from those in which the possible harms (e.g., retaliation) caused by disclosure outweigh the government's interest in requiring it. The prime example of this was *NAACP v. Alabama ex rel. Patterson*, the Supreme Court case holding that the State of Alabama could not require the NAACP to disclose its membership list.[568] In this case, NAM had proffered no evidence to suggest that its members faced similarly serious risks of retaliation or harm. Rather, Judge Garland explained, the risks that NAM members faced were "no different from those suffered by any organization that employs or hires lobbyists itself, and little different from those suffered by any individual who contributes to a candidate or political party," which are not sufficient to render a disclosure statute unconstitutional.[569]

564 *Id.* at 14.
565 *Id.* at 18.
566 582 F.3d 1 (D.C. Cir. 2009).
567 *Id.*
568 *Id.* at 20 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).
569 *Id.* at 22.

APPENDIX A | Judge Garland's Dissents

OP= authored majority

CP/DP= concurring in part, dissenting in part

No notation= joined the majority opinion

CASE	YEAR	ISSUE	GARLAND	JUDGE 2	JUDGE 3
United States v. Spinner, 152 F.3d 950	1998	Criminal—Trial Errors	**dissent**	Sentelle (OP)	Edwards
United States v. Watson, 171 F.3d 695	1999	Criminal—Trial Error—Evidence	**dissent**	Rogers (OP)	Edwards
Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111	1999	Civil Rights—Employment—Labor	**concurring in part, dissenting in part**	Silberman (Concur)	Sentelle (CP/DP)
Ross Stores v. NLRB, 235 F.3d 669	2001	Labor	**concurring in part, dissenting in part**	Henderson (OP)	Randolph (Concur)
United States v. Wilson, 240 F.3d 39	2001	Criminal—Sentencing	**concurring in part, dissenting in part**	Williams (OP)	Silberman
Am. Corn Growers Ass'n v. EPA, 291 F.3d 1	2002	Admin Law—Environment	**concurring in part, dissenting in part**	Edwards	Randolph
Akinseye v. District of Columbia, 339 F.3d 970	2003	Civil Rights	**dissent**	Henderson (OP)	Randolph
McDonnell Douglas Corp. v. United States Dep't of the Air Force, 375 F.3d 1182	2004	FOIA	**concurring in part, dissenting in part**	Ginsburg (OP)	Edwards
United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488	2004	False Claims Act	**dissent**	Roberts (OP)	Rogers

Lee v. DOJ, 428 F.3d 299	2005	First Amendment	**dissent**	A majority voted for the denial of rehearing en banc; Rogers (Dissent), Tatel (Dissent), Garland (dissent), Edwards would have granted rehearing but did not author or join a dissent	
Fin. Planning Ass'n v. SEC, 482 F.3d 481	2007	Admin Law—Securities	**dissent**	Rogers (OP)	Kavanaugh
Valdes v. United States, 475 F.3d 1319	2007	Criminal	**dissent**	En banc: Williams (OP), Kavanaugh (Concur), Henderson (Dissent)	
FedEx Home Delivery v. NLRB, 563 F.3d 492	2009	Labor	**dissenting in part**	Brown (OP)	Williams
Northeast Bev. Corp. v. NLRB, 554 F.3d 133	2009	Labor	**dissenting in part**	Ginsburg (OP)	Henderson
Saleh v. Titan Corp., 580 F.3d 1	2009	Access to Justice —Detainee Rights	**dissent**	Silberman (OP)	Kavanaugh
In re Aiken County, 725 F.3d 255	2013	Environment	**dissent**	Kavanaugh (OP)	Randolph (Concur)

APPENDIX B | Divided Administrative Law Cases

OP= wrote opinion

CP/DP= concurring in part, dissenting in part

no notation = joined the majority opinion

CASE	YEAR	GARLAND	JUDGE 2	JUDGE 3
SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202	2014	**joined majority**	Rogers (OP)	Kavanaugh (Dissent)
White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222	2014	**joined majority (per curiam)**	Rogers	Kavanaugh (CP/DP)
In re Aiken County, 725 F.3d 255	2013	**dissent**	Randolph (Concur)	Kavanaugh (OP)
Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22	2011	**joined majority**	Griffith (OP)	Henderson (Dissent)
FedEx Home Delivery v. NLRB, 563 F.3d 492	2009	**dissenting in part**	Brown (OP)	Williams
Northeast Bev. Corp. v. NLRB, 554 F.3d 133	2009	**dissenting in part**	Henderson	Ginsburg (OP)
Fin. Planning Ass'n v. SEC, 482 F.3d 481	2007	**dissent**	Rogers (OP)	Kavanaugh
Alpharma, Inc. v. Leavitt, 460 F.3d 1	2006	**opinion**	Silberman	Williams (CP/DP)
McDonnell Douglas Corp. v. United States Dep't of the Air Force, 375 F.3d 1182	2004	**concurring in part, dissenting in part**	Edwards	Ginsburg (OP)
Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1	2003	**opinion**	Rogers	Sentelle (Dissent)
Am. Corn Growers Ass'n v. Epa, 291 F.3d 1	2002	**concurring in part, dissenting in part**	Randolph (per curiam)	Edwards (per curiam)
Ross Stores v. NLRB, 235 F.3d 669	2001	**concurring in part, dissenting in part**	Randolph (Concur)	Henderson (OP)
Iceland S.S. Co. v. United States Dep't of the Army, 201 F.3d 451	2000	**joined majority**	Sentelle (OP)	Henderson (CP/DP)
NRA v. Reno, 216 F.3d 122	2000	**joined majority**	Tatel (OP)	Sentelle (Dissent)
Appalachian Regional Healthcare v. Shalala, 131 F.3d 1050	1997	**joined majority**	Silberman (OP)	Sentelle (Dissent)

APPENDIX C | Labor Law Majority Opinions Authored By Judge Garland

Both judges joined Judge Garland's opinion for the court, except where noted otherwise.

CASE	YEAR	GARLAND	JUDGE 2	JUDGE 3
Spurlino Materials, LLC v. N.L.R.B., 805 F.3d 1131	2015	**opinion**	Williams	Randolph
Pacific Coast Supply v. N.L.R.B., 801 F.3d 321	2015	**opinion**	Griffith	Kavanaugh
Monmouth Care Center v. N.L.R.B., 672 F.3d 1085	2012	**opinion**	Tatel	Ginsburg
Bally's Park Place, Inc. v. N.L.R.B., 646 F.3d 929	2011	**opinion**	Sentelle	Ginsburg
Wayneview Care Center v. N.L.R.B., 664 F.3d 341	2011	**opinion**	Rogers	Edwards
Spectrum Health – Kent Community Campus v. N.L.R.B., 647 F.3d 341	2011	**opinion**	Henderson	Griffith
Guard Publishing Co. v. N.L.R.B., 571 F.3d 53	2009	**opinion**	Sentelle	Griffith
Dean Transp., Inc. v. N.L.R.B., 551 F.3d 1055	2009	**opinion**	Henderson	Randolph
Carpenters and Millwrights, Local Union 2471 v. N.L.R.B., 481 F.3d 804	2007	**opinion**	Randolph	Griffith
Flying Food Group Inc. v. N.L.R.B., 471 F.3d 178	2006	**opinion**	Henderson	Kavanaugh
Ceridian Corp v. N.L.R.B., 435 F.3d 352	2006	**opinion**	Sentelle	Griffith
ITT Industries, Inc. v. N.L.R.B., 413 F.3d 64	2005	**opinion**	Randolph	Roberts
Ark Las Vegas Restaurant Corp. v. N.L.R.B., 334 F.3d 99	2003	**opinion**	Henderson	Randolph
Shamrock Foods Co. v. N.L.R.B., 346 F.3d 1130	2003	**opinion**	Henderson	Tatel
Antelope Valley Bus Co., Inc. v. N.L.R.B., 275 F.3d 1089	2002	**opinion**	Tatel	Williams
Lee Lumber and Building Material Corp. v. N.L.R.B., 310 F.3d 209	2002	**opinion**	Sentelle (Concur)	Rogers
Halle Enterprises, Inc. v. N.L.R.B., 247 F.3d 268	2001	**opinion**	Sentelle	Tatel
Tasty Baking Co. v. N.L.R.B., 254 F.3d 114	2001	**opinion**	Ginsburg	Randolph

Pacific Bell v. N.L.R.B., 259 F.3d 719	2001	**opinion**	Ginsburg	Williams
United Food and Commercial Workers International Union Local 400, AFL-CIO v. N.L.R.B., 222 F.3d 1030	2000	**opinion**	Williams	Sentelle
Mohave Elec. Co-op, Inc. v. N.L.R.B., 206 F.3d 1183	2000	**opinion**	Ginsburg	Henderson
Pioneer Hotel, Inc. v. N.L.R.B., 182 F.3d 939	1999	**opinion**	Wald	Silberman

APPENDIX D | Guantanamo Detainee Cases

OP= wrote opinion

CP/DP= concurring in part, dissenting in part

no notation = joined the majority opinion

CASE	YEAR	ISSUE	GARLAND	JUDGE 2	JUDGE 3
Al Odah v. United States, 321 F.3d 1134	2003	Habeas	**joined majority**	Randolph (OP)	Williams
Parhat v. Gates, 532 F.3d 834	2008	CSRT determination	**opinion**	Sentelle	Griffith
Awad v. Obama, 608 F.3d 1	2010	Habeas	**joined majority**	Sentelle (OP)	Silberman
Al Odah v. United States, 611 F.3d 8	2010	Habeas	**joined majority**	Sentelle (OP)	Rogers
Al Alwi v. Obama, 653 F.3d 11	2011	Habeas	**opinion**	Williams	Tatel
Uthman v. Obama, 637 F.3d 400	2011	Habeas	**joined majority**	Kavanaugh (OP)	Griffith
Khan v. Obama, 655 F.3d 20	2011	Habeas	**opinion**	Ginsburg	Sentelle
Alsabri v. Obama, 684 F.3d 1298	2012	Habeas	**opinion**	Kavanaugh	Ginsburg
Obaydullah v. Obama, 688 F.3d 784	2012	Habeas	**joined per curiam**	Henderson	Sentelle (dissenting on jurisdictional grounds)
Khairkhwa v. Obama, 703 F.3d 547	2012	Habeas	**joined majority**	Randolph (OP)	Rogers
Suleiman v. Obama, 670 F.3d 1311	2012	Habeas	**joined majority**	Griffith (OP)	Tatel
Hatim v. Obama, 760 F.3d 54	2014	Habeas	**joined majority**	Griffith (OP)	Henderson
Al Bahlul v. United States, 767 F.3d 1	2014	Military Commission conviction	**joined majority**	En banc: Henderson (OP), Henderson (Concur), Rogers (CP/DP), Brown (CP/DP), Kavanaugh (CP/DP)	

APPENDIX E | Divided Criminal Law Cases

OP= wrote opinion

CP/DP= concurring in part, dissenting in part

no notation = joined the majority opinion

CASE	YEAR	GARLAND	GARLAND PRO GOVERNMENT OR PRO DEFENDANT	JUDGE 2	JUDGE 3
In re Sealed Case, 131 F.3d 208	1997	joined majority	**government**	Sentelle (OP)	Randolph (CP/DP)
United States v. Spinner, 152 F.3d 950	1998	dissent	**government**	Edwards	Sentelle (OP)
United States v. Watson, 171 F.3d 695	1999	dissent	**government**	Edwards	Rogers (OP)
United States v. Williams, 212 F.3d 1305	2000	joined majority	**government**	Henderson (OP)	Silberman (Dissent)
United States v. Wilson, 240 F.3d 39	2001	concurring in part, dissenting in part	**government**	Williams (OP)	Silberman
United States v. Brown, 334 F.3d 1161	2003	opinion	**government**	Sentelle	Rogers (Dissent)
United States v. Harris, 491 F.3d 440	2007	joined majority	**government**	Brown (OP)	Williams (DP)
In re Sealed Case, 573 F.3d 844	2009	joined majority	**defendant**	Tatel (OP)	Henderson (CP/DP)
United States v. Crowder, 141 F.3d 1202	1998	joined majority	**government**	en banc, Randolph (OP)	N/A
United States v. McCoy, 313 F.3d 561	2002	joined majority	**defendant**	en banc, Williams (OP)	N/A
Valdes v. United States, 475 F.3d 1319	2007	dissent	**government**	en banc, Williams (OP)	N/A
United States v. Powell, 483 F.3d 836	2007	joined majority	**government**	en banc, Ginsburg (OP)	N/A
United States v. Askew, 529 F.3d 1119	2008	joined in part	**defendant**	en banc, Edwards (OP)	N/A
United States v. Burwell, 690 F.3d 500	2012	joined majority	**government**	en banc, Brown (OP)	N/A

WWW.THEGARLANDRECORD.ORG

ALLIANCE FOR JUSTICE

11 DUPONT CIR NW #200
WASHINGTON, DC 20036