

Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court

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April 27, 2016

Congressional Research Service

7-5700

www.crs.gov

R44479

Summary

On March 16, 2016, President Obama nominated Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill the vacancy on the Supreme Court created by the unexpected death of Justice Antonin Scalia in February. Judge Garland was appointed to the D.C. Circuit by President Clinton in 1997, and is currently its chief judge, an administrative position that rotates among the active judges on the circuit. Prior to his appointment to the bench, Judge Garland served in the Criminal Division of the U.S. Department of Justice, where he notably oversaw the prosecution of the 1995 Oklahoma City bombing case, as well as other cases. It remains to be seen whether or how the Senate might proceed in considering Judge Garland's nomination; however, the nomination remains effective until it is withdrawn or this term of Congress ends, whichever occurs first.

This report provides an overview of Judge Garland's jurisprudence and discusses what the impact on the Court might be if he, or a judge of a similar judicial approach, were to be confirmed to succeed Justice Scalia. In particular, the report focuses upon those areas of law where Justice Scalia can be seen to have influenced the High Court's approach to certain issues, or served as a fifth and deciding vote on the Court, with a view toward how Judge Garland might approach those same issues if he were to be confirmed. The report begins with his views on two overarching issues—the role of the judiciary and statutory interpretation. It then addresses 14 separate areas of law, which are arranged in alphabetical order from “administrative law” to “takings.” The report includes one table which notes the cases where the Supreme Court has reviewed majority opinions written or joined by Judge Garland. Another table, in the appendix to the report, identifies Judge Garland's colleagues on the D.C. Circuit and lists notable cases involving Judge Garland and that colleague. A separate report is forthcoming that will list all opinions authored by Judge Garland during his tenure on the D.C. Circuit.

Other CRS products discuss various issues related to the vacancy on the Supreme Court. For an overview of available products, see CRS Legal Sidebar WSLG1526, *Vacancy on the Supreme Court: CRS Products*, by Kate M. Manuel and Andrew Nolan.

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On March 16, 2016, President Obama nominated Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to fill the vacancy on the Supreme Court created by the unexpected death of Justice Antonin Scalia in February.¹ Judge Garland was appointed to the D.C. Circuit by President Clinton in 1997,² and is currently its chief judge,³ an administrative position that rotates among the active judges on the circuit.⁴ Prior to his appointment to the bench, Judge Garland served in the Criminal Division of the U.S. Department of Justice (DOJ), where he notably oversaw the prosecution of the 1995 Oklahoma City bombing case,⁵ as well as other cases.⁶ It remains to be seen whether or how the Senate might proceed in considering Judge Garland's nomination;⁷ however, his nomination remains effective until it is withdrawn or this term of Congress ends, whichever occurs first.⁸

This report provides an overview of Judge Garland's jurisprudence and discusses what the impact on the Supreme Court might be if he, or a judge of a similar judicial philosophy, were to be confirmed to succeed Justice Scalia. In attempting to ascertain how the Court's jurisprudence could be affected if Judge Garland were to fill the vacancy created by Justice Scalia's death, however, it is important to note at the outset that it is difficult to predict accurately an individual's service on the Court based on his prior experience for various reasons. Accordingly, a section of this report entitled "Predicting Nominees' Future Decisions on the Court" provides a broad context and framework for evaluating how determinative a lower court judge's prior record may be in predicting future votes on the Supreme Court.

The report focuses on those areas of law where Justice Scalia can be seen to have influenced the High Court's approach to particular issues, or served as a fifth and deciding vote on the Court,⁹ with a view toward how Judge Garland might approach that same issue if he were to be confirmed. The report begins with his views on two cross-cutting issues—the role of the judiciary and statutory interpretation. It then addresses 14 separate areas of law, which are arranged in

¹ See, e.g., *Transcript: Obama Announces Nomination of Merrick Garland to Supreme Court*, WASH. POST (March 16, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/03/16/transcript-obama-announces-nomination-of-merrick-garland-to-supreme-court/>. See also CRS Legal Sidebar WSLG1518, *Merrick Garland's Nomination to the Supreme Court: Initial Observations*, by Andrew Nolan.

² See *Garland, Merrick B.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=820> (last visited April 15, 2016) [hereinafter "FJC Garland"]. Judge Garland was initially nominated to the D.C. Circuit in 1995, but the Senate did not vote on that nomination. *Id.*

³ *Id.*

⁴ See U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT, AS AMENDED THROUGH MARCH 1, 2016, 2, [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/\\$FILE/HandbookMarch2016Final.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/HandbookMarch2016Final.pdf) (last visited April 20, 2016).

⁵ See, e.g., *Confirmation Hearings on Federal Appointments: Hearings before the Committee on the Judiciary, United States Senate, Part 2*, 104th Congress, 1st sess., 1058 (1995).

⁶ FJC Garland, *supra* note 2.

⁷ See, e.g., David M. Herszenhorn, *Senator Grassley and Judge Garland Meet, and Rehash the Obvious*, N.Y. TIMES (April 12, 2016), http://www.nytimes.com/2016/04/13/us/politics/senator-chuck-grassley-merrick-garland-meet.html?_r=0; Todd Ruger, *Grassley: I Haven't Changed My Mind on Garland Hearings*, ROLL CALL (April 7, 2016), <http://www.rollcall.com/news/home/grassley-havent-changed-mind-garland-hearings>.

⁸ See S. COMM. ON RULES AND ADMIN., *STANDING RULES OF THE SENATE*, S. Doc. No. 113-18 (2013) (Rule XXXI), <https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/html/CDOC-113sdoc18.htm>; CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

⁹ These areas are noted in CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Kate M. Manuel, Brandon J. Murrill, and Andrew Nolan [hereinafter referred to as the "CRS Scalia report"].

alphabetical order from “administrative law” to “takings.” Within each of these sections, the report reviews whether and how Judge Garland has addressed particular issues in opinions he authored or joined, or in other votes in which he participated (e.g., votes regarding whether the D.C. Circuit should grant en banc review to decisions of three-judge circuit panels). The report analyzes majority, concurring, and dissenting opinions, as well as opinions of three-judge *district* court panels in which Judge Garland participated.¹⁰ Where relevant, the report also notes Judge Garland’s writings prior to joining the D.C. Circuit, which often centered upon issues of administrative or antitrust law.¹¹

The report discusses numerous cases and votes involving Judge Garland. However, it focuses particularly on cases in which Judge Garland participated that divided the D.C. Circuit, as these cases arguably best showcase how he might approach a legal controversy whose resolution is a matter of dispute and is not predetermined by prior case law.¹² In addition, the report highlights areas where Judge Garland demonstrated views on the law that contrasted with the views of some of his colleagues. Moreover, to the extent that Judge Garland’s votes in particular cases may reflect broader trends and tendencies in his decisionmaking that could be manifested if he were to be confirmed to the Court, the report highlights such trends. Nonetheless, this report does not attempt to catalog every matter in which Judge Garland participated during his 19 years of service on the D.C. Circuit. A separate CRS report is forthcoming that will list all opinions authored by Judge Garland.

Other CRS products discuss various issues related to the vacancy on the Court. For an overview of available products, see CRS Legal Sidebar WSLG1526, *Vacancy on the Supreme Court: CRS Products*, by Kate M. Manuel and Andrew Nolan.

Predicting Nominees’ Future Decisions on the Court

It is important to note at the outset of this report that, at least as a historical matter, attempting to predict how particular Supreme Court nominees may approach their work on the High Court based on their previous experience is a task fraught with uncertainty.¹³ For example, Justice Felix

¹⁰ See 28 U.S.C. §2284(a) (“A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.”).

¹¹ See, e.g., *Confirmation Hearings on Federal Appointments*, *supra* note 5, at 1109 (listing Judge Garland’s publications prior to joining the D.C. Circuit).

¹² See Jonathan H. Adler, *What Happened When Merrick Garland Wrote for Himself*, VOLOKH CONSPIRACY (March 21, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/21/what-happened-when-merrick-garland-wrote-for-himself/> (“The best way to get a handle on a circuit judge’s judicial philosophy is to look at the judge’s concurrences and dissents.”).

¹³ Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838-2009*, 76 MO. L. REV. 999, 1040 (2011) (“[U]ncertainty is empirically well-founded. It is borne out by Justices’ overall voting records since at least 1838. The president’s odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip.”); *id.* at 1021 (listing Justices Brennan, Clark, Frankfurter, Holmes, McLean, McReynolds, Reed, Souter, Stevens, Warren, and Wayne as examples of jurists who “disappointed” the expectations of the President who appointed them to the Court); see also *The Judicial Nomination and Confirmation Process: Hearings Before the Subcommittee on Administrative Oversight & the Courts, Senate Committee on the Judiciary*, 107th Cong., 1st sess., 195 (2001) (statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America) (“Nominee selection—as a matter of fact—is seldom sufficient to predict accurately the philosophical direction of a particular judicial candidate, once appointed to a lifetime job with no salary diminution. Eisenhower had his Earl Warren; Nixon had his Blackmun; Bush had his Souter. In each case, it is either popularly speculated or actually articulated that the nominee’s service was at some considerable variance to the philosophy of the nominating president. A recent study for the LBJ Journal of Public Affairs estimates (continued...)”).

Frankfurter, who had a reputation as a “progressive” legal scholar prior to his appointment to the Court in 1939,¹⁴ disappointed¹⁵ some as he became a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties and civil rights during World War II¹⁶ and the early Cold War era.¹⁷ Similarly, Justice Harry Blackmun, who had served on the U.S. Court of Appeals for the Eighth Circuit for a little over a decade prior to his appointment to the Court in 1970,¹⁸ was originally considered by President Richard Nixon to be a “strict constructionist,” in the sense that he viewed the judge’s role as interpreting the law, rather than making new law.¹⁹ In the years that followed, however, Justice Blackmun authored the majority opinion constitutionalizing the right to terminate a pregnancy in *Roe v. Wade*,²⁰ and was generally considered one of the more liberal voices on the Court by the time of his retirement in 1994.²¹

The difficulty in attempting to predict future Supreme Court votes remains even when the nominee has had as lengthy a federal judicial career prior to nomination as Judge Garland.²² Federal appellate judges are bound by Supreme Court and circuit precedent²³ and, therefore, are

(...continued)

that one Justice in four disappointed his appointing president.”).

¹⁴ See Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 220 (1990) (“When Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, ‘the most useful lawyer in the United States’: defender of Tom Mooney, the alien victims of the Palmer Red Raids, the striking miners of Bisbee, Arizona, Sacco and Vanzetti, and too many others to mention.”); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 13-16, 46-47 (1989) (noting fears in some political circles that Frankfurter was a Communist or Communist sympathizer, “inspir[ing] American conservatives to label Frankfurter a dangerous radical”); see generally NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 14, 21-27 (2010).

¹⁵ See, e.g., Rauh, *supra* note 14, at 220 (“But ... a deep belief in judicial restraint in all matters overtook even [Frankfurter’s] lifelong dedication to civil liberties.”).

¹⁶ See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for the constitutionality of a World War II-era law requiring students to salute the flag); *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (contending that the propriety of the Japanese-American civilian exclusion order was the “business” of Congress and the Executive, not the Court).

¹⁷ See, e.g., *Dennis v. United States*, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

¹⁸ See *Blackmun, Harry Andrew*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=187&cid=0&ctype=sc&instat=na> (last visited April 15, 2016).

¹⁹ See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 97 (1979) (“Nixon found Blackmun’s moderate conservatism perfect.... [Blackmun] had a ... predictable, solid body of opinions that demonstrated a levelheaded, strict-constructionist philosophy.... Blackmun was a decent man, consistent, wedded to routine, unlikely to venture far.”).

²⁰ See generally 410 U.S. 113 (1973) (Blackmun, J.).

²¹ See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 235 (2005) (noting that, by 1994, “Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court”).

²² Judge Garland has served for nearly 20 years on the D.C. Circuit. See FJC Garland, *supra* note 2. By comparison, of the current members of the Supreme Court, Justice Alito had served the longest on the federal court of appeals—16 years—prior to being elevated to the High Court. See *Alito, Samuel A., Jr.*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=26> (last visited April 15, 2016).

²³ See *Brewster v. Comm’r of Internal Revenue*, 607 F.2d 1369, 1373-74 (D.C. Cir. 1979) (explaining that future panels are bound to follow precedent set by previous panels until the en banc court or Supreme Court overrules that precedent); see generally Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 816 n.160 (2006) (“Vertical stare decisis binds hierarchically inferior federal appellate judges to follow the Supreme Court’s on-point precedent. The relationship is vertical, or between inferior and superior. Horizontal stare decisis merely constrains justices to follow their own precedent—decisions made by their co-equal (continued...)”).

not normally in a position to espouse freely their views on particular legal issues in the context of their judicial opinions.²⁴ Moreover, unlike the Supreme Court, which enjoys “almost complete discretion” in selecting its cases, the federal courts of appeals are required to hear many cases as a matter of law and, as a result, tend to hear “many routine cases in which the legal rules are uncontroverted.”²⁵ Perhaps indicative of the nature of federal appellate work, the vast majority of cases decided by three-judge panels of federal courts of appeals are decided without dissent.²⁶ Unanimity is particularly frequent on the D.C. Circuit where Judge Garland serves.²⁷ Accordingly, while Judge Garland’s work on the D.C. Circuit may provide some insight into his general approach toward particular legal issues,²⁸ the bulk of the opinions that Judge Garland has authored or joined may not be particularly insightful with regard to his views on specific areas of law or how he would approach these issues if he were a Supreme Court Justice.

Even in closely contested cases where concurring or dissenting opinions are lodged,²⁹ it still may be difficult to determine the preferences of the nominated judge if the nominee did not actually write an opinion in the case. The act of joining an opinion authored by another judge may not necessarily reflect full agreement with the underlying opinion.³⁰ For example, some judges, in an effort to promote consensus on a court, will refuse to dissent unless the underlying issue invokes

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predecessors—until a five-vote majority decides to overrule it. Once there are five votes to overrule, it merely becomes a matter of prudence whether the Court will revise what was once established precedent.”).

²⁴ See HON. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 367 (2009) (“Supreme Court decisions bind the courts of appeals in a way in which they do not bind the Court itself, and therefore narrow considerably the scope for those courts to exercise choice.”); see also DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 171 (1999) (noting that the nature of a judge’s work on a federal appellate court allows “most circuit judges [to] chart a course of moderation” and “more often than not, a circuit judge’s opinions tend to betray outsiders’ perceptions of that judge as a sharp ideological extremist”).

²⁵ Louis J. Sirico, Jr., *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); see generally POSNER, *supra* note 24, at 367 (2009) (observing that “more of the work of [the federal appellate] courts really is technical.... Most of the appeals they get can be decided uncontroversially by the application of settled principles.”).

²⁶ See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 160 (2007) (noting the “relative paucity of circuit court panel dissents”).

²⁷ See, e.g., Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter Georgetown University Law Center, April 26, 2011*, 10 GEO. J.L. & PUB. POL’Y 1, 7 (2012) (noting that in 2010, panels of the D.C. Circuit “disposed of 873 cases, 191 of them with published opinions, but our nine active and four senior judges ... issued a total of only nineteen dissenting opinions”); see also Hon. Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 GEO. WASH. L. REV. 259, 265 (2002) (noting that, from FY1995 through FY2001, a dissent was filed in only 9% of published decisions of the D.C. Circuit).

²⁸ See YALOF, *supra* note 24, at 170 (“Although hardly dispositive, federal appellate opinions offer perhaps the best gauge available for predicting an individual’s future voting behavior on the Supreme Court.”).

²⁹ See Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1754-55 (2015) (suggesting that the “presence of a concurrence or dissent serves as a signal” that the case before the court is a “hard case”); see generally Hon. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412-15 (1995) (noting the motivations that prompt judges to write concurring or dissenting opinions); Hon. Diane P. Wood, *When to Hold, When to Fold, When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1451-57 (2012) (describing the considerations that prompt judges to publish separate opinions).

³⁰ See Hon. Ruth Bader Ginsburg, as quoted in Irin Carmon, *Opinion, Justice Ginsburg’s Cautious Radicalism*, N.Y. TIMES (October 24, 2015), <http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html> (noting that “an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself”).

particularly strong disagreement.³¹ As one commentator notes, “[T]he fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like ‘I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on.’”³²

The caution with which one interprets a judge’s vote isolated from a written opinion may be particularly important in the context of a judge’s votes with respect to procedural matters. A judge’s vote to grant an extension of time for a party to submit a filing, for example, generally does not signal any sort of agreement with the substantive legal position proffered by that party.³³ Thus, while votes by Judge Garland in favor of having certain cases—which had been ruled on by three-judge panels—reconsidered by the D.C. Circuit sitting en banc have garnered considerable attention from some examining his judicial record,³⁴ those votes should be interpreted with some degree of caution. On the one hand, a vote to rehear a case en banc could signal disagreement with the legal reasoning of the panel decision and may suggest that a judge wants the entire court to have an opportunity to correct a perceived error by the panel.³⁵ On the other hand, as one federal appellate judge noted in dissenting from a decision to deny a petition for rehearing en banc,

Most of us vote against most such petitions and suggestions even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases.³⁶

³¹ See Sanford Levinson, *Trash Talk at the Supreme Court: Reflections on David Pozen’s Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 174 (2016) (declaring the assumption that “all adjudicators are splendidly isolated” to be “foolish,” and arguing that it may be “incumbent” upon judges to engage in “intellectual compromise[s]” “to serve the public weal”); see, e.g., Gerald W. Heaney, *Judge Martin Donald Van Oosterhout: The Big Judge from Orange City, Iowa*, 79 IOWA L. REV. 1, 16 (1993) (discussing former Eighth Circuit Judge Van Oosterhout’s judicial philosophy).

³² See Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 924 (2011).

³³ Cf. *Mathes v. Comm’r of Internal Revenue*, 788 F.2d 33, 35 (D.C. Cir. 1986) (noting that the “substantive merits of a claim” are irrelevant when a claim is prosecuted in an untimely manner).

³⁴ See, e.g., *Priests for Life v. Dep’t of Health & Human Servs. (HHS)*, 808 F.3d 1 (D.C. Cir. 2015) (voting to deny a petition for en banc hearing in a matter arising under the Religious Freedom Restoration Act); *Parker v. District of Columbia*, No. 04-7041, 2007 U.S. App. LEXIS 11029 (D.C. Cir. May 8, 2007) (dissenting from a vote denying a petition for rehearing en banc in a Second Amendment case). For further discussion of these votes, see *infra* “Freedom of Religion” and “Right to Bear Arms,” respectively.

³⁵ See Hon. Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784 (1983) (noting that “[s]ome judges vote routinely for rehearings en banc on all cases with which they disagree....”); see also Hon. Antonin Scalia, *Submitted Testimony to the Commission on Structural Alternatives for the Federal Courts of Appeals* 1 (August 21, 1998), <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf> (“[T]he function of en banc hearings ... is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong.”).

³⁶ See *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of reh’ing en banc); see also *Bartlett v. Bowen*, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of reh’ing en banc) (“By declining to rehear a case, ‘we do not sit in judgment on the panel; we do not sanction the result it reached’.... We decide merely that ... review by the full court is not justified.”). This more limited view of the nature of a vote for or against a rehearing aligns with the plain text of the Federal Rules of Appellate Procedure, which state that an en banc hearing is “not favored and ordinarily will not be ordered” unless en banc consideration is necessary to “secure or maintain” the uniformity of a court’s decisions, or the proceeding involves a question of “exceptional importance.” See FED. R. APP. P. 35(a).

As a consequence, a vote for or against rehearing a case, or on other procedural matters does not necessarily equate to an endorsement or repudiation of a particular legal position.³⁷

Finally, it should be noted that, despite having served on the federal appellate bench for nearly two decades, Judge Garland has said very little about some areas of law because of the nature of the D.C. Circuit's docket, and as a consequence, it may be difficult to predict how he might rule on certain issues if he were elevated to the Supreme Court. Because of its location in the nation's capital and because of various jurisdictional statutes,³⁸ the D.C. Circuit hears a significant number of cases on administrative³⁹ and environmental law matters.⁴⁰ In contrast, cases at the D.C. Circuit rarely, if ever, involve "hot-button" social issues such as abortion, affirmative action, or the death penalty.⁴¹ As a result, this report focuses primarily on areas of law where Judge Garland has written extensively, and notes only in passing those areas where little can arguably be gleaned from his judicial record on account of Judge Garland having participated in few, if any, decisions directly addressing those particular areas of law.

Role of the Judiciary

In contrast to Justice Scalia, who was a well-known proponent of originalism and textualism both within and outside the Court,⁴² regularly arguing his views on the lecture circuit⁴³ and dissenting from opinions that, in his view, failed to construe legal texts in accordance with their ordinary meaning at the time of drafting,⁴⁴ Judge Garland's approach to the craft of judging is less immediately apparent. In a questionnaire submitted to the Senate Judiciary Committee in

³⁷ See *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in the reh'ing en banc) ("No one thinks a vote against rehearing en banc is an endorsement of a panel decision....").

³⁸ See CRS Legal Sidebar WSLG533, *Why is the D.C. Circuit "So" Important?*, by Andrew Nolan.

³⁹ See Hon. Brett M. Kavanaugh, *The Courts and the Administrative State*, 64 CASE W. RES. L. REV. 711, 715 (2014) ("[T]he bread and butter of our docket, is our administrative law docket. What I mean by that is determining in a particular case whether an administrative agency, like the EPA, the NLRB, or the FCC, exceeded statutory limits on their authority or violated a statutory prohibition on what they can do. These are the cases that come up to our court constantly. We see very complicated administrative records, and we adjudicate very complex statutes."); see also Hon. Harry T. Edwards, *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 64 (2004) ("The D.C. Circuit docket largely consists of very dense administrative law cases in appeals that often include huge records and numerous parties with their numerous briefs."); Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 152 (2013) ("The modern D.C. Circuit hears a disproportionate share of administrative petitions and other cases involving the federal government....").

⁴⁰ See Jason J. Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 790 (2008) (noting that, in a data set of 347 judicial votes cast in the federal courts of appeals from 2003 to 2005 on environmental law matters, "cases involving environmental statute interpretation tend to occur in the D.C. Circuit"); Hon. Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 623, 633 (1994) (stating that the D.C. Circuit has decided a number of significant environmental law cases).

⁴¹ See David G. Savage, *Supreme Court Nominee Merrick Garland Has a Record of Restraint, Not Activism*, L.A. TIMES, (March 18, 2016), <http://www.latimes.com/nation/la-na-garland-legal-analysis-20160318-story.html>.

⁴² See generally CRS Scalia report, *supra* note 9, at 2-4.

⁴³ See, e.g., Hon. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (an address delivered on September 16, 1988, at the University of Cincinnati as the William Howard Taft Constitutional Law Lecture); Hon. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-47 (Amy Gutmann ed., 1997) (containing Justice Scalia's Tanner Lectures on Human Values delivered at Princeton University on March 8 and 9, 1995).

⁴⁴ See, e.g., *Obergefell v. Hodges*, --- U.S. ---, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting); *King v. Burwell*, --- U.S. ---, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).

conjunction with his nomination to the D.C. Circuit in 1995,⁴⁵ Judge Garland wrote of the limited role that judges have under the Constitution, noting that “federal judges do not have roving commissions to solve societal problems,” and the “role of the court is to apply the law ... not to legislate, not to arrogate to itself the executive power, not to hand down advisory opinions on the issues of the day.”⁴⁶ Judge Garland echoed these sentiments in the statement he issued upon his nomination to the Supreme Court.⁴⁷ During the hearing on his 1995 nomination, Judge Garland also told Senators that among the Supreme Court Justices he most deeply admired were Chief Justice John Marshall, the author of *Marbury v. Madison*;⁴⁸ Justice Oliver Wendell Holmes, Jr., the great dissenter of the early 20th century and Justice William Brennan, the judge for whom Judge Garland clerked.⁴⁹

Beyond these general statements, though, Judge Garland has not articulated any overarching legal philosophy in a manner akin to Justice Scalia. In his public appearances outside the court, Judge Garland has tended to participate in conferences on discrete issues, such as prosecutorial misconduct,⁵⁰ indigent criminal defense,⁵¹ or changing the rules of civil procedure,⁵² rather than broadly discussing or defending particular interpretative methodologies. In his judicial opinions, Judge Garland has, at times, utilized originalism as a method of constitutional interpretation, including in a jointly issued 2000 opinion⁵³ that relied on the Constitution’s text and structure,⁵⁴ as well as materials from the 1787 Constitutional Convention⁵⁵ and subsequent ratifying

⁴⁵ Judge Garland was initially nominated by President Clinton to serve on the D.C. Circuit in 1995. See FJC Garland, *supra* note 2. No vote was ever taken on his nomination then, and he was subsequently renominated in 1997 and confirmed to his current office soon after. *Id.*

⁴⁶ See *Confirmation Hearings on Federal Appointments*, *supra* note 5, at 1128 (submission of Senate Judiciary Committee Questionnaire for Judicial Nominees for Merrick Brian Garland).

⁴⁷ See Hon. Merrick B. Garland, *Remarks by the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court* (March 16, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme> (“People must be confident that a judge’s decisions are determined by the law, and only the law. For a judge to be worthy of such trust, he or she must be faithful to the Constitution and to the statutes passed by the Congress. He or she must put aside his personal views or preferences, and follow the law—not make it.”).

⁴⁸ 1 Cranch (5 U.S.) 137 (1803).

⁴⁹ See *Confirmation Hearings on Federal Appointments*, *supra* note 5, at 1064 (submission of Senate Judiciary Committee Questionnaire for Judicial Nominees for Merrick Brian Garland). As one commentator has noted, to the extent that Judge Garland’s opinions on the court can be seen to reflect the judges whom he admires, he cites most often to Judge Harry Edwards, followed by Justice William Rehnquist and Judge David Sentelle. See *What Data Science Tells Us About Merrick Garland*, RAVEL LAW’S BLOG (March 17, 2016), <http://blog.ravellaw.com/what-data-science-tells-us-about-merrick-garland>.

⁵⁰ See *Independence of Federal Prosecutors: A Panel Discussion at the Federalist Society 2007 National Lawyers Convention*, 7 AVE MARIA L. REV. 207 (2008) (moderator).

⁵¹ See (In)effective Assistance of Counsel for Criminal Defendants: Constitutional Standards and Practical Solutions: A Panel Discussion at the 2008 American Constitution Society Convention (June 13, 2008), <http://acslaw.org/pdf/ACS%20National%20Convention%20Schedule.pdf>.

⁵² See *Changing the Federal Rules of Civil Procedure: Has the Time Come?: Litigation Practice Group for the Federalist Society* (December 9, 2010), <http://www.fed-soc.org/multimedia/detail/changing-the-federal-rules-of-civil-procedure-has-the-time-come-event-audiovideo> (moderator).

⁵³ See *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge panel). *Adams* was a 2-1 decision with Judge Garland and Judge Colleen Kollar-Kotelly of the D.C. district court joining the per curiam opinion and Judge Louis Oberdorfer of the D.C. district court dissenting.

⁵⁴ See, e.g., *id.* at 50 (“We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives.”).

⁵⁵ See, e.g., *id.* at 50 n.25 (quoting from James Madison’s notes from the federal convention in 1787).

conventions,⁵⁶ in rejecting a lawsuit brought by a group of DC voters seeking the right to elect representatives to Congress.⁵⁷ On the other hand, in neither that opinion⁵⁸ nor in other opinions has Judge Garland purported to rely on originalism or textualism as the sole or primary method of interpreting the law.⁵⁹

Nonetheless, even without more comprehensive explanations from Judge Garland outlining his specific judicial philosophy, the nominee's writings provide some insights into his approach to judging. First and foremost, Judge Garland has been widely viewed as a meticulous and cautious jurist, writing with precision and an eye toward ensuring that the court does not overreach in any particular case.⁶⁰ *Trudeau v. Federal Trade Commission (FTC)*, the opinion of Judge Garland that has been most widely cited by other judges,⁶¹ may be seen as illustrative of this approach.⁶² There, Judge Garland, on behalf of a unanimous three-judge panel, affirmed the dismissal of a complaint lodged by Kevin Trudeau, an author and producer of television and radio infomercials, which had alleged that an FTC press release about him was "false and misleading," exceeded the agency's statutory authority, and violated his First Amendment rights.⁶³ The case raised several difficult issues of federal jurisdiction and administrative law that had split the circuit courts of appeals in previous cases.⁶⁴ However, in his opinion, Judge Garland succinctly clarified two complex jurisdictional questions;⁶⁵ avoided resolving a weighty administrative law question as to whether an agency's press release could amount to "final agency action" under the Administrative

⁵⁶ See, e.g., *id.* at 51 ("At the New York ratifying convention, for example, Thomas Tredwell argued that '[t]he plan of the federal city ... departs from every principle of freedom ... subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote.'").

⁵⁷ *Id.* at 37 ("[W]e are constrained to agree with defendants that the remedies plaintiffs request are beyond this court's authority to grant.").

⁵⁸ See *id.* at 55-56 ("In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention.").

⁵⁹ As a lower court judge, Judge Garland has, of course, relied on precedent from the Supreme Court and the D.C. Circuit as a necessary guide for his opinions. See, e.g., *United States v. Weathers*, 186 F.3d 948, 957 n.12 (D.C. Cir. 1999) (Garland, J.) (noting that lower courts should "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.") (internal citations and quotations omitted).

⁶⁰ See, e.g., Savage, *supra* note 41 (describing Judge Garland's record as being "cautious" and "centrist"); Karen Dunn, as quoted in Josh Gerstein, *Garland's Lack of Standout Opinions a Boon in Confirmation Fight*, POLITICO (March 16, 2016), <http://www.politico.com/story/2016/03/merrick-garland-supreme-court-opinions-220902#ixzz45CGt5Vcb> ("When he crafts opinions, he's just extremely meticulous.").

⁶¹ See RAVEL'S LAW BLOG, *supra* note 49 (noting that *Trudeau* had been cited in nearly 500 other cases as of March 2016).

⁶² 456 F.3d 178 (D.C. Cir. 2006).

⁶³ *Id.* at 180.

⁶⁴ On the question of whether the Administrative Procedure Act's (APA's) requirement of "final agency action" is jurisdictional, compare *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 33 (1st Cir. 2007) (holding that the APA's finality requirement is nonjurisdictional) with *Flue-Cured Tobacco Coop. Stabilization Corp. v. Envtl. Prot. Agency (EPA)*, 313 F.3d 852, 857 (4th Cir. 2002) (holding that, because the agency action being challenged did not constitute final agency action under Section 704 of the APA, the court lacked subject-matter jurisdiction). With regard to the question of whether the APA's waiver of sovereign immunity is contingent on the existence of final agency action, compare *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525-26 (9th Cir. 1989) (holding that the waiver of sovereign immunity provided in 5 U.S.C. §702 is not limited to "final agency actions" as defined in Section 704) with *In re Secs. & Exch. Comm'n (SEC) ex rel. Glotzer*, 374 F.3d 184, 190 (2d Cir. 2004) (holding that "the federal government, in enacting the APA, waived its immunity with respect to those 'action[s] in a court of the United States' which seek review of 'agency action'").

⁶⁵ *Trudeau*, 456 F.3d at 184 (holding that the APA's requirement of final agency action is not jurisdictional); *id.* at 187 (holding that the APA's waiver of sovereign immunity permits both a cause of action brought under that act as well as nonstatutory and constitutional claims).

Procedure Act (APA),⁶⁶ a question raising serious issues about the propriety of older D.C. Circuit precedent,⁶⁷ and rested the decision on the less controversial grounds that the substance of Trudeau's complaint was simply legally insufficient.⁶⁸ As one commentator noted, the *Trudeau* case "stands out" among Judge Garland's cases as exemplifying his ability to examine a complicated area of law, while at the same time limiting the court's ruling to the matters necessary to resolve the case.⁶⁹

Trudeau exemplifies the relatively circumspect nature of Judge Garland's judicial work, something that is arguably reflected more generally throughout the Nominee's judicial career. This caution is seen especially in the numerous concurring and dissenting opinions where Judge Garland has taken issue with majority opinions that have, in his view, reached issues that were unnecessary to the ultimate holding of the court.⁷⁰ Perhaps the best indication of Judge Garland's minimalist approach to judging is provided by looking at how the Supreme Court has evaluated his work, a topic further detailed in **Table 1**. Perhaps surprisingly for a jurist who has served on an important federal appellate court for nearly two decades,⁷¹ none of Judge Garland's written opinions have even been reviewed in a formal opinion⁷² by the Supreme Court. This suggests that Judge Garland's opinions tend to be crafted to avoid unnecessary controversy that might prompt

⁶⁶ *Id.* at 191 (assuming without deciding that a press release by an agency constitutes final agency action under the APA).

⁶⁷ *Id.* at 189 (noting criticism of the holding of *Hearst Radio v. Fed. Comm'n Comm'n (FCC)*, 167 F.2d 225 (D.C. Cir. 1948), which concluded that agency publications do not constitute "agency action").

⁶⁸ *Id.* at 191.

⁶⁹ See Allan Smith, *Supreme Court Pick Merrick Garland's Most Cited Decision Involved an Informercial Star*, BUS. INSIDER (March 18, 2016), <http://www.businessinsider.com/merrick-garland-infomercial-star-2016-3> (quoting Daniel Lewis of Revel Law).

⁷⁰ See, e.g., *Bismullah v. Gates*, 514 F.3d 1291, 1298-99 (D.C. Cir. 2008) (Garland, J., concurring in the reh'ing en banc) (reserving judgment on the merits of the dispute and arguing that the D.C. Circuit should not grant en banc review in *Bismullah v. Gates*, a Guantanamo Bay detainee case, when the Supreme Court had already granted certiorari in *Boumediene v. Bush*, as en banc review would "plainly delay" the resolutions of the two cases by the D.C. Circuit and the Supreme Court); *United States v. Linares*, 367 F.3d 941, 953 (D.C. Cir. 2004) (Garland, J., concurring) (concluding that the appeal of a criminal defendant could have been resolved on harmless error grounds alone, and the majority of the court did not need to reach a "substantially more difficult question" respecting whether the admission of certain evidence violated the Federal Rules of Evidence); *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n (FEC)*, 475 F.3d 337, 341 (D.C. Cir. 2007) (Garland, J., concurring) (agreeing with the majority opinion on the sole ground that the instant case could not be distinguished from controlling circuit precedent); *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182, 1194 (D.C. Cir. 2004) (Garland, J., dissenting) (arguing that the majority opinion unnecessarily "come[s] perilously close" to imposing a "per se rule that line-item prices [in a public contract] may never be revealed to the public"); *Pub. Citizen Health Research Grp. v. Food & Drug Admin. (FDA)*, 185 F.3d 898, 907 (D.C. Cir. 1999) (Garland, J., concurring in judgment) (noting that while the "court exercises appropriate discretion in declining to decide" whether the Federal Food, Drug and Cosmetic Act's prohibition on the disclosure of certain trade secrets is "congruent with" Exemption 4 of the Freedom of Information Act, the court "errs ... in not exercising similar restraint with respect to an issue regarding the meaning of Exemption 4 itself").

⁷¹ By comparison, Judge David Tatel, who has served on the D.C. Circuit for roughly as long as Judge Garland (Tatel was appointed in 1994, and Garland in 1997), has authored at least five opinions that have been reviewed by the Supreme Court. See *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 237 F.3d 639 (D.C. Cir. 2001) (en banc), *rev'd*, 535 U.S. 137 (2002); *NextWave Pers. Commc'ns, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003); *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007), *vacated sub nom.*, *Munaf v. Geren*, 553 U.S. 674 (2008); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge panel), *rev'd & remanded sub nom.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, --- U.S. ---, 133 S. Ct. 2612 (2013).

⁷² See Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1756 n.129 (2015) ("Court observers routinely use reversal rates only among published opinions to measure the quality of a particular court.").

review by the High Court.⁷³ Moreover, only nine opinions that Judge Garland joined have been the subject of a subsequent opinion by the Supreme Court. Of these nine opinions, five were ultimately affirmed or otherwise supported in part by the High Court.⁷⁴ This is a notably high affirmance rate—given that the Court in recent years has, on average, reversed the lower court in over 70% of all cases it heard⁷⁵—and perhaps indicates the cautious nature of Judge Garland’s jurisprudence.⁷⁶

⁷³ See William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 325-26 (1998) (hypothesizing that the Supreme Court “rarely takes cases” from certain “top-ranked” federal appellate judges because these judges “get things ‘right’”); Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1405 (2009) (“[The] Supreme Court selectively reviews the most important decisions rendered by circuit courts, making it reasonable to use these important decisions as a metric.... [T]o the degree that evaluation of circuit court judges is employed as a standard for Supreme Court appointments, it seems appropriate to consider the fate of their decisions at the Supreme Court level.”); cf. Scalia, *Submitted Testimony*, *supra* note 35 (suggesting that the Supreme Court’s discretionary docket reflects, in part, cases where errors have occurred); but see Cross & Lindquist, *supra*, at 1405 (noting that the rate of Supreme Court review may not fully gauge the quality of a federal appellate judge’s work, as “[m]any incorrect circuit court rulings may go unexamined by the Supreme Court, which is not a court of ‘error correction’”).

⁷⁴ See **Table 1**. Four of the decisions were affirmed by the Supreme Court; *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958 (D.C. Cir. 1998), in which Judge Garland joined the dissent, was ultimately reversed by the Supreme Court, in a complicated result that could be interpreted in various ways regarding its take on the position of the dissenting judges in the D.C. Circuit. 527 U.S. 526 (1999). For more on *Kolstad*, see *infra* “Civil Rights.”

⁷⁵ See *Stat Pack Archive*, SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack/> (last visited April 16, 2016) (indicating reversal rates of 72% for the October 2014 Term; 73% for the October 2013 Term; 72% for the October 2012 Term; 63% for the October 2011 Term; and 72% for the October 2010 Term).

⁷⁶ See Cross & Lindquist, *supra* note 73, at 1402-05 (discussing why the “success of judges’ opinions before the Supreme Court ... is a legitimate factor to be considered” when evaluating circuit court judges); cf. Wendy E. Long, counsel to the Judicial Confirmation Network, as quoted in Keith Perine, CONG. Q. TODAY ONLINE NEWS (May 26, 2006), <http://www.cq.com/doc/news-3125545?0> (arguing that the high rate at which then Judge Sonia Sotomayor had been reversed by the Supreme Court indicated that she was a “liberal activist”); but see Guy-Uriel Charles et al., *Sonia Sotomayor and the Construction of Merit*, 61 EMORY L.J. 801, 811 (2012) (arguing that “the rate at which the Supreme Court reverses a judge” is a poor metric to gauge judicial activism). Another means by which academics assess federal circuit judges has been the frequency with which a judge is cited by his peers. See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004). In a 2004 study by Professors Choi and Gulati, Judge Garland ranked among the lowest-scoring judges in an assessment based, in part, on the number of times a federal judge was cited in other cases. *Id.* at 77. However, those assessing the Choi and Gulati study have suggested that the study may indicate how inclined a particular judge is toward “judicial entrepreneurship,” with judges that “strive to make law” being more frequently cited. See Cross & Lindquist, *supra* note 73, at 1412. As a result, the findings regarding Judge Garland in the Choi and Gulati study could be seen to confirm the hypothesis that Judge Garland has a more cautious approach to judging than many other federal appellate judges.

Table I. Judge Garland and the Supreme Court

Majority Opinions of the Supreme Court Reviewing
Cases in Which Judge Garland Wrote or Joined an Opinion

D.C. Cir. Case	Relevant D.C. Cir. Holding	Garland's Role	S. Ct. Decision	S. Ct. Vote
Menominee Indian Tribe of Wis. v. United States, 764 F.3d 51 (D.C. Cir. 2014)	Indian tribe was not entitled to equitable tolling of a statute of limitations period to allow for the continuation of a cause of action for breach of a self-determination contract.	Joined majority opinion	Affirmed , Menominee Indian Tribe of Wis. v. United States, --- U.S. ---, 136 S. Ct. 750 (2016)	9-0
Pinson v. Samuels, 761 F.3d 1 (D.C. Cir. 2014)	Monthly installment payments required under the Prison Litigation Reform Act of 1995 must be assessed on a "per-case" basis, as opposed to a "per-prisoner" approach.	Joined majority opinion	Affirmed , Bruce v. Samuels, --- U.S. ---, 136 S. Ct. 627 (2016)	9-0
White Stallion Energy Ctr., LLC v. Envtl. Prot. Agency (EPA), 748 F.3d 1222 (D.C. Cir. 2014)	The Environmental Protection Agency's interpretation of the phrase "appropriate and necessary" in Section 112(n)(1)(A) of the Clean Air Act is a reasonable construction of the statute.	Joined majority per curiam opinion	Reversed , Michigan v. EPA, --- U.S. ---, 135 S. Ct. 2699 (2015)	5-4
Mohamad v. Rajoub, 634 F.3d 604 (D.C. Cir. 2011)	Only a natural person is amenable to suit under the Torture Victim Protection Act.	Joined majority opinion	Affirmed , Mohamad v. Palestinian Auth., --- U.S. ---, 132 S. Ct. 1702 (2012)	9-0
Me. Pub. Utils. Comm'n v. Fed. Energy Reg. Comm'n, 520 F.3d 464 (D.C. Cir. 2008)	The Federal Power Act's public interest standard did not apply to challenges to contract rates brought by noncontracting third parties.	Joined majority per curiam opinion	Reversed , NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165 (2010)	8-1
Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003)	U.S. courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and held at the U.S. Naval Station at Guantanamo Bay, Cuba.	Joined majority opinion	Reversed , Rasul v. Bush, 542 U.S. 466 (2004)	6-3
Amfac Resorts, L.L.C. v. Dep't of the Interior (DOI), 282 F.3d 818 (D.C. Cir. 2002)	Regulations of the National Park Service governing concession contracts in the National Park System are valid. * The D.C. Circuit ruling reached the merits of the case; the Supreme Court asked for supplemental briefing on the question of ripeness and reversed on ripeness grounds.	Joined majority opinion	Reversed , Nat'l Park Hosp. Ass'n v. DOI, 538 U.S. 803 (2003)	7-2

D.C. Cir. Case	Relevant D.C. Cir. Holding	Garland's Role	S. Ct. Decision	S. Ct. Vote
NextWave Pers. Commc'ns, Inc. v. Fed. Commc'ns Comm'n (FCC), 254 F.3d 130 (D.C. Cir. 2001)	Section 525 of the Bankruptcy Code prohibits the Federal Communications Commission (FCC) from revoking licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments owed to the FCC for the purchase of licenses.	Joined majority opinion	Affirmed , FCC v. NextWave Pers. Commc'ns, 537 U.S. 293 (2003)	8-1
Kolstad v. Am. Dental Ass'n, 139 F.3d 958 (D.C. Cir. 1998) (en banc)	Punitive damages can only be imposed in a Title VII action upon a showing of egregious or outrageous conduct.	Joined dissenting opinion	Vacated and remanded , Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999)	5-4

Source: Congressional Research Service, based on various sources cited in **Table I**.

Note: The purpose of this table is to show the cases in which Judge Garland's opinions have been substantively reviewed by the Supreme Court. As a result, the table includes any majority panel or en banc rulings written or joined by Judge Garland that were, at least in part, reviewed in a written opinion by the Supreme Court. It does not include (1) any short order by the Supreme Court, such as a grant or denial of a writ of certiorari or an order summarily and simultaneously granting certiorari, vacating the ruling, and remanding the case for further proceedings; (2) any temporary order of the Court, such as a stay of an order of the D.C. Circuit; (3) any summary affirmance of an opinion authored or joined by Judge Garland; or (4) any of Judge Garland's votes on petitions for rehearing en banc. As a result, Judge Garland's votes in support of opinions dissenting from the denial of rehearing en banc in *Parker v. District of Columbia* and *American Trucking Associations v. EPA* are not included in this list. See below "Right to Bear Arms" and "Environmental Law," respectively.

Another notable aspect of Judge Garland's opinions is that they appear, at times, to be motivated by pragmatic concerns about how particular rulings may affect the democratic branches of government. For example, in *Wagner v. Federal Election Commission (FEC)*,⁷⁷ Judge Garland, writing on behalf of a unanimous en banc court, upheld against a First Amendment challenge a law that generally banned individuals who contract to perform services for federal agencies from contributing to federal campaigns while they are negotiating or performing the contract.⁷⁸ Notably, approximately one-fourth of Judge Garland's opinion⁷⁹ for the court in *Wagner* was devoted to the "long historical experience"⁸⁰ of corruption involving federal contractors, which he viewed as evidencing that "the concerns that spurred [congressional action] remain as important today as when the statute was enacted,"⁸¹ a considerable portion of a legal opinion to be devoted to a historical record.

Nor is *Wagner* the only case in which Judge Garland expressed concerns about how a court's ruling could affect the work of the political branches. In the criminal law context, Judge Garland dissented from the D.C. Circuit's en banc ruling in *Valdes v. United States*.⁸² In *Valdes*, a majority of the court, motivated in part by concerns about whether the underlying statute provided the criminal defendant sufficient notice of the criminality of his conduct,⁸³ held that a police officer

⁷⁷ 793 F.3d 1 (D.C. Cir. 2015) (en banc).

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 10-18.

⁸⁰ *Id.* at 22.

⁸¹ *Id.* at 3.

⁸² 475 F.3d 1319, 1333 (D.C. Cir. 2007) (Garland, J., dissenting).

⁸³ *Id.* at 1323 ("Sun-Diamond's interpretive gloss, like the rule of lenity, thus works to protect a citizen from punishment under a statute that gives at best dubious notice that it has criminalized his conduct.").

who took money from an undercover federal agent, in exchange for looking up license plate numbers and outstanding warrants in a police database, could not be prosecuted under the federal antigraffiti statute.⁸⁴ Judge Garland dissented out of a concern that the majority opinion had interpreted the statute too narrowly to avoid “absurdities” not at issue in the case and, in so doing, “denied the government an important weapon in fighting official corruption.”⁸⁵ In this sense, as one commentator has noted, Judge Garland may be “more likely” to favor “pragmatic arguments that certain” interests (like criminal defendants’ right to receive notice that their acts are against the law) should be interpreted “flexibly, with an eye toward the practical consequences of given rules.”⁸⁶ Such an approach toward judging arguably echoes Judge Garland’s writings prior to his appointment to the D.C. Circuit, when he wrote, in the context of antitrust law, that the judiciary should generally “not interfere ... with a state’s political decision....”⁸⁷ Thus, a general skepticism of judicial interference with the work of the political branches for reasons of pragmatism appear to underlie Judge Garland’s often relatively functional approach to judging and could contrast with Justice Scalia’s formalism if Judge Garland were confirmed to the High Court.⁸⁸

Finally, commentators have suggested that Judge Garland’s approach to judging tends to embrace compromise, consensus-building, and collegiality in particularly difficult or high profile matters where plausible arguments could be made by either side.⁸⁹ In this vein, perhaps the sharpest contrast between Judge Garland and the Justice he could succeed may lie in their respective personalities and temperaments, especially with respect to how each approaches the role of writing a judicial opinion that garners the majority of jurists on a court. While the subject of Justice Scalia’s personality in the abstract has been a topic of general debate amongst legal scholars,⁹⁰ it is important to note that, relative to the tone of Judge Garland’s opinions, Justice

⁸⁴ *Id.* at 1330.

⁸⁵ *Id.* at 1346 (Garland, J., dissenting).

⁸⁶ See Adler, *supra* note 12.

⁸⁷ See Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 488 (1987).

⁸⁸ See Adler, *supra* note 12 (predicting that Judge Garland would be unlikely to follow Justice Scalia’s formalist approach); see generally HON. RICHARD POSNER, HOW JUDGES THINK 30-31 (2010) (describing Justice Scalia as “our most prominent legalist judge,” in contrast to those judges that may “trade off principle against effectiveness”).

⁸⁹ See, e.g., Jess Bravin & Brent Kendall, *For Supreme Court Nominee Merrick Garland, Law Prevails Over Ideology*, WALL STREET J. (March 16, 2016), <http://www.wsj.com/articles/judge-garland-had-been-considered-for-seat-on-high-court-before-1458138973> (“Judge Garland has been part of consensus rulings joined by judges appointed by both Democrats and Republicans.”); Laurence H. Tribe, *From Judge to Justice: The Case for Merrick Garland*, BOSTON GLOBE (March 29, 2016), <https://www.bostonglobe.com/opinion/2016/03/29/from-judge-justice-case-for-merrick-garland/gHBtdYos4vjZTUmtVDfsVL/story.html> (“As chief judge of the D.C. Circuit, a court that has often witnessed bitter divisions, Garland has presided over a collegial court and gained universal respect among his colleagues, whatever their philosophical bent. And he has long been able to write opinions that win votes from judges with views quite different from his own.”).

⁹⁰ While noted for his humor, outgoing personality, and friendships with persons who could be seen as his ideological opposites, see Nadine Strossen, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 1, 9 (2006) (“Nino Scalia’s warm and ebullient personality has won him many friends, across the ideological spectrum. To cite one prominent example, Ruth Bader Ginsburg refers to him as her closest friend on the Court....”), Justice Scalia’s colleagues and legal scholars have noted that his approach at oral argument and sharp tone of his opinions, at times, were perceived to be counterproductive to persuading others to agree with him. See, e.g. Hon. Sandra Day O’Connor, as quoted in Joan Biskupic, SANDRA DAY O’CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 277 (stating that with respect to Justice Scalia’s criticism of her opinion, that it “probably isn’t true” that “[s]ticks and stones will break my bones, but words will never hurt me”); see generally DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 99-100 (1996) (arguing that Scalia’s approach to his colleagues at times “diminished his ability to persuade other justices to join in his opinions”); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 199- (continued...)

Scalia's writing could be quite pointed and acerbic in style.⁹¹ More importantly, Justice Scalia's often-strict adherence to his originalist judicial philosophy at times resulted in him writing fairly broad opinions that did not garner the votes of the majority of the Court, as his colleagues were unwilling to embrace wholly Justice Scalia's take on the law.⁹² In contrast, Judge Garland may be less pointed in his approach to judging, particularly with respect to his writing style. Following Judge Garland's recent nomination to the Supreme Court, his D.C. Circuit colleague, Judge Brett Kavanaugh, widely viewed as a one of the more conservative members of that court,⁹³ spoke

(...continued)

200 (2006) (arguing that Scalia's "relentless personal attacks on O'Connor and Kennedy dissuaded them from overturning *Roe v. Wade*"); William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1602 (2012) ("It is fair to say ... that Justice Scalia's judicial style and sometimes caustic pen alienated some of his colleagues, particularly Justice Sandra Day O'Connor.... Justice Scalia famously characterized Justice O'Connor's separate opinion in *Webster v. Reproductive Health Services* as 'irrational' and not to be taken 'seriously'—and in the process was said to have fairly seriously alienated Justice O'Connor. Other Justices were also put off by Justice Scalia's style."); Tinsley E. Yarborough, *THE REHNQUIST COURT AND THE CONSTITUTION* 44 (2000) (quoting Justice O'Connor regarding Scalia's *Webster* opinion and noting that "O'Connor's alienation from Scalia probably worked to undermine further whatever influence he might otherwise have enjoyed among the justices"); but see Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver*, 9 NYU J.L. & LIBERTY 793, 820 (2015) ("David Souter, like Sandra Day O'Connor and Anthony M. Kennedy, was not 'driven to the left' by Justice Scalia's dissents and his ebullient, joyful personality. Souter, O'Connor, and Kennedy were ALWAYS well to the left of Justice Scalia, and this fact was widely known to many people at the time they were appointed."). Because Justices are "reluctant to reveal the inner workings of the Supreme Court, let alone reveal any interpersonal problems," the impact of Justice Scalia's personality and approach toward his colleagues "will never be known," see SCHULTZ & SMITH, *supra* at 101, and, as a result, this report's discussion of Justice Scalia's personality and temperament is focused on what can be demonstrated—Justice Scalia's ability to garner support among his colleagues on the Court for opinions that he wrote.

⁹¹ See, e.g., *Obergefell v. Hodges*, --- U.S. ---, 135 S. Ct. 2584, 2630 (2015) ("If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."); *Holland v. Illinois*, 493 U.S. 474, 486 (1990) (Scalia, J.) ("Justice [Marshall's] dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly."); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) ("Justice [O'Connor's] assertion ... that a 'fundamental rule of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously").

⁹² See, e.g., *Kerry v. Din*, --- U.S. ---, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in the judgment) (declining to join Justice Scalia's opinion that held that a citizen does not have a protected liberty interest in the visa application of her alien spouse); *Hudson v. Michigan*, 547 U.S. 586, 602 (2006) (Kennedy, J., concurring in part and concurring in judgment) (declining to provide the fifth vote for a Justice Scalia's opinion openly questioning the continued viability of the exclusionary rule); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (Scalia, J.) (receiving only four votes for the proposition that "it is no violation [of the Establishment Clause] for government to enact neutral policies that happen to benefit religion"); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of Kennedy, O'Connor, & Souter, JJ.) (rejecting Justice Scalia's argument to overturn *Roe* entirely); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (declining to join part of Justice Scalia's opinion holding that an injury for purposes of Article III standing needed to equate with injuries found at common law); *Harmelin v. Mich.*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring) (refusing to join Justice Scalia's opinion arguing that the Eighth Amendment contains no proportionality guarantee); *Michael H. v. Gerald D.*, 491 U.S. 110, 127-128, n.6 (1989) (Scalia, J.) (delivering the opinion of the court except for footnote six which broadly argued that due process rights should be viewed with heightened specificity); see generally SCHULTZ & SMITH, *supra* note 90 at 99-100 (contending that Justice Scalia's "clear, fixed vision of how cases should be decided" may have prevented other Justices from joining his opinions).

⁹³ See Jeffrey Toobin, *Holding Court*, NEW YORKER (March 26, 2012), <http://www.newyorker.com/magazine/2012/03/26/holding-court> ("If a Republican ... wins in November, his most likely first nominee to the Supreme Court will be Brett Kavanaugh.").

highly of the new Nominee, describing Judge Garland as “a brilliant jurist,” “a great Chief Judge,” “thoughtful,” “collegial,” “considerate,” and someone “who works well with others.”⁹⁴ Such sentiments are echoed by lawyers who have practiced in front of Judge Garland. Anonymous evaluations in the *Almanac of the Federal Judiciary* uniformly describe him with regard to his legal ability in positive terms, including having an “excellent temperament” and being “courteous” and “cerebral.”⁹⁵

Such comments appear not to be merely abstract descriptions of Judge Garland’s personality; instead Judge Garland’s judicial writings could be seen to reflect a tendency toward consensus-building. For example, for having such a lengthy career on the D.C. Circuit, Judge Garland has dissented relatively infrequently—on average, less than once per year⁹⁶—something that suggests he may value collegiality above adhering to a particular legal orthodoxy in his legal writings.⁹⁷ Moreover, when Judge Garland has written the majority opinion for a court, his opinions have tended to garner few separate opinions relative to many of his colleagues on the D.C. Circuit,⁹⁸ which may indicate that the Nominee places a high value on reaching a consensus in the opinions he writes.⁹⁹ Judge Garland’s supporters suggest that, because of his tendency to consensus-building, he may be able to find agreement amongst colleagues with disparate views on the law in especially contentious cases if he were to be elevated to the Supreme Court.¹⁰⁰ While it is

⁹⁴ See Hon. Brett M. Kavanaugh, at *The Court: Power, Policy, and Self-Government*, AM. ENTER. INST. (March 31, 2016), <http://www.aei.org/events/the-court-power-policy-and-self-government/>.

⁹⁵ See *Merrick B. Garland*, 2 ALMANAC OF THE FED. JUDICIARY, 2016 WL 15131 (“Lawyers were unanimous in their praise of Garland’s legal ability. ‘His legal ability is the best.’ ‘He’s very smart.’ ‘I have a high regard for him; he’s very bright and very able.’ ‘His legal ability is extraordinary.’ ‘He has excellent legal ability.’ ‘His legal ability is superb.’ ‘He’s a brilliant judge.’ ‘He’s one of the great judges in the country; he’s a spectacular judge.’ ‘He’s very bright.’ ‘He’s a very, very smart guy; he has very strong legal ability.’ Garland is very courteous to litigants, lawyers interviewed said. ‘His courtroom demeanor is excellent.’ ‘He’s very nice.’ ‘He has an excellent temperament.’ ‘He’s courteous to litigants.’ ‘It’s very good; he’s very even tempered.’ ‘He’s a judge’s judge.’ ‘It’s pretty good, an A-minus.’ ‘He’s no-nonsense.’ ‘He’s very courteous.’”).

⁹⁶ See *Garland Citation List of Dissenting Opinions*, CONG. RES. SERV., <http://www.crs.gov/products/Documents/Garland%20Citation%20List%20of%20Dissenting%20Opinions/pdf> (listing 16 dissenting opinions for Judge Garland). By comparison, an April 2016 Lexis search indicates that Judge Kavanaugh, who has served on the D.C. Circuit since 2006, has authored 48 dissenting opinions, averaging nearly five dissents per year. Judge Tatel, who has served on the D.C. Circuit since 1994, has written 56 dissents in his tenure on the court, averaging around two and a half dissents per year.

⁹⁷ Lee Epstein, William M. Landes, & Hon. Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 135 (2011) (arguing that the frequency with which a judge dissents may be a product of the costs of “impaired collegiality” versus the benefits of influencing or clarifying the law).

⁹⁸ An April 2016 Lexis search of Judge Garland’s majority opinions on the D.C. Circuit indicate that in 21 out of 329 (6.4%), a concurrence or dissent was written in response to the majority. By comparison, an April 2016 Lexis search showed that Judge Kavanaugh, who has served on the D.C. Circuit since 2006, authored 36 majority opinions that prompted a concurrence or dissent out of approximately 162 majority opinions (22.2%). Judge Tatel, who has served on the D.C. Circuit since 1994, has written approximately 447 majority opinions of which 75 prompted a concurrence or dissent (16.8%).

⁹⁹ See Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 362, 364-65 (2001) (arguing that Justices, driven by a norm of suppressing dissent in order to preserve consensus, will write broad unanimous opinions).

¹⁰⁰ See Nina Totenberg, *Merrick Garland Has a Reputation of Collegiality, Record of Republican Support*, NAT’L PUB. RADIO (March 16, 2016), <http://www.npr.org/2016/03/16/126614141/merrick-garland-has-a-reputation-of-collegiality-record-of-republican-support> (“But Garland also has been a persuasive voice for liberals, managing to bring conservatives over to his side on issues ranging from the environment to national security.”); Jaime Gorelick, as quoted in Ed Shanahan, *Does D.C. Circuit Court Judge Merrick Garland Have Supreme Potential?*, AM. L. LITIG. DAILY (November 17, 2008), <http://amlawdaily.typepad.com/amlawdaily/2008/11/the-am-law-li-9.html> (“If you look at [Judge Garland’s] opinion in the Uighur case, he brought along judges from very different parts of the political and (continued...)”).

impossible to firmly predict how Judge Garland's past work might impact any future service on the High Court,¹⁰¹ his work on the D.C. Circuit on a number of high profile matters could be said to support such claims.¹⁰² For example, in 2003, Judge Garland authored a unanimous opinion, joined by a Reagan-era Supreme Court nominee, Judge Douglas Ginsburg, and Judge Harry T. Edwards, an appointee of President Jimmy Carter, which rejected a challenge alleging that, in the circumstances of the case, Congress had exceeded its powers under the Commerce Clause when enacting the Endangered Species Act.¹⁰³ Subsequently, in 2008, in *Parhat v. Gates*,¹⁰⁴ Judge Garland wrote for the court in invalidating a determination by a Guantanamo Bay combatant status review tribunal that the petitioner was an enemy combatant,¹⁰⁵ a conclusion joined by Judges David Sentelle and Thomas Griffith—sometimes viewed as two of the court's more judicially conservative members¹⁰⁶—who sit on a court that often takes a skeptical view of the rights of detainees vis-a-vis the rights of the government.¹⁰⁷ Similarly, Judge Garland's 2015 opinion on behalf of a unanimous en banc court in *Wagner* on the ever-contentious issue of the constitutionality of campaign finance regulations may speak to the Nominee's tendency to be able to garner the support of disparate colleagues in potentially difficult cases.¹⁰⁸ Judge Garland's ability to garner unanimous opinions in such cases resolving legal issues that have tended to sharply divide the High Court in recent years¹⁰⁹ may demonstrate his willingness to prioritize collaboration above ideological rigidity in his work.¹¹⁰

Statutory Interpretation

Unlike Justice Scalia, who publicly advocated for textualism and a canons-based approach to statutory interpretation,¹¹¹ Judge Garland does not appear to have articulated an overarching

(...continued)

judicial spectrum.... That is precisely what one would want on the Supreme Court.”).

¹⁰¹ See *supra* “Predicting Nominees’ Future Decisions on the Court.”

¹⁰² As such, the fact that judges of differing ideologies might agree in *any* case is—in and of itself—unremarkable, as the D.C. Circuit tends to issue unanimous opinions in many cases. See *supra* note 27 and accompanying text. What is notable is that Judge Garland has been able to author unanimous opinions in number of cases on often contentious matters like the scope of Congress's power vis-à-vis the states, the rights of detainees at Guantanamo Bay, or the limits the First Amendment imposes on campaign finance restrictions.

¹⁰³ See *Rancho Viejo LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

¹⁰⁴ 532 F.3d 834 (D.C. Cir. 2008).

¹⁰⁵ *Parhat*, 532 F.3d at 836-37.

¹⁰⁶ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 575 (2015) (noting the judicial leanings of Judges Sentelle and Griffith on economic issues).

¹⁰⁷ See Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 595 (2013) (arguing that Guantanamo Bay detainee cases in the D.C. Circuit tend to be divisive with judges with perceived conservative leanings “rul[ing] against the detainee in every case that has come before” the court); see generally CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia (discussing decisions by D.C. Circuit in litigation concerning Guantanamo detainees).

¹⁰⁸ See *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

¹⁰⁹ See, e.g., *NFIB v. Sebelius*, --- U.S. ---, 132 S. Ct. 2566 (2012) (5-4 decision on scope of the Commerce Clause); *Boumediene v. Bush*, 553 U.S. 723 (2008) (5-4 decision on Guantanamo Bay detainees’ ability to seek habeas review of the legality of their detention); *Citizens United v. FEC*, 558 U.S. 310 (2010) (5-4 decision on limits of the First Amendment imposes on a campaign finance regulation).

¹¹⁰ See *supra* notes 97 and 99.

¹¹¹ For further discussion of Justice Scalia’s approach to statutory interpretation, as well as questions about the degree to which he applied textualism and canons of interpretation in his own decisions while on the Court, see CRS Scalia report, *supra* note 9, at 4-7.

approach to or philosophy of statutory interpretation. However, his practices when construing statutes in his published opinions could be said to resemble that of many other judges,¹¹² with a couple of exceptions noted below, in that he generally bases his conclusions about a statute's meaning upon consideration of multiple factors including the text, structure, context, and history of specific statutory provisions.¹¹³ For example, in his dissenting opinion in *United States ex rel. Totten v. Bombardier Corp.*, Judge Garland relied, in part, upon the "plain text" of the False Claims Act (FCA) in rejecting the majority's view that presentment of a false or fraudulent claim to the federal government was effectively required for liability under an FCA provision that had "no express requirement of presentment to an officer or employee of the United States Government."¹¹⁴ He also pointed to other provisions of the FCA and, in particular, its definition of "claim," which he noted did not require presentment of a false or fraudulent claim to the federal government.¹¹⁵ In addition, he drew support for his proposed interpretation from the legislative history of the FCA,¹¹⁶ as well as prior interpretations of the act by the D.C. Circuit.¹¹⁷

Judge Garland's approach to construing statutory text can also be seen as fairly mainstream—and even to resemble that of Justice Scalia¹¹⁸—in that Judge Garland often highlights how people would normally understand specific statutory terms. For example, in his opinion for the court in *Southeast Alabama Medical Center v. Sebelius*, Judge Garland found that the Department of Health and Human Services (HHS) had properly included fringe benefits when calculating hospitals' "wage and wage-related costs" because, if fringe benefits were not to be seen as wages, they "fit comfortably within the broad meaning of the term 'wage-related.'"¹¹⁹ Similarly, in his opinion for the court in *Public Citizen, Inc. v. HHS*, Judge Garland noted how people would normally understand the term "disposition" when rejecting HHS's argument that Medicare peer-review organizations (PROs) had met their obligation to disclose the "final disposition of

¹¹² William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) ("[Justice Scalia's] judicial opinions, speeches, articles, and books have generated great debates, which have (ironically) revealed a substantial consensus about the ground rules for statutory interpretation.... [V]irtually all theorists and judges are 'textualists,' in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear.... [V]irtually all theorists and judges are also 'purposivists,' in the sense that all believe that statutory interpretation ought to advance statutory purposes, so long as such interpretations do not impose on words a meaning they will not bear. And virtually all theorists and judges insist the statutory context is important in discerning the meaning of statutory texts. So what has the debate been all about? Doctrinally, the big debate has been whether interpretative context can include internal 'legislative history' preceding a statute's enactment into law.... Theoretically, the big debate has focused on what the role of judges should be."). For more on the latter, see *supra* "Role of the Judiciary."

¹¹³ In some cases, Judge Garland seems to have viewed the consideration of these factors to be required by Supreme Court or circuit precedents. *See, e.g., United States v. Cassell*, 530 F.3d 1009, 1013 (D.C. Cir. 2008) (citing Supreme Court precedent when looking at the "language, structure, context, history, and such other factors as typically help courts determine a statute's objectives" in construing particular statutory text); *Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 662 (D.C. Cir. 2003) (citing circuit precedent when looking at the "text, structure, legislative history, and purpose" of the statute in question). In other cases, Judge Garland invokes similar factors without expressly noting that he is relying upon Supreme Court or circuit precedents when applying them to construe statutory text. *See, e.g., Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672-76 (D.C. Cir. 2007); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 502-13 (D.C. Cir. 2004) (Garland, J., dissenting).

¹¹⁴ *Totten*, 380 F.3d at 503.

¹¹⁵ *Id.* at 506, 510-11.

¹¹⁶ *Id.* at 511-13.

¹¹⁷ *Id.* at 503 (citing, among other things, *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731 (D.C. Cir. 1998)).

¹¹⁸ For more on Justice Scalia's approach here, see CRS Scalia report, *supra* note 9, at 4-7.

¹¹⁹ 572 F.3d 912 (D.C. Cir. 2009).

[patients'] complaint[s]" by sending a form letter that noted that the PRO had reviewed the complaint and would take appropriate action, but did not specify what action was to be taken.¹²⁰ According to Judge Garland, most people would not see these form letters as disclosing the final disposition of the complaint, because the words "final disposition" are "far more persuasive[ly] read[]" to mean informing persons of the "substantive result or conclusion" of a matter, not merely that the matter has been completed.¹²¹ Notably, Judge Garland has sometimes referenced dictionary definitions of statutory terms in such discussions,¹²² a practice that often factors in textualist approaches¹²³ (although Judge Garland does not appear to have displayed any particular concern with ensuring that these definitions are contemporaneous with the statute's enactment, as Justice Scalia did¹²⁴). However, Judge Garland very seldom expressly invokes the phrase "original meaning,"¹²⁵ which was a key component of Justice Scalia's approach to textualism,¹²⁶ and can serve as an indicator of a similar interpretative approach.¹²⁷

¹²⁰ 332 F.3d 654, 662 (D.C. Cir. 2003).

¹²¹ *Id.*; see also *id.* at 663 ("We expect that litigants, including the parties to this appeal, would be both surprised and puzzled if all we told them at the end of the day was that 'the case has been decided'—without telling them what the decision was."). For other examples of a similar approach to statutory interpretation by Judge Garland, see *Sottera, Inc. v. FDA*, 627 F.3d 891, 899 (D.C. Cir. 2010) (Garland, J., concurring) ("On its face, the natural meaning of the term 'tobacco product' is a product—like cigarettes or chewing tobacco—that contains tobacco."); *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 24 (D.C. Cir. 2010) (Garland, J., concurring) ("No one would say that property a tenant uses as a gin joint is being used exclusively for educational purposes, even if the landlord uses the rent to send his children to college."); *United States v. Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008) (finding that the use of the phrase "convicted of a violation" makes clear that the provisions of 18 U.S.C. §924(c)(1) apply only at sentencing); *Totten*, 380 F.3d at 503 (Garland, J., dissenting) ("The court's interpretation of that subsection as *requiring* presentment is ... inconsistent with its plain text," since the word "presentment" does not appear there).

¹²² *Public Citizen*, 332 F.3d at 662-63; *Se. Ala. Med. Ctr.*, 572 F.3d at 917; *Grand Canyon Air Tour Coal. v. Fed. Aviation Admin. (FAA)*, 154 F.3d 455, 474-75 (D.C. Cir. 1998) (resorting to dictionaries on the question of whether "substantial" means more than half); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 496 (D.C. Cir. 2007) (Garland, J., dissenting) (resorting to the dictionary definition of "other" in construing the phrase "other persons").

¹²³ See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. (AT&T) Co.*, 512 U.S. 218, 228-30 (1994) (discussing the definitions of the term "modify" given in various dictionaries when determining whether certain proposed changes were within the FCC's authority under a statutory provision that authorized the FCC to "modify any requirement" of the Federal Communications Act).

¹²⁴ See, e.g., *id.* at 228 (rejecting the definition of "modify" given in *Webster's Third New International Dictionary* on the grounds that "[i]n 1934, when the Communications Act became law—the most relevant time for determining a statutory term's meaning ...—*Webster's Third* was not yet even contemplated.").

¹²⁵ It would appear that Judge Garland has authored only one opinion that uses the words "ordinary meaning" in a context that does not involve a clear quotation or paraphrase of another court decision or a party's arguments. See *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1314 (D.C. Cir. 2005) (noting, in construing a Postal Service regulation, that "[t]he ordinary meaning of 'solicit' is merely to request, without reference to whether an immediate response is expected"); see also *id.* at 1317 (also referring to the "ordinary meaning" of the term "solicit"). In the few other cases where an opinion authored by Judge Garland uses the phrase "ordinary meaning," the opinion either is quoting or paraphrasing another opinion or a party, or is construing text that is not a statute or regulation. See *Se. Ala. Med. Ctr.*, 572 F.3d at 916-17 (using the phrase "ordinary meaning" in paraphrasing the district court's decision and in quoting a Supreme Court opinion); *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004) (Garland, J., dissenting) (referring to "ordinary meaning" when discussing the text of a prior Supreme Court opinion); *Global Crossing Telecomm., Inc. v. FCC*, 259 F.3d 740 (D.C. Cir. 2001) (noting that the agency had relied on the "ordinary meaning" of the term "certify," as defined in *Black's Law Dictionary*); *In re Sealed Case No. 96-3167*, 153 F.3d 759, 771 (D.C. Cir. 1998) (noting that the Supreme Court had, in an earlier decision, held that Congress intended "carry" to have its "ordinary meaning" in the statute in question).

¹²⁶ For more on Justice Scalia's approach here, see CRS Scalia report, *supra* note 9, at 4-7.

¹²⁷ See, e.g., Miranda O. McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 148-49 (2009) (noting that subtle differences in judges' use of terms like "ordinary meaning," "plain meaning," etc., can reflect more fundamental differences in their (continued...)

In addition, Judge Garland's approach to statutory interpretation can be seen to resemble other judges' approaches in that he often refers to commonly accepted "canons"—or general principles—of statutory interpretation.¹²⁸ Judge Garland has invoked many different interpretative canons in the opinions he has authored while on the D.C. Circuit, including, but not limited to, canons providing that (1) similar language in the same or related statutes is to be construed similarly;¹²⁹ (2) when Congress uses particular language in one section of a statute, but omits this language in another section of that same statute, it is presumed to have acted "intentionally and purposely in the ... exclusion";¹³⁰ (3) courts are to give effect to every clause and word of a statute, if possible;¹³¹ (4) words used in the singular are presumed to include the plural;¹³² (5) specific terms in a statute usually prevail over general ones;¹³³ (6) repeals by implication are disfavored and are not to be presumed to have occurred;¹³⁴ (7) titles or headings in statutory text provide only limited interpretative aid and are not meant to take the place of detailed provisions of the text;¹³⁵ (8) Congress is presumed to know how courts have construed particular statutory language when it enacts other statutes using that same language;¹³⁶ (9) the inclusion of some things in a list means the exclusion of other things not listed;¹³⁷ and (10) the word "or" is disjunctive, meaning that only one item in a list need be satisfied.¹³⁸ However, Judge Garland's resort to these and other canons of statutory interpretation appears to be driven by the specific statutory text in question and, in particular, whether one or more canons may be seen as helpful in construing the statutory text. It does not appear to be driven by a desire for standards or rules, per se, as means to cabin judicial discretion, as was the case with Justice Scalia.¹³⁹

Two aspects of Judge Garland's practice in construing statutory text can be seen as more distinctive. One is the frequency with which he finds that statutory language is ambiguous, a finding which means that courts must generally defer to the agency's interpretation of the statutory language.¹⁴⁰ Specifically, Judge Garland seems to have not infrequently taken the view

(...continued)

approaches to statutory interpretation).

¹²⁸ See *infra* notes 129-139 and accompanying text. In his dissenting opinion in *Totten*, Judge Garland did suggest that the various canons of statutory interpretation employed by the majority "serve here as 'cannons' of statutory destruction." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 503 (D.C. Cir. 2004). However, immediately thereafter, he clarified that he had "no quarrel with the canons the court has chosen," but rather with the conclusion they were used to support in *Totten*. *Id.*

¹²⁹ See, e.g., *United States v. Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008); *In re Sealed Case No. 97-312*, 181 F.3d 128, 133 (D.C. Cir. 1999).

¹³⁰ See, e.g., *Totten*, 380 F.3d at 505 (Garland, J., dissenting); *Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 665 (D.C. Cir. 2003) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 71 (D.C. Cir. 2000).

¹³¹ See, e.g., *Totten*, 380 F.3d at 505, 509 (Garland, J., dissenting); *Public Citizen*, 332 F.3d at 670 (quoting *Moskal v. United States*, 498 U.S. 103, 109-110 (1990)).

¹³² See, e.g., *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 9 (D.C. Cir. 2003).

¹³³ See, e.g., *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.C. Cir. 2014).

¹³⁴ See, e.g., *id.* at 307.

¹³⁵ See, e.g., *Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 675 (D.C. Cir. 2007).

¹³⁶ See, e.g., *id.*

¹³⁷ *In re Sealed Case No. 97-312*, 181 F.3d 128, 132 (D.C. Cir. 1999).

¹³⁸ *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 509 (D.C. Cir. 2004) (Garland, J., dissenting).

¹³⁹ See, e.g., William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1156 (1991/1992) (discussing Justice Scalia's concern that judicial discretion in interpreting statutes is inconsistent with a government of rules).

¹⁴⁰ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984); *infra* "Administrative Law."

that particular statutory terms which are not defined, or whose meaning is not expressly prescribed by Congress, are ambiguous.¹⁴¹ His dissenting opinion in *Financial Planning Association v. Securities and Exchange Commission (SEC)* can be seen to illustrate this practice.¹⁴² The case centered upon provisions of the Investment Advisers Act that, in relevant part, exempt from regulation under the act:

[1] any broker or dealer ... whose performance of [investment advice] services is solely incidental to the conduct of his business as a broker or dealer and ... who receives no special compensation therefore; ... or

[2] such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.¹⁴³

The majority took the view that this statutory language unambiguously precluded the SEC from exempting broker-dealers who received “special compensation” from regulation under the act on the grounds that the first of these exemptions is “all inclusive” of broker-dealers because it uses the word “any.”¹⁴⁴ Thus, in the majority’s view, broker-dealers who receive “special compensation” are excluded from the phrase “other persons not within the intent of this paragraph,” and the SEC cannot rely upon this language to exempt broker-dealers who receive “special compensation” from regulation under the act.¹⁴⁵ Judge Garland disagreed, viewing the phrases “such other persons” and “within the intent of this paragraph” as inherently ambiguous.¹⁴⁶ In so doing, he noted the lack of any language in the statute that purported to bar the SEC from exempting under the second provision broker-dealers who are not covered by the first provision,¹⁴⁷ as well as the absence of a definition of “other persons” in the act.¹⁴⁸

¹⁴¹ See generally CRS Congressional Distribution Memorandum, *Judge Merrick Garland and His Approach Towards Administrative Law*, by Jared P. Cole, Michael John Garcia, and Andrew Nolan (noting that Judge Garland voted to uphold the agency’s interpretation in all but five of the 21 cases in which he participated (either as part of a three-judge panel or in en banc proceedings) that (1) raised *Chevron* issues and (2) prompted a concurring or dissenting opinion by a member of the court). Copies of this memorandum are available upon request from its authors.

¹⁴² 482 F.3d 481 (D.C. Cir. 2007).

¹⁴³ *Id.* at 484-85.

¹⁴⁴ *Id.* at 488 (“The word ‘any’ is usually understood to be all inclusive.”).

¹⁴⁵ *Id.* at 489 (“[T]he word ‘other’ connotes ‘existing besides, or distinct from, that already mentioned or implied.’”). See also *id.* (“There is nothing to suggest that Congress did not intend the words ‘any’ or ‘other’ to have their ‘ordinary or natural meaning.’”).

¹⁴⁶ *Fin. Planning Ass’n v. SEC*, 482 F.3d 481, 495 (D.C. Cir. 2007) (Garland, J., dissenting).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 496. But see *id.* at 492 (majority opinion) (“First, [a]mbiguity is a creature not of definitional possibilities but of statutory context.... Second, the absence of a statutory definition of ‘intent of this paragraph’ and ‘other persons’ does not necessarily render their meaning ambiguous.”). Other cases manifest a similar approach to statutory interpretation by Judge Garland. See, e.g., *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 917, 923 (D.C. Cir. 2009); (noting that the statute in question does not define “wages,” “wage-related,” or “geographic area”); *Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 19 (D.C. Cir. 2002) (Garland, J., dissenting) (“There is nothing in the statutory language that requires a source-by-source application of the fifth factor.”); *Arizona v. Thompson*, 281 F.3d 248, 257 (D.C. Cir. 2002) (noting that there is nothing in the statutory phrase “authorized to use” that dictates that funds be used under a state plan, as opposed to a state cost allocation); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1319-20 (D.C. Cir. 1998) (noting that the statute in question did not define the phrase “same as” or indicate whether chemical or clinical identity was contemplated); *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 70-71 (D.C. Cir. 2000) (noting that nothing in the statute specifies that the only way to determine reactivity was through the agency’s own studies); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 466-67 (D.C. Cir. 1998) (“There is nothing in the Overflights Act’s reference to ‘natural quiet’ that requires the FAA to define the term by survey results rather than decibel level.”); *id.* at 467 (noting that there is nothing in the statute requiring the agency to create one or a few “quiet” zones); *id.* at 474 (observing that the statute does not say “noise free”).

Judge Garland's assessment of when or whether statutory text is ambiguous is significant because statutory text must be found to be *ambiguous* for a court to defer to an administrative agency's interpretation of that text under the precedent of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*; if the text is seen as *unambiguous*, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁴⁹ Indeed, Judge Garland's penchant for finding ambiguity in statutory texts would seem to underlie the observation of one D.C. Circuit judge, who dissented from another opinion authored by Judge Garland, that "some will find ambiguity even in a 'No Smoking' sign,"¹⁵⁰ although this tendency could be seen to reflect a more generalized desire by Judge Garland to avoid having the courts constrain the options of the political branches.¹⁵¹

The other notable aspect of Judge Garland's approach to statutory interpretation involves his willingness to consider legislative history materials in construing statutory text.¹⁵² Indeed, his resort to legislative history materials when construing statutes can be seen as interrelated with his willingness to find ambiguity in statutory text, as he has characterized the consideration of legislative history materials as "appropriate" when statutory text is ambiguous.¹⁵³ For example, in the *Totten* case mentioned earlier, the majority opinion by then-Judge John Roberts criticized Judge Garland's dissenting opinion, which the majority characterized as having excessively relied upon legislative history materials to construe the FCA. According to then-Judge Roberts, "[t]he dissent literally begins and ends with legislative history.... We [in the majority] will end as we began, too, but with the statutory language."¹⁵⁴ However, the disagreement among the *Totten* panel could be characterized as something less than a dispute between judges with radically different philosophies of statutory interpretation. Judge Garland's opinion in *Totten* characterizes the "existing statutory text" as the "starting point in discerning congressional intent,"¹⁵⁵ and the *Totten* majority also made use of legislative history materials.¹⁵⁶

¹⁴⁹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). Notably, in *Grand Canyon Air Tour Coalition*, Judge Garland paraphrased *Chevron* as saying that "where Congress leaves a statutory term undefined, it makes an implicit 'delegation of authority to the agency to elucidate a specific provision of the statute' through reasonable interpretation." 154 F.3d at 474 (quoting *Chevron*, 467 U.S. at 843-44). However, the cited passage of *Chevron* refers to the "unambiguously expressed intent of Congress," not congressionally established definitions per se.

¹⁵⁰ *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 14 (D.C. Cir. 2003) (Sentelle, J., dissenting). See also *In re Sealed Case No. 97-312*, 181 F.3d 128, 144 (D.C. Cir. 1999) (Sentelle, J., concurring) (stating, of the majority opinion by Judge Garland, which had found the statutory language in question ambiguous, "I write separately only to say that I think this is not nearly so close a case as the very thoroughness of the majority opinion might imply").

¹⁵¹ See *supra* "Role of the Judiciary."

¹⁵² See, e.g., *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014); *Nat'l Res. Def. Council v. Nuclear Reg. Comm'n (NRC)*, 216 F.3d 1180, 1193-94 (D.C. Cir. 2000); *Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 668 (D.C. Cir. 2003); *Grand Canyon Air Tour Coal.*, 154 F.3d at 467. It is important to note that, in at least some cases, Judge Garland would appear to have viewed the consideration of legislative history materials as required by Supreme Court or circuit precedent. See *supra* note 113 and accompanying text. However, in other cases, he does not expressly indicate that he views precedent as requiring the consideration of legislative history materials when resorting to such materials. See *id.* See also Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 YALE L. REV. 1291, 1292 n.4 (1987) ("There is nothing wrong with a court looking at legislative history in order to interpret the meaning of a statute.").

¹⁵³ See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 511-12 (D.C. Cir. 2004) (Garland, J., dissenting).

¹⁵⁴ *Id.* at 502.

¹⁵⁵ *Id.* at 504 (Garland, J., dissenting) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)).

¹⁵⁶ See, e.g., *id.* at 495. Chief Justice Roberts subsequently acknowledged the "difficulty" of this case, as well as the possibility that the majority "didn't get it right" in his own confirmation hearings to the High Court. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the* (continued...)

Judge Garland's use of legislative history materials in other cases can also be seen as relatively restrained in that (1) he generally treats legislative history as only one factor among many when construing text, rather than as the sole basis for his interpretation;¹⁵⁷ (2) he repeatedly notes that the statutory text, and not legislative history materials, is paramount in statutory interpretation;¹⁵⁸ and (3) he has, in several cases, recognized the limitations of legislative history materials to interpret a statute.¹⁵⁹ More generally, Judge Garland does not appear to have ever adopted an interpretation based on congressional purpose—as ascertained solely from legislative history materials—that was contrary to what he viewed as unambiguous statutory text to the contrary.¹⁶⁰

In both his penchant for finding statutory text ambiguous and his resort to legislative history materials in construing statutory text, Judge Garland's practices can be seen to diverge from those of former Justice Scalia. While Justice Scalia was a vocal supporter of the approach adopted by the Court in *Chevron*,¹⁶¹ he frequently found that statutory text was unambiguous and, thus, there was no need to consider the agency's interpretation of the text.¹⁶² Justice Scalia also opposed the consideration of legislative history materials, including their use to confirm text-based interpretations of statutory text.¹⁶³ In this sense, Judge Garland would, if he were elevated to the

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Committee on the Judiciary, United States Senate, 109th Congress, 1st Sess., 320-21 (2005). However, while acknowledging the possibility that *Totten* might have been wrongly decided, Chief Justice Roberts continued to maintain that the *Totten* majority was correct. *Id.* at 321.

¹⁵⁷ See, e.g., *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014) (taking the view that a text-based interpretation is “confirmed by the legislative history of the section”).

¹⁵⁸ See, e.g., *United States v. Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008) (looking at the actual words of the statute last, but characterizing the statutory text as the “most significant” factor in construing the statute); *Pub. Citizen, Inc. v. HHS*, 332 F.3d 654, 662 (D.C. Cir. 2003) (characterizing the statutory text as “the most important manifestation of Congressional intent”).

¹⁵⁹ See, e.g., *Cassell*, 530 F.3d at 1017 (characterizing legislative history materials as “inconclusive” on the question at issue); *Arizona v. Thompson*, 281 F.3d 248, 257 (D.C. Cir. 2002) (rejecting the view that the word “activities,” as used in a conference report, necessarily indicated an intent to preclude the use of funds to reimburse administrative costs common to both the funded program and other related programs); *Grand Canyon Tour Coalition v. FAA*, 154 F.3d 455, 467 (D.C. Cir. 1998) (noting Supreme Court precedents on the lack of weight to be given to the statements of a single legislator, even if that legislator was the bill's sponsor); *id.* at 474 (noting that parties with opposing interests in the litigation had cited the same legislative history materials as supporting differing positions).

¹⁶⁰ When Judge Garland does refer to “congressional purpose,” his understanding of that purpose would appear to be based on the statutory text, not extrinsic considerations. See, e.g., *Thompson*, 281 F.3d at 255 (“There is no doubt that Congress imposed a 15% cap in order to limit administrative expenditures; what other purpose could such a limit have?”). In his dissenting opinion in *Financial Planning Association*, Judge Garland does note that his interpretation of the statute in question would permit the statute to serve its purpose as to a population that did not exist when the statute was enacted in 1940. *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 500 (D.C. Cir. 2007) (Garland, J., dissenting). However, he also viewed the statute in question in that case as ambiguous. See *supra* notes 142-148; *infra* notes 191-200 and accompanying text.

¹⁶¹ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) (“*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion.”); Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (similar).

¹⁶² See, e.g., *Immigration & Naturalization Serv. (INS) v. Cardozo-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (“Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.”) (internal citations omitted); Hon. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (“It is rare ... that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft.”).

¹⁶³ *Zedner v. United States*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring) (“[T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face....”).

Supreme Court, appear to approach matters of statutory interpretation somewhat differently from the man he would be succeeding, which could result in changes in the Court's rulings on close cases of statutory interpretation.

Administrative Law

A significant portion of the D.C. Circuit's docket consists of administrative law cases, in part, because Congress has vested the court with exclusive jurisdiction to hear challenges to a wide variety of government actions.¹⁶⁴ Broadly speaking, at least two key legal doctrines might be said to inform administrative law cases. The first is whether a challenged agency action is suitable for judicial review in the first place, including whether a plaintiff has standing to sue to obtain judicial relief as a result of unauthorized agency conduct. The second is whether an agency's action comports with the law.¹⁶⁵ An analysis of Judge Garland's opinions in administrative law cases that divided the D.C. Circuit reveals several trends that could provide insight into how he might approach these matters if he were confirmed to the Supreme Court.¹⁶⁶

Before considering the merits of a legal challenge to administrative action, a federal court often must assess whether judicial review is available and appropriate in the first place—an assessment that may be informed by constitutional,¹⁶⁷ prudential,¹⁶⁸ and statutory considerations affecting a petitioner's access to the courts.¹⁶⁹ A court may be called upon to determine, for example, whether a petitioner has standing or is the appropriate party to bring a lawsuit challenging agency action;¹⁷⁰ whether the petitioner has exhausted administrative remedies prior to seeking judicial review;¹⁷¹ whether the challenge concerns matters that are ripe for judicial consideration;¹⁷² or whether legal or factual developments have rendered the legal challenge moot.¹⁷³

¹⁶⁴ See *supra* note 39 (discussing the prominence of administration law cases on the docket of the D.C. Circuit).

¹⁶⁵ Although beyond the scope of this report, another major issue might be judicial review of agency compliance with the procedural requirements of the APA, 5 U.S.C. §§551 *et seq.*

¹⁶⁶ See CRS Congressional Distribution Memorandum, *Judge Merrick Garland*, *supra* note 141.

¹⁶⁷ The Constitution establishes that the judicial power of the federal courts extends to “Cases” and “Controversies.” U.S. CONST. art. III, §2, cl. 1. See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (“As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions are requisite.”) (internal quotations and citations omitted).

¹⁶⁸ See *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (“In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.”) (internal citations and quotations omitted).

¹⁶⁹ See, e.g., 5 U.S.C. §704 (providing for the availability of judicial review of administrative action under the APA when such action is “final”).

¹⁷⁰ See *Bennett*, 520 U.S. at 162 (“To satisfy the ‘case’ or ‘controversy’ requirement of Article III, which is the ‘irreducible constitutional minimum’ of standing, a plaintiff must, generally speaking, demonstrate that he has suffered ‘injury in fact,’ that the injury is ‘fairly traceable’ to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.”) (quoting *Lujan*, 504 U.S. at 560-61).

¹⁷¹ The requirement that a plaintiff exhaust administrative remedies before seeking judicial review of agency action is commonly the result of a judicial doctrine premised on prudential concerns, but may also be statutorily required in some circumstances. See generally *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004).

¹⁷² Consideration of whether a legal claim is ripe for review often involves both constitutional elements—namely, whether a petitioner has alleged an imminent or impending injury-in-fact—as well as prudential concerns relating to “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting *Abbott Labs. v. Gardner*, 387 (continued...)

While a judge's assessment of these issues often depends upon the particular facts of the case before the court, there are arguably some trends that can be identified in Judge Garland's jurisprudence. As an initial matter, Judge Garland has often sided with the majority on issues of judicial access that were litigated before the D.C. Circuit. In most decisions in which the appropriateness of judicial review of agency action was seriously contested, Judge Garland either wrote or joined the majority opinion of the court,¹⁷⁴ or authored or joined a separate opinion that did not dispute the majority's ultimate conclusion regarding whether judicial access was available.¹⁷⁵ Opinions authored by Judge Garland concerning petitioners' ability to seek review of administrative action tended to be written on behalf of unanimous circuit panels.¹⁷⁶ In the majority of these cases, Judge Garland concluded that the challenge was nonjusticiable because the petitioner lacked standing; the asserted legal claim was unripe or moot; or some other issue made judicial review inappropriate.¹⁷⁷

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U.S. 136, 149 (1967)).

¹⁷³ For a general overview of the mootness doctrine and relevant exceptions thereto, see, generally, archived CRS Report RS22599, *Mootness: An Explanation of the Justiciability Doctrine*, by Brian T. Yeh.

¹⁷⁴ See, e.g., *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 596-99 (D.C. Cir. 2015) (Garland, J.) (holding that an environmental advocacy group had associational standing to represent members affected by a lease program permitting drilling in the Outer Continental Shelf); *Cohen v. United States*, 578 F.3d 1, 13 (D.C. Cir. 2009) (in majority opinion joined by Judge Garland, concluding that the petitioners' challenge to an Internal Revenue Service (IRS) refund mechanism satisfied the requirements for ripeness), *reh'g en banc granted in part, vacated in part*, 599 F.3d 652 (D.C. Cir. 2010); *Devia v. NRC*, 492 F.3d 421, 422 (D.C. Cir. 2007) (Garland, J.) (holding that a petition for review of an NRC decision to grant a license that permitted construction of a spent nuclear fuel storage facility was prudentially unripe); *PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n (FERC)*, 419 F.3d 1194, 1200 (D.C. Cir. 2005) (Garland, J.) (holding that the petitioners had standing to challenge FERC's rejection of agreements they had reached to provide electric power to certain locations, but lacked standing to challenge the agency's rejection of agreements made by other energy providers); *La. Envtl. Action Network v. EPA*, 172 F.3d 65, 67-69 (D.C. Cir. 1999) (in a majority opinion joined by Judge Garland, holding that an organization had prudential standing to challenge an EPA regulation that would allow variances from normal treatment standards for excavated waste).

¹⁷⁵ *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 341 (D.C. Cir. 2007) (Garland, J., concurring in judgment) (in a case where the petitioner sought information on campaign contribution activity from a previous presidential election, concurring with the majority's dismissal of the case on standing grounds because there was "no meaningful distinction" between the case and a prior D.C. Circuit case dismissed on standing grounds); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (Garland, J., dissenting) (dissenting on the grounds that the agency action was based on a reasonable interpretation of the governing statute in a case where the majority, after finding that the petitioners had standing, ruled that the agency action was contrary to that statute); *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 15 (D.C. Cir. 2002) (per curiam) (Garland, J., concurring in part and dissenting part) (dissenting based on a disagreement with the majority's characterization of the agency's interpretation of the statute as unreasonable in a case where the majority upheld certain aspects of a challenged agency action and struck down others, while also finding some claims unripe for review).

¹⁷⁶ See, e.g., *People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. (USDA)*, 797 F.3d 1087, 1097 (D.C. Cir. 2015) (concluding that PETA had standing to sue the USDA for failure to promulgate bird-specific animal welfare regulations under the Animal Welfare Act); *Holistic Candles & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2014) (upholding the dismissal of a suit against the FDA by manufacturers of candles intended to remove ear wax, who had sought to enjoin a possible FDA determination that the candles were unapproved medical devices, because the warning letters sent to the manufacturers did not constitute "final agency action" subject to judicial review under the APA). *But see* *Util. Air Regulatory Grp. (UARG) v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (concurring in full with the majority opinion authored by Judge Garland, but suggesting that the majority's characterization of the statute as constraining judicial review might not be in accordance with developments in Supreme Court case law, despite being consistent with existing D.C. Circuit jurisprudence); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (per curiam) (Kavanaugh, J., dissenting) (disagreeing with the majority's view that the case was ripe for review in a panel decision in which Judge Garland was in the majority, but the majority opinion was not credited to a particular author).

¹⁷⁷ See, e.g., *Holistic Candles*, 664 F.3d at 941-42 (upholding dismissal of a suit against the FDA by candle (continued...))

On the other hand, in several cases, Judge Garland joined majority opinions where the court split on the question of whether a challenge to agency action was properly before it, and in those cases, he tended to be more permissive on matters of judicial access than his dissenting colleagues. In such instances, the judges who did not join the controlling opinion typically characterized the majority as having inappropriately allowed judicial recourse to a plaintiff who failed to satisfy the requirements necessary for judicial review of their claims.¹⁷⁸

To the extent that Judge Garland's rulings on the D.C. Circuit can be seen as taking a permissive approach on issues of justiciability, including whether a party has standing to challenge administrative action, it could signal a difference in approach from that taken by Justice Scalia, who authored a number of Court opinions that served to restrict access to the courts for persons seeking to challenge or compel administrative action.¹⁷⁹ Because many recent Supreme Court rulings concerning standing and related matters have been closely divided cases,¹⁸⁰ Judge

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manufacturers, because the warning letters sent to the manufacturers did not constitute "final agency action" subject to judicial review under the APA); *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013) (dismissing various claims raised against the Fish and Wildlife Service (FWS) regarding purported violations of the Endangered Species Act on mootness and ripeness grounds); *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (in a challenge brought by the Chamber of Commerce and an automobile dealership organization to an EPA decision to waive federal preemption under the Clean Air Act (CAA) and allow California to adopt more stringent emission standards, dismissing the claims on various grounds including lack of standing and mootness); *Ranger Cellular v. FCC*, 348 F.3d 1044 (D.C. Cir. 2003) (dismissing applicants' challenge to the validity of FCC-issued cellular telephone licenses due to lack of standing because a judicial ruling in the plaintiffs' favor would not provide redress because it would result in an open auction for licenses in which the applicants would almost certainly be outbid); *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008) (dismissing a challenge by a water users association to review of FERC orders concerning an electric utility's license, when the association had not demonstrated that court action would likely provide redress to its purported injuries); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998) (deeming unripe for judicial review various claims raised in a challenge to an FAA final rule for the reduction of aircraft noise from Grand Canyon sightseeing tours).

¹⁷⁸ See, e.g., *Ctr. for Sustainable Econ.*, 779 F.3d at 612-14 (Sentelle, J., dissenting) (disagreeing with the panel majority's finding that an environmental organization had standing to challenge the EPA permit process on behalf of two affected members, and arguing that the organization had not satisfied the requirements previously recognized by the D.C. Circuit as necessary for associational standing); *Cohen v. United States*, 578 F.3d at 15-22 (Kavanaugh, J., dissenting in part) (disputing the panel majority's conclusion that the petitioners could proceed in a judicial challenge to an IRS refund mechanism on the grounds that the plaintiffs had failed to exhaust their administrative remedies, as required by statute, and the case was unripe for review), *accord* *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc) (Kavanaugh, J., dissenting) (dissenting on similar grounds in en banc reconsideration of an earlier decision); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc) (Sentelle, J., dissenting) (arguing, in response to the majority opinion—which had found that the plaintiff challenging USDA regulations as contrary to the Animal Welfare Act had standing on account of suffering an aesthetic injury based on viewing affected animals in animal exhibitions—that "the majority significantly weakens existing requirements of constitutional standing"). See also *PETA*, 797 F.3d at 1099 (Millett, J., dubitante) (acknowledging that the majority opinion, which found that PETA had standing to bring suit against the USDA for failing to promulgate bird-specific animal welfare regulations, was consistent with D.C. Circuit jurisprudence, but expressing concern that the ruling was "in grave tension with Article III precedent and principles, such as the principle that an individual's interest in having the law properly enforced against others is not, without more, a cognizable [] injury").

¹⁷⁹ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (environmental organizations lacked standing to challenge U.S. Forest Service regulations exempting small fire-rehabilitation and timber-salvage projects from the notice, comment, and appeal process); *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83 (1998) (organization lacked standing to employ the citizen suit provision of an environmental statute against a private party for violating reporting requirements; the complaint alleged only past infractions and not a continuing violation or the likelihood of a future violation, meaning that court-ordered injunctive relief would not redress the organization's injuries). For a more extensive discussion of Justice Scalia's views on standing, see CRS Scalia report, *supra* note 9, at 7-10.

¹⁸⁰ See generally Margaret McDonald, *Summers v. Earth Island Institute: Overhauling the Injury-in-Fact Test for Standing to Sue*, 71 LA. L. REV. 1053, 1066 (2011) (cataloging the recent standing cases before the Supreme Court and (continued...))

Garland's confirmation to the High Court could play a role in relaxing justiciability requirements that are often the first hurdle to challenging agency action.

In considering Judge Garland's approach to whether agency actions comport with the law—a matter on which he wrote prior to becoming a federal judge¹⁸¹—two important standards of review generally govern challenges to federal agency action under the APA and, thus, merit particular examination: statutory review, and arbitrary and capricious review.

Under the APA, a reviewing court must set aside agency action that is “not in accordance with law” or that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹⁸² When reviewing challenges to an agency's interpretation of a statute that it administers, courts grant deference to the agency's interpretation if Congress delegated to the agency authority to “speak with the force of law,” and the relevant interpretation was “promulgated in the exercise of that authority.”¹⁸³ Pursuant to the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*,¹⁸⁴ a court evaluating a challenge to an agency's interpretation must, as a first step, determine whether the legislature “has directly spoken to the precise question at issue.”¹⁸⁵ If so, a court is required to give effect to Congress's intent, notwithstanding a contrary agency interpretation.¹⁸⁶ However, if a statute is silent or ambiguous on the matter, the second step in the *Chevron* analysis requires a court to defer to a reasonable agency interpretation.¹⁸⁷ Thus, a judicial finding of ambiguity is significant because it means that agencies are not foreclosed from altering their interpretations in the future in response to changed circumstances, whereas a finding that Congress clearly spoke to the issue “displaces a conflicting agency construction.”¹⁸⁸

With regard to Judge Garland's approach toward review of an agency's interpretation of law under *Chevron*, in cases that divided the D.C. Circuit,¹⁸⁹ Judge Garland often finds ambiguity in the underlying statute, leading him to evaluate an agency's regulation or rule through the more deferential lens of step two of the *Chevron* analysis.¹⁹⁰ Judge Garland's dissenting opinion in

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noting typical division among the Justices as to their outcome).

¹⁸¹ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 585 (1985) (examining the evolution of administrative law in response to deregulation by executive agencies).

¹⁸² 5 U.S.C. §706(2)(A), (C).

¹⁸³ *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). In a series of cases, the Supreme Court has limited *Chevron*'s applicability by introducing a threshold inquiry that looks at a multi-factor balancing test to determine whether the two-step *Chevron* analysis is appropriate; see *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), often referred to as *Chevron* “step zero.” See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). One critical factor in determining *Chevron*'s applicability to a particular agency interpretation is the formality of the agency procedures when issuing the operative interpretation. See *Mead*, 533 U.S. at 226-27.

¹⁸⁴ 467 U.S. 837 (1984).

¹⁸⁵ *Id.* at 842.

¹⁸⁶ *Id.* at 842-43.

¹⁸⁷ *Id.* at 843.

¹⁸⁸ See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

¹⁸⁹ For purposes of this section, the term “divided court” refers to a case that prompted a concurrence or dissent. For a defense of relying on such opinions, see CRS Congressional Distribution Memorandum, *Judge Merrick Garland*, *supra* note 141 (discussing why cases with concurrences or dissents typically signal “closer” cases). See also *supra* note 29.

¹⁹⁰ See CRS Congressional Distribution Memorandum, *Judge Merrick Garland*, *supra* note 141 (studying 21 cases in (continued...))

Financial Planning Association v. SEC is indicative of his approach in such cases.¹⁹¹ At issue in that case was the Investment Advisers Act, which regulates the activity of “investment advisers,” subject to six exceptions.¹⁹² One exception applies to “any broker or dealer whose performance of such services is solely incidental to the conduct of his business ... and who receives no special compensation therefor.”¹⁹³ Another exempts “such other persons not within the intent of this paragraph[], as the Commission may designate by rules and regulations or order.”¹⁹⁴ The SEC promulgated a rule under this second provision exempting broker-dealers who receive “special compensation therefor.”¹⁹⁵ The panel majority ruled that the SEC lacked authority to exempt broker-dealers beyond the scope of the first exemption, reasoning that because broker-dealers were addressed in the first exemption, they did not qualify as “other persons” for the purposes of the second exemption.¹⁹⁶ Writing in dissent, Judge Garland argued that the terms of the second exemption were ambiguous and concluded that the agency interpretation was reasonable and entitled to *Chevron* deference.¹⁹⁷ He argued that the majority’s reasoning in finding the statute unambiguous apparently relied on the statutory canon of *expressio unius*—the concept that the mention of one thing excludes another—but that canon is, in Judge Garland’s view, inappropriate in an administrative context where Congress has left an agency with discretion to interpret its statutory authority.¹⁹⁸ And, for Judge Garland, the canon is particularly inapt where Congress expressly delegates authority to the agency to promulgate additional exceptions to a statute.¹⁹⁹ Determining that the underlying statute in *Financial Planning Association* was ambiguous, Judge Garland would have moved to step two of the *Chevron* analysis and found that the agency’s interpretation was reasonable, in part, because the agency’s interpretation was intended to serve the purposes of the statute for a group that did not exist when the statute was enacted in 1940.²⁰⁰

In divided cases where Judge Garland has ruled *against* an agency’s interpretation of a federal statute, he has appeared to favor outcomes that could leave room for the agency to adopt more formal interpretations in the future that, if enacted, would allow the agency’s legal position to eventually prevail. In other words, when voting against an agency’s interpretation of the law, Judge Garland has often found that the *Chevron* doctrine did not apply because the agency has not spoken with the force of law.²⁰¹ Because a finding that a statute is unambiguous effectively eliminates an agency’s discretion to adopt a contrary interpretation in the future,²⁰² his conclusion that *Chevron* was inapplicable in a particular case left open the possibility that the agency could later reinterpret the statute through a different procedure that could qualify for *Chevron*

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which Judge Garland voted that raised *Chevron* issues, and finding that Judge Garland deferred to the agency in 16 of these cases).

¹⁹¹ 482 F.3d 481, 493 (2007). *See supra* “Statutory Interpretation.”

¹⁹² 15 U.S.C. §§80b–3 to –6.

¹⁹³ 15 U.S.C. §80b-2(a)(11)(C).

¹⁹⁴ 15 U.S.C. §80b-2(a)(11)(F).

¹⁹⁵ SEC, Certain Broker–Dealers Deemed Not to be Investment Advisers, 70 Fed. Reg. 20424 (April 19, 2005).

¹⁹⁶ *Fin. Planning*, 482 F.3d at 487-93.

¹⁹⁷ *Id.* at 501 (Garland, J., dissenting).

¹⁹⁸ *Id.* at 495.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 500.

²⁰¹ *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

²⁰² *See* Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

deference.²⁰³ For example, in *Sottera, Inc. v. Food & Drug Administration (FDA)*,²⁰⁴ Judge Garland rejected the majority's view that Supreme Court precedent foreclosed the FDA from regulating e-cigarettes under the Federal Food, Drug and Cosmetic Act (FFDCA), and instead concurred in the court's judgment on the basis that the FDA had merely failed to put forth "an authoritative agency interpretation" of the FFDCA warranting *Chevron* deference.²⁰⁵ In so doing, Judge Garland argued that the agency could in the future submit a formal regulation interpreting its authority to regulate e-cigarettes under the FFDCA, which would warrant more deference from the judiciary.²⁰⁶ In this vein, even in cases where Judge Garland has rejected an agency's interpretation of a statute, the rationale for his vote typically has not wholly foreclosed agency discretion on the underlying legal issue.²⁰⁷

In addition to statutory review cases, the other major basis for challenges to agency actions under the APA is Section 706(2)(A) of the act, which authorizes reviewing courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion...."²⁰⁸ The Supreme Court has viewed this provision as requiring agencies to "examine the relevant data and articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'"²⁰⁹ "In reviewing that explanation, [the court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."²¹⁰ Generally, arbitrary and capricious review is "highly deferential" to the agency,²¹¹ as "a court is not to substitute its judgment for that of the agency."²¹²

Judge Garland's record in applying the APA's arbitrary and capricious standard of review appears more mixed relative to his jurisprudence in statutory review cases.²¹³ The arbitrary-and-

²⁰³ *Id.* See *supra* "Statutory Interpretation."

²⁰⁴ 627 F.3d 891 (D.C. Cir. 2010).

²⁰⁵ *Id.* at 904 (Garland, J., concurring).

²⁰⁶ *Id.*

²⁰⁷ See, e.g., *Miller v. Clinton*, 687 F.3d 1332, 1335, 1341-42 (D.C. Cir. 2012) (ruling that, notwithstanding language potentially favorable to the agency in the Basic Authorities Act, the Age Discrimination in Employment Act applied to State Department employees overseas, in part, because the department's view to the contrary had been articulated in a contract between the department and a private party and thus lacked the formality to suggest that it possessed the force of law); *Fox v. Clinton*, 684 F.3d 67, 78 (D.C. Cir. 2012) (Edwards, J., joined by Garland & Williams, JJ.) (joining a majority opinion that refused to defer broadly to the State Department's interpretation of a section of the Immigration and Nationality Act because that interpretation was rendered in an informal decision letter rather than in a manner "clearly intended to have general applicability and the force of law").

²⁰⁸ See 5 U.S.C. §706(2)(A).

²⁰⁹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Court explained that a decision will be arbitrary if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43. The doctrine is often referred to as "hard look" review. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 763 (2008) ("In its seminal decision in *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, the Court entrenched hard look review and clarified its foundations.").

²¹⁰ See *State Farm*, 463 U.S. at 43.

²¹¹ *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 118 (D.C. Cir. 2013); see also *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009) (cataloging the "many times" when the D.C. Circuit has noted the "highly deferential" nature of arbitrary and capricious review).

²¹² See *State Farm*, 463 U.S. at 43.

²¹³ See CRS Congressional Distribution Memorandum, *Judge Merrick Garland*, *supra* note 141.

capricious-review cases where Judge Garland has deferred to an agency's decisionmaking under the standard set forth in Section 706(2)(A) of the APA have tended to involve challenges to agency action on highly technical matters, particularly in environmental law.²¹⁴ Judge Garland's views in such cases may have been motivated by a reluctance for courts to second-guess the expert views of agencies that have been charged by Congress with administering a statute. For example, in *Americans for Safe Access v. Drug Enforcement Administration (DEA)*, he voted with the majority to uphold the DEA's decision not to initiate procedures to reclassify marijuana to a less restrictive schedule under the Controlled Substances Act.²¹⁵ The plaintiffs in that case challenged the DEA's conclusion that marijuana lacked a "currently accepted medical use," in part because there were not "adequate and well-controlled studies" proving marijuana's medical efficacy.²¹⁶ In oral arguments in that case, with regard to the agency's conclusion that such studies did not exist, Judge Garland asked: "Don't we have to defer to the agency ... we're not scientists, they are."²¹⁷ These comments perhaps demonstrate a view that administrative agencies are better equipped to make such decisions than the courts. Likewise, in an analogous but distinct context from arbitrary and capricious review, in the case of *In re Aiken County*, Judge Garland dissented from the panel majority's decision issuing a writ of mandamus ordering the Nuclear Regulatory Commission (NRC) to resume the processing of a Department of Energy (DOE) application for a license to store nuclear waste at Yucca Mountain in Nevada.²¹⁸ Judge Garland's dissent argued that the majority opinion functionally ordered an agency to "do a useless thing,"²¹⁹ as the NRC had stopped the application proceeding because it did not have sufficient appropriated funds to complete the project, and Congress had, at the agency's request, appropriated only enough money to shut down the agency's licensing activity.²²⁰ For Judge Garland, the agency simply lacked the funds to complete the application process, and the court was inappropriately questioning the agency's view that it simply could not "make any meaningful progress" with the funds it currently possessed.²²¹

In other cases, however, Judge Garland has voted to invalidate agency actions or remand cases to the agency for a more developed explanation of its policy choice.²²² For instance, in *Alpharma*,

²¹⁴ See *infra* "Environmental Law." See, e.g., *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 459-60 (D.C. Cir. 1998) (Garland, J.) ("We ... uphold the rule ... not because we necessarily believe the rule is 'just right,' but because we defer to the agency's reasonable exercise of its judgment and technical expertise....").

²¹⁵ 706 F.3d 438, 452 (D.C. Cir. 2013).

²¹⁶ *Id.* at 450 (internal quotations omitted). See 21 U.S.C. §812(b)(3)-(5); *Drug Enf't Admin. (DEA), Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 76 Fed. Reg. 40552 (July 8, 2011).

²¹⁷ Transcript of Oral Argument, *Americans for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013), [https://www.cadc.uscourts.gov/recordings/recordings2013.nsf/8D0A87D269BCD0C285257BC90058DF5D/\\$file/10161211-1265.mp3/](https://www.cadc.uscourts.gov/recordings/recordings2013.nsf/8D0A87D269BCD0C285257BC90058DF5D/$file/10161211-1265.mp3/) ("Don't we have to defer to the agency, defer doesn't mean they win, but defer in the sense of ... we're not scientists, they are, to the definition of what is an adequate and well-controlled study.").

²¹⁸ 725 F.3d 255, 257 (D.C. Cir. 2013). For background and analysis on other issues raised with regards to Yucca Mountain, see CRS Report R44151, *Yucca Mountain: Legal Developments Relating to the Designated Nuclear Waste Repository*, by Todd Garvey and Alexandra M. Wyatt.

²¹⁹ *In re Aiken Cty.*, 725 F.3d at 268-69 (Garland, J., dissenting).

²²⁰ *Id.* at 269.

²²¹ *Id.*

²²² *Del. Dep't. of Nat. Res. & Env'tl. Control v. EPA*, 785 F.3d 1, 10-19 (2015) (panel holding that the EPA acted arbitrarily and capriciously when it modified CAA rules allowing backup generators to operate without emissions controls for up to 100 hours per year as part of an emergency demand-response program); *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012) (panel finding that because "the Department failed to provide any coherent explanation for its decision regarding the applicability of Section 1, the agency's action was arbitrary and capricious for want of reasoned decisionmaking"); *Int'l Union, United Mine Workers of Am. (UMWA) v. Mine Safety & Health Admin.*, 626 F.3d 84, 93 (D.C. Cir. 2010) (panel finding that "[t]he training provision is nonetheless arbitrary and capricious because, as the (continued...)").

Inc. v. Leavitt, Judge Garland wrote for the majority in remanding a matter to the FDA so that the agency could provide a fuller explanation of its reasoning in making the decision to approve a new animal drug application.²²³ In particular, Judge Garland's majority opinion found that the agency's response to a previous remand order by the D.C. Circuit raised new concerns, as the FDA made, in the majority's view, contradictory assertions that prevented the court from concluding that the agency's decision was reasonable.²²⁴ Nonetheless, while *Alpharma* demonstrates that Judge Garland has at times exhibited skepticism in reviewing agency action in the context of arbitrary and capricious review, no discernible trend appears in such cases akin to how he approaches the review of agency interpretations of statutes.

To the extent that Judge Garland's approach to administrative law would afford agencies flexibility in interpreting statutes that are found to be ambiguous,²²⁵ his approach arguably contrasts with that of Justice Scalia, who readily acknowledged that his textualist approach to statutory interpretation made it less likely that the "triggering requirement for *Chevron* deference" would be found.²²⁶ In this sense, Judge Garland's confirmation to the Supreme Court could result in significant changes to the Court's approach to the jurisprudence on administrative law.

Capital Punishment

Judge Garland's views on capital punishment may be particularly important insofar as he would, if confirmed, be replacing Justice Scalia, who believed the death penalty was fully consistent with the Eighth Amendment,²²⁷ and two Justices currently on the Court openly have argued that the

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UMWA contends, it defies the expert record evidence and is unexplained"); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 524 (D.C. Cir. 2009) (concluding that the EPA failed reasonably to explain why it believes its standard will provide an appropriate degree of protection from the health effects of short-term exposure to particulate matter); *Dep't of State v. Coombs*, 482 F.3d 577, 581 (D.C. Cir. 2007) (panel finding that "[t]he Board does not appear to have even considered whether it is reasonable to require reinstatement of such an employee, in light of the demands of the Foreign Service. We think such an omission makes the Board's decision arbitrary and capricious").

²²³ 460 F.3d 1, 9-12 (D.C. Cir. 2006).

²²⁴ *Id.* at 9. In particular, the *Alpharma* court found that the agency's choice of the appropriate dosage used in its study contradicted agency statements that a bioequivalence study must use the highest approved dosage. *Id.* at 10. In addition, in the view of the majority, the agency failed to explain why its choice of dosage was appropriate. *Id.* at 11.

²²⁵ See *supra* "Statutory Interpretation."

²²⁶ See Scalia, *Judicial Deference to Administrative Interpretations*, *supra* note 161, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.") (emphasis in original). This is not to imply that Justice Scalia was necessarily less likely to defer to agencies when he did find statutory ambiguity, or skeptical of affording deference to agency decisions. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 353 (1994) ("Although *Chevron* itself was decided before Justice Scalia joined the Court, he has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision."); Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991) ("Justice Scalia is a fierce, sometimes strident defender of *Chevron*."). But see *Perez v. Mortg. Bankers Ass'n*, --- U.S. ---, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations.").

²²⁷ See, e.g., *Baze v. Rees*, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in judgment) ("This conclusion [that the death penalty violates the Eighth Amendment] is insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes significant contribution to social or public purposes."); *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("What compelled Arizona (and many other states) to specify particular 'aggravating factors' that must be found before the death penalty can be (continued...)")

practice is unconstitutional.²²⁸ However, Judge Garland does not appear to have had occasion to address directly the subject of capital punishment during his tenure on the D.C. Circuit since the District of Columbia does not provide for the imposition of the death penalty,²²⁹ and federal death penalty cases are not confined to the D.C. Circuit,²³⁰ as certain administrative law and environmental law cases are.²³¹ Prior to his appointment to the D.C. Circuit, Judge Garland was a prosecutor and handled cases wherein the government sought the death penalty, most notably against Oklahoma City bomber Timothy McVeigh.²³² In addition, Judge Garland also stated, in response to questioning at the 1995 hearing on his original nomination to the D.C. Circuit, that “as a personal matter,” he viewed capital punishment as “settled law now. The Court has held that capital punishment is constitutional and lower courts are to follow that rule.”²³³ Based on only these isolated statements, with no judicial record interpreting the Eighth Amendment generally or the death penalty specifically, it is difficult to make any firm predictions about how Judge Garland might vote were he appointed to the High Court.

Civil Liability

One major area where Judge Garland could be quite influential, if he were to be confirmed to the Supreme Court, involves the limits that federal law imposes procedurally and substantively on civil defendants’ exposure to monetary liability, particularly in the context of lawsuits resulting from allegedly faulty products, discriminatory practices, or fraudulent activities.²³⁴ This is because Justice Scalia, whom Judge Garland could succeed on the Supreme Court, cast critical votes in several closely contested cases that read federal law relatively expansively to restrict plaintiffs’ ability both to use (1) procedural vehicles, such as class action litigation, to facilitate civil recoveries,²³⁵ and (2) substantive state law, including common law tort actions, to sue businesses that may have harmed them.²³⁶ In other cases, Justice Scalia cast important votes more

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imposed was the line of this Court’s cases beginning with *Furman v. Georgia*. In my view, that line of decisions had no proper foundation in the Constitution.”). For further discussion of Justice Scalia’s jurisprudence on capital punishment, see CRS Scalia report, *supra* note 9, at 10-12.

²²⁸ *Glossip v. Gross*, --- U.S. ---, 135 S. Ct. 2726, 2776-77 (2015) (Breyer, J., dissenting). Justice Ginsburg joined in Justice Breyer’s dissent in *Glossip*. Previously, certain other Justices on the Court shared similar views. *See, e.g., Baze*, 553 U.S. at 86 (Stevens, J., concurring) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.’”) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972)).

²²⁹ *See, e.g., District of Columbia: General Information*, DEATH PENALTY INFO. CENTER, (2016), <http://www.deathpenaltyinfo.org/district-columbia>.

²³⁰ 18 U.S.C. §3235 (“The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.”).

²³¹ *See generally supra* “Administrative Law” and *infra* “Environmental Law.”

²³² *See, e.g., Confirmation Hearings on Federal Appointments, supra* note 5, at 1062 (1995) (Judge Garland noting his prior work as a prosecutor in death penalty cases in the 1995 hearing on his nomination). He did not specify which cases were involved, but Oklahoma City bomber Timothy McVeigh was executed. *See, e.g., Defiant McVeigh Dies in Silence*, BBC NEWS (June 11, 2001), <http://news.bbc.co.uk/2/hi/1382602.stm>.

²³³ *Confirmation Hearings on Federal Appointments, supra* note 5, at 1062.

²³⁴ *See* CRS Scalia report, *supra* note 9, at 12-15.

²³⁵ *See, e.g., Comcast Corp. v. Behrend*, --- U.S. ---, 133 S. Ct. 1426 (2013); *Wal-Mart v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

²³⁶ *See, e.g., Mut. Pharm. v. Bartlett*, --- U.S. ---, 133 S. Ct. 2466, 2480 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, (continued...)

narrowly interpreting the scope of federal law to limit corporate defendants' potential civil liability.²³⁷ Given Justice Scalia's decisions, commentators have debated how Judge Garland might affect the Roberts Court's perceived "warmth" toward businesses on civil liability matters if he were to be confirmed to the Court.²³⁸ Some have suggested that the Nominee's tendency to defer to executive agencies could make him less apt to use judicial power to interfere with marketplace externalities,²³⁹ while others contend that Judge Garland's record, particularly on labor law matters,²⁴⁰ would make him more hostile toward business interests and more likely to side with the plaintiffs' bar in interpreting federal law.²⁴¹

While certain predictions could perhaps be made with regard to how Judge Garland might rule on civil liability matters based on his votes in other areas of law, like labor law, the docket of the D.C. Circuit—which tends to have a considerable number of administrative law disputes and relatively "few explicit business cases"²⁴²—makes it difficult to predict confidently how he might rule if he were to be elevated to the High Court. Indeed, because there are very few cases in which he has ruled directly on matters of civil liability akin to those matters on which Justice Scalia was so influential. Moreover, many of the rulings that Judge Garland has made on civil liability matters have been unanimous ones, joined by judges of differing philosophies and backgrounds,²⁴³ which presumably signals that precedent was seen to have largely dictated the result in such cases.²⁴⁴ For example, Judge Garland joined majority decisions twice in 2013 that took the relatively unusual step of vacating class action certifications on interlocutory appeal, "command[ing]," in one case, a lower court to take a "hard look at the soundness of [the] statistical models" that formed the basis for class certification.²⁴⁵ Nonetheless, a year later, Judge Garland joined a majority decision written by Judge Douglas Ginsburg that denied a petition to

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606 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232 (2011).

²³⁷ See, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011).

²³⁸ See, e.g., Lee Epstein, William M. Landes, & Hon. Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("Whether measured by decisions or Justices' votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were.").

²³⁹ See James B. Stewart, *On Business Issues, Republicans Might Want a Justice Garland*, N.Y. TIMES (March 24, 2016), http://www.nytimes.com/2016/03/25/business/on-business-issues-republicans-might-want-a-justice-garland.html?_r=0 ("Memo to the Republican senators who refuse to consider President Obama's Supreme Court nominee, Merrick Garland: When it comes to business issues, Judge Garland is about as good as you could hope for. That's because if there is any overriding philosophy in Judge Garland's writing and opinions, dating to his earliest law review articles, it is judicial restraint—a deference to decisions by elected officials and those they appoint.").

²⁴⁰ One study noted that in 22 appeals involving decisions of the National Labor Relations Board (NLRB), Judge Garland sided with the agency to find that an employer had committed an unfair labor practice in all but four cases. See Hannah Belitz, *The Supreme Court Vacancy and Labor: Merrick Garland*, ON LABOR (February 23, 2016), <https://onlabor.org/2016/02/23/the-supreme-court-vacancy-and-labor-merrick-garland-2/>.

²⁴¹ See Juanita Duggan, *We Oppose Judge Garland's Confirmation*, WALL STREET J. (March 16, 2016), <http://www.wsj.com/articles/we-oppose-judge-garlands-confirmation-1458169299> ("After studying his extensive record, the National Federation of Independent Business believes that Judge Garland would be a strong ally of the regulatory bureaucracy, big labor and trial lawyers.").

²⁴² See Stewart, *supra* note 239; see also *supra* "Predicting Nominees' Future Decisions on the Court."

²⁴³ See generally Stewart, *supra* note 239 (noting that many of Judge Garland's labor law decisions were unanimous and had the support of more conservative or even libertarian members of the D.C. Circuit).

²⁴⁴ See generally "Predicting Nominees' Future Decisions on the Court."

²⁴⁵ See *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013); see also *DL v. District of Columbia*, 713 F.3d 120, 125-26 (D.C. Cir. 2013).

vacate a class certification order despite the existence of “unsettled questions of law relating to class actions at issue in this case.”²⁴⁶ As a consequence, on many civil liability matters, like the scope of the rules governing class action certifications, Judge Garland has arguably not exhibited any clear tendencies or preferences.²⁴⁷

Nonetheless, at least a few of Judge Garland’s cases stand out with regard to general civil liability matters, and may provide some insight into how he might rule on such issues. With respect to the interpretation of federal law in displacing state causes of action, such as tort law—an issue of considerable dispute on the High Court in recent years²⁴⁸—Judge Garland notably dissented in *Saleh v. Titan Corp.*²⁴⁹ The *Saleh* case arose from the abuse of detainees who were imprisoned at the Abu Ghraib detention facility during Operation Iraqi Freedom.²⁵⁰ The plaintiffs, Iraqi nationals, sued the military contractors that had provided interrogation and translation services at the prison,²⁵¹ claiming that the defendant contractors were liable for assault, battery, wrongful death, and intentional infliction of emotional distress.²⁵² In response, the defendants argued²⁵³ that these common law tort claims were preempted by the Federal Tort Claims Act (FTCA),²⁵⁴ a law that has a limited waiver of sovereign immunity, but exempts from that waiver the discretionary functions of federal officials and the combatant activities of the military.²⁵⁵ Because federal contractors are expressly excluded from coverage under the FTCA,²⁵⁶ the defendants in *Saleh* based their preemption argument on an extension of the Supreme Court’s 1988 decision in *Boyle v. United Technologies Corp.*, which established a potential defense for federal contractors facing liability under state tort law if a state tort claim raises a “significant conflict” with the requirements of a federal government contract.²⁵⁷

²⁴⁶ See *In re Johnson*, 760 F.3d 66, 76 (D.C. Cir. 2014).

²⁴⁷ Similar conclusions can be made with respect to Judge Garland’s votes on substantive issues of civil liability. For example, he has participated in several unanimous cases that interpreted D.C. law with mixed results for the plaintiffs. *E.g.*, *Sigmund v. Starwood Urban Retail VI, LLC*, 617 F.3d 512 (D.C. Cir. 2010) (finding that a parking garage did not have increased awareness of violent, armed assault for purposes of a negligence claim); *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251 (D.C. Cir. 2008) (finding that a discharged employee had successfully stated a claim for intentional infliction of emotional distress under DC law); *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000) (finding that DC law would not authorize the imposition of punitive damages for negligent supervision on the facts before the court).

²⁴⁸ *E.g.*, *Oneok, Inc. v. Learjet, Inc.*, --- U.S. ---, 135 S. Ct. 1591 (2015); *Mut. Pharm. Co., Inc. v. Bartlett*, --- U.S. ---, 133 S. Ct. 2466 (2013); *Kurns v. R.R. Friction Prods. Corp.*, --- U.S. ---, 132 S. Ct. 1261 (2012); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009).

²⁴⁹ 580 F.3d 1, 17 (D.C. Cir. 2009) (Garland, J., dissenting), *cert. denied*, 564 U.S. 1037 (2011).

²⁵⁰ *Id.* at 2.

²⁵¹ *Id.*

²⁵² *Id.* at 3.

²⁵³ *Id.* at 4.

²⁵⁴ 28 U.S.C. §§2671-2680.

²⁵⁵ 28 U.S.C. §2680(a), (j).

²⁵⁶ 28 U.S.C. §2671.

²⁵⁷ *Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009); see also *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507-08 (1988); CRS Report R43462, *Tort Suits Against Federal Contractors: Selected Legal Issues*, by Rodney M. Perry. The suit in *Boyle* alleged that the manufacturer of a helicopter for the government was liable for a design defect that resulted in the death of a U.S. Marine. 487 U.S. at 502-03. Noting that the alleged defect was part of the product specifications the government had provided to the contractor, the Court determined that allowing the suit to proceed against the contractor would conflict with a federal requirement set forth in the contract. *Id.* at 511-12. Notably, the *Boyle* Court found that a lesser degree of conflict between state and federal law is required to find preemption in areas involving “uniquely federal interests” such as the procurement of equipment by the government. *Id.* at 504-07. Writing for a majority of the Court, Justice Scalia found that allowing the suit against the contractor would have the same effect as (continued...)

In *Saleh*, Judge Garland and the majority disagreed on whether a sufficiently “significant conflict” existed given the facts before them.²⁵⁸ Looking to the FTCA’s preservation of sovereign immunity with respect to “[a]ny claim arising out of the combatant activities of the military,”²⁵⁹ the majority held that the purpose of this exception is the “elimination of tort from the battlefield” in order to “free military commanders from the doubts and uncertainty” that accompany potential civil liability.²⁶⁰ Judge Garland, in contrast, found that the duties imposed by tort law and the contract in the case were “congruent rather than incompatible,”²⁶¹ largely because the allegedly unlawful conduct of the defendants had not been “directed or authorized” by military personnel.²⁶² Judge Garland also argued that what he viewed as the “extraordinarily broad” preemption under the majority’s interpretation was incompatible with the presumption that state causes of action should be left intact absent a “clear and manifest” congressional purpose to displace state law,²⁶³ a rule of construction that Justice Scalia repeatedly criticized.²⁶⁴ In this regard, although *Saleh* addressed preemption within the narrow context of suits against federal contractors, it may exemplify the general approach that Judge Garland could employ when analyzing whether and to what degree federal and state law conflict, as well as illustrate how Judge Garland might approach such matters differently from Justice Scalia. Because the conflict required in *Saleh*—which dealt with “uniquely federal interests”—is less than that which would be required in ordinary preemption cases, it would be reasonable to presume that Judge Garland would similarly disfavor broad displacement of state claims “when Congress legislates in a field which the States have traditionally occupied.”²⁶⁵ More broadly, Judge Garland’s views on preemption, as discussed in *Saleh*, may be part and parcel of his writings prior to joining the D.C. Circuit, where he expressed deep skepticism with respect to federal courts broadly invalidating state laws under preemption principles in the context of federal antitrust law.²⁶⁶

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allowing the plaintiff to sue the government for its decision to require the defective design. *Id.* at 511-12. However, as evidenced by the discretionary function exception to the FTCA, the government has not waived sovereign immunity with respect to these claims. *Id.* at 511. Therefore, preemption of the state cause of action is required; to permit otherwise would, in the opinion of the Court, frustrate the purpose of Congress’s choice to exclude these suits from its waiver of sovereign immunity. *Id.* at 512.

²⁵⁸ *Saleh*, 580 F.3d at 32.

²⁵⁹ 28 U.S.C. §2680(j).

²⁶⁰ *Saleh*, 580 F.3d at 7.

²⁶¹ *Id.* at 32 (Garland, J., dissenting).

²⁶² *Id.* at 24 (distinguishing *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), which had found a tort suit against the manufacturer of a weapons system that shot down a civilian aircraft during authorized military action to be preempted). If the military had authorized or directed the defendants’ actions at Abu Ghraib, Judge Garland acknowledged that preemption of the state claims may be warranted. *Id.* at 34.

²⁶³ *Id.* at 23-24 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

²⁶⁴ See, e.g., *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621 (2011) (plurality opinion) (Thomas, J., joined by Roberts, C.J., & Scalia & Alito, JJ.) (arguing that the presumption against preemption is inappropriate in implied preemption matters); *Cipollone v. Liggett Grp.*, 505 U.S. 504, 548 (1992) (Scalia, J., dissenting) (arguing against the use of the presumption to foreclose implied preemption where Congress provides an express preemption clause).

²⁶⁵ *Saleh*, 580 F.3d at 21.

²⁶⁶ See Garland, *Antitrust and State Action*, *supra* note 87, at 488. In this vein, it might be argued that Judge Garland, who was unpersuaded by the argument that federal antitrust law should be read to preempt economically inefficient state laws, *id.* at 487-88 (“The judiciary should not interfere under the aegis of the antitrust laws with a state’s political decision, however misguided it may be, to substitute regulation for the operation of the market.”), may similarly find unconvincing arguments that federal law should displace state laws, such as the common law tort system, that may interfere with optimal market conditions. See, e.g., *Wyeth*, 555 U.S. at 626 (Alito, J., dissenting) (arguing that state juries are “ill equipped” to perform the necessary cost-benefit-balancing function necessary to determine whether a (continued...)

In a related but distinct context, Judge Garland has tended, particularly in nonunanimous opinions, to read federal laws that *impose* civil liability more expansively than some of his colleagues on the D.C. Circuit. For example, in a decision ultimately reversed by the Supreme Court, a majority of the en banc D.C. Circuit held in *Kolstad v. American Dental Association* that Congress’s authorization of punitive damages for sex discrimination claims brought under Title VII of the Civil Rights Act of 1964²⁶⁷ should be interpreted in the context of the common law.²⁶⁸ Because punitive damages at common law require that the defendant’s conduct be “egregious,” the majority held that the same standard should apply under Title VII, even though the text of the statute appeared to require only malice or reckless indifference.²⁶⁹ Judge Garland, however, joined the dissent in *Kolstad*, which argued that the plain language of the statute should control, and that adding the common law requirement of “egregious” conduct was inappropriate.²⁷⁰ Moreover, in interpreting the False Claims Act, a law that imposes certain penalties upon any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval,” Judge Garland wrote two opinions that tend to favor plaintiffs that prompted disagreement with some of his colleagues on the D.C. Circuit. First, in *United States ex rel. Yesudian v. Howard University*,²⁷¹ Judge Garland, over the dissent of Judge Karen Henderson,²⁷² wrote a majority opinion reversing the dismissal of claims that a university employee was discharged in retaliation for whistleblowing activity under the FCA. In so doing, the majority held that to prove retaliation for purposes of the FCA, a plaintiff need not demonstrate that the defendant knows or is advised that the underlying fraud of which the whistleblower complains would necessarily violate the act.²⁷³ Six years later, in *United States ex rel. Totten v. Bombardier Corp.*, Judge Garland dissented from a majority opinion by then Judge John Roberts in another FCA matter. There, the majority held that a manufacturer could not, under the version of the FCA then in effect, be held liable for false claims allegedly submitted to a *private* entity even though the claims were paid for largely with *federal* funds.²⁷⁴ However, in dissent, Judge Garland argued that the majority decision unnecessarily “immunizes those who defraud” government-funded private organizations from FCA liability, leaving “vast sums of federal monies” unprotected by the act.²⁷⁵ Nonetheless, while these cases provide some insight into how Judge Garland might vote in future cases where the Court addresses the scope of liability for civil defendants, the small number of D.C. Circuit cases on business law and general civil liability issues make it difficult to predict confidently how Judge Garland would rule on such matters if confirmed to the High Court.

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human drug should be introduced into commerce).

²⁶⁷ 42 U.S.C. §1981a(b)(1).

²⁶⁸ *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 964-65 (D.C. Cir. 1998) (en banc), *rev’d* 527 U.S. 526 (1999).

²⁶⁹ *Id.* at 964-65.

²⁷⁰ *Id.* at 973 (Tatel, J., dissenting). The dissent acknowledged that common law principles of agency may result in a finding that the employer is not liable for the employee’s discriminatory conduct. *Id.* at 974.

²⁷¹ 153 F.3d. 731 (D.C. Cir. 1998).

²⁷² *Id.* at 748 (Henderson, J., dissenting).

²⁷³ *Id.* at 742. Instead, the majority held that the plaintiff must provide evidence that the defendant “know[s] ... that [the] plaintiff is engaged in protected activity as defined above—that is, in activity that reasonably could lead to a False Claims Act case.” *Id.* On this point, Judge Henderson dissented. *Id.* at 748 (“Such a showing requires a plaintiff to have put the employer on notice not only that he is investigating fraud but also that the fraud is *against the federal government*, so as to potentially support a *qui tam* suit or a direct suit by the government.”) (emphasis in original).

²⁷⁴ 380 F.3d 488, 490 (D.C. Cir. 2004).

²⁷⁵ *Id.* at 502 (Garland, J., dissenting).

Civil Rights

Civil rights are another prominent legal issue frequently raised in cases before the Court. Justice Scalia's views regarding the scope of constitutional and statutory civil rights protections were established in a number of judicial opinions, and he participated in several cases—including on gay rights and affirmative action—that were closely divided.²⁷⁶ His eventual replacement could affect how the Court addresses such issues. However, unlike Justice Scalia, Judge Garland's views on *constitutional* civil rights questions are generally unknown because he has not had occasion to address such questions directly in the cases before the D.C. Circuit. Rather, most of the civil rights decisions in which Judge Garland has participated during his tenure on the appellate court appear to have centered on statutory civil rights claims and, in particular, statutory employment discrimination claims.

The most notable of Judge Garland's statutory civil rights cases is arguably *Kolstad v. American Dental Association*,²⁷⁷ an en banc decision that eventually made its way to the Supreme Court. In *Kolstad*, a majority of the en banc D.C. Circuit upheld the dismissal of a claim for punitive damages filed under Title VII of the Civil Rights Act of 1964, on the grounds that such damages are available only when an employer engages in egregious misconduct, which the court viewed as lacking in this case.²⁷⁸ Judge Garland, however, joined the dissenting opinion, authored by Judge David Tatel, which argued that punitive damages should be available in intentional discrimination cases if the plaintiff can show reckless indifference by an employer.²⁷⁹ The Supreme Court subsequently adopted a view closer to that of the dissent than the majority on this question, concluding that while the statute imposes a separate, higher standard for awarding punitive relief in cases of intentional discrimination, there need not be a certain level of egregiousness for awarding such relief.²⁸⁰ Instead, the Court held that under the Title VII, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."²⁸¹ Some commentators have noted that Judge Garland's vote in in *Kolstad*, as well as his opinions or votes in certain other statutory civil rights cases, have frequently, though not always, tended to result in outcomes that favor employees, rather than employers.²⁸² However, the outcomes in these cases may reflect Judge Garland's general approach to questions of statutory interpretation or administrative law, rather than "pro-

²⁷⁶ See CRS Scalia report, *supra* note 9, at 15-16; see also *Obergefell v. Hodges*, --- U.S. ---, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting); *United States v. Windsor*, --- U.S. ---, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Scalia, J., dissenting).

²⁷⁷ *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958 (1998) (en banc).

²⁷⁸ *Id.* at 60. Title VII, which prohibits employment discrimination on the basis of race, color, national origin, sex, or religion, is codified as amended at 42 U.S.C. §§2000e *et seq.*

²⁷⁹ *Kolstad*, 139 F.3d at 970-71.

²⁸⁰ 527 U.S. 526, 534-35 (1999).

²⁸¹ *Id.* at 536. The Court, however, also found that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Id.* at 545 (internal citations omitted).

²⁸² See, e.g., *Steele v. Schafer*, 535 F.3d 689 (2008) (reinstating an employee's Title VII hostile work environment and retaliation claims); *Czekalski v. Peters*, 475 F.3d 360 (2007) (reviving an employee's Title VII claim that her reassignment was due to sex discrimination); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111 (2000) (reversing a lower court's decision to dismiss a plaintiff's race discrimination claim for failure to establish a *prima facie* case); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284 (1998) (allowing an employee's age and disability discrimination claims to proceed); *but see*, *Duncan v. Washington Metro. Area Transit Author. (WMATA)*, 240 F.3d 1110 (2001) (vacating a jury's verdict in favor of an employee's claim under the Americans with Disabilities Act).

employee” sentiments per se. Moreover, even if Judge Garland’s *statutory* civil rights jurisprudence were seen to favor plaintiffs generally, it remains unclear how he might rule on *constitutional* civil rights questions, given his lack of votes in cases involving such questions while on the D.C. Circuit.

Criminal Law and Procedure

Judge Garland’s opinions in the field of criminal law and procedure constitute another noteworthy segment of his overall jurisprudence, especially given that he would, if confirmed, replace Justice Scalia, who can be seen to have been generally,²⁸³ although not universally,²⁸⁴ solicitous of the rights of criminal defendants when construing the Constitution and criminal statutes.²⁸⁵ Criminal law and procedure is an area of law with which Judge Garland was well familiar by the time of his appointment to the federal judiciary in 1997; in the years immediately preceding his appointment to the D.C. Circuit, he served as a federal prosecutor for the DOJ,²⁸⁶ overseeing the investigation of several prominent cases, including those involving the Unabomber, the 1995 Oklahoma City bombing, and the 1996 Atlanta Olympics attack.²⁸⁷ Perhaps because of his background prosecuting major criminal cases on behalf of the federal government, several commentators have suggested that Judge Garland would, if elevated to the Supreme Court, tend to side with the government’s interests in criminal cases.²⁸⁸ Such suggestions have been supported by examinations of Judge Garland’s votes in criminal law matters while on the D.C. Circuit, which show that the Nominee tends to vote in favor of the government.²⁸⁹ Putting to the side

²⁸³ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (recognizing broad Confrontation Clause rights for criminal defendants); *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2555 (2015) (invalidating a federal criminal statute in the face of a Due Process challenge).

²⁸⁴ See, e.g., *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (limiting the right to counsel rule for confined prisoners); *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (holding that a violation of the knock-and-announce rule does not require suppression of evidence).

²⁸⁵ See generally CRS Scalia report, *supra* note 9, at 16-19.

²⁸⁶ FJC Garland, *supra* note 2.

²⁸⁷ See David A. Graham, *How Did the Oklahoma City Bombing Shape Merrick Garland?*, ATLANTIC (March 17, 2016), <http://www.theatlantic.com/politics/archive/2016/03/merrick-garland-oklahoma-city-bombing-supreme-court/474090/>; Nina Totenberg, *Out of the Horror in Oklahoma City, Merrick Garland Forged the Way Forward*, (April 19, 2016), <http://www.npr.org/2016/04/19/474689286/out-of-the-horror-in-oklahoma-city-merrick-garland-forged-the-way-forward>.

²⁸⁸ See, e.g., Eric Posner, *Merrick Garland Would Shift the Court Decisively Leftward*, SALON (March 17, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/merrick_garland_would_shift_the_supreme_court_left_a_lot.html (“Garland was a prosecutor, and may well be less sympathetic to criminal defendants than most liberal are.”); Lincoln Caplan, *Merrick Garland, President Obama’s Sensible Supreme Court Choice*, NEW YORKER (March 16, 2016), <http://www.newyorker.com/news/news-desk/president-obamas-sensible-supreme-court-choice> (noting how Judge Garland’s time as a prosecutor has influenced his work as a judge); Dara Lind, *One Tweet That Shows Why Some Liberals Are Worried About Merrick Garland*, VOX (March 16, 2016), <http://www.vox.com/2016/3/16/11246258/merrick-garland-prosecutor> (“In Garland’s case, the issue that gives him so much cred with conservatives is the very issue that gives liberals pause: criminal justice. Garland is a former prosecutor with a tough-on-crime record.”).

²⁸⁹ Charlie Savage, *In Criminal Rulings, Garland Has Usually Sided with Law Enforcement*, N.Y. TIMES (March 22, 2016), http://www.nytimes.com/2016/03/23/us/politics/merrick-garland-supreme-court-nominee.html?_r=0 (“Of 14 criminal cases identified by the *New York Times* in which Judge Garland voted differently from at least one fellow judge, he came down in favor of law enforcement 10 times.”); Tom Goldstein, *The Potential Nomination of Merrick Garland*, SCOTUSBLOG (April 26, 2010), <http://www.scotusblog.com/2010/04/the-potential-nomination-of-merrick-garland/> (noting that “in ten criminal cases, Judge Garland ha[d] disagreed with his more-liberal colleagues; in each, he adopted the position that was more favorable to the government or declined to reach a question on which the majority adopted the more favorable position”); Daniel Denver, *Inside Merrick Garland’s Troubling Record: Why He Could* (continued...)

questions about the value of such bottom-line assessments of Judge Garland's entire jurisprudence on criminal law²⁹⁰—an area of law where the federal appellate judiciary, as a whole, sides with the government a substantial percentage of the time²⁹¹—an examination of how he resolved issues in a host of criminal law cases, particularly cases that divided the court,²⁹² may provide a more nuanced and perhaps more insightful approach to predicting how the Supreme Court's criminal jurisprudence may change if Judge Garland succeeds Justice Scalia.

With respect to constitutionally based criminal procedure rules, Judge Garland, when siding with the government's position, has tended to afford deference to law enforcement officers' reactions

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Take the Supreme Court Right in One Very Important Regard, SALON (Mar. 17, 2016), <http://www.salon.com/2016/03/17/>

inside_merrick_garlands_bleak_record_why_he_could_take_the_supreme_court_right_in_one_very_important_regard/ ("Garland's record is particularly troubling when it comes to his deference to police and prosecutors, including the suppression of evidence allegedly obtained by way of an unconstitutional police search."); Totenberg, *supra* note 100 ("On the appeals court, Garland has been a moderate liberal, with a definite pro-prosecution bent in criminal cases. Indeed, his views in the area of criminal law are considerably more conservative than those of the man he would replace, Justice Antonin Scalia.").

²⁹⁰ Perhaps countering the viewpoint that Judge Garland has been visibly supportive of the government's position in criminal procedure cases, in 2010, Judge Garland voted not to rehear the government's appeal in the Global Positioning System tracking case, *United States v. Jones*. See 625 F.3d 766 (D.C. Cir. 2010). Nonetheless, Judge Garland has, at times, been more sympathetic to the government's position in criminal cases than colleagues whom some view as more liberal or libertarian in their judicial philosophies. In the context of sentencing decisions, in at least two cases, a colleague criticized Judge Garland for deferring too much to the government's position in at least two cases. See, e.g., *United States v. Bigley*, 786 F.3d 11, 17 (D.C. Cir. 2015) (Brown, J., concurring); *United States v. Riley*, 376 F.3d 1160, 1176-78 (D.C. Cir. 2004) (Rogers, J., dissenting). Judge Garland also once authored an opinion dissenting from the majority's decision (authored by Judge Rogers and joined by Judge Edwards) to grant the defendant a new trial on the grounds that the prosecutor had substantially misstated the evidence during closing argument, and the jury instructions had not adequately cured the resulting prejudice. See *United States v. Watson*, 171 F.3d 695, 703 (D. C. Cir. 1999). In dissent, Judge Garland asserted that the prosecutor's mistake was not sufficiently egregious to warrant reversing the defendant's conviction because, at the time of the trial in 1999, transcripts of witness testimony were unavailable during closing arguments, making "[i]nnocent mistakes of recollection ... inevitable and hardly uncommon[;]" "[i]n the end, the jury's memory of what a witness actually said provides the corrective for errors made by the parties." See *id.* at 703-04 (Garland, J., dissenting). Yet Judge Garland also recognized that "[i]t may well be that in the not-too-distant future even routine criminal trials will have the benefit of real-time transcripts of witness testimony," and "[w]hen that day comes, disputes over testimony will be resolved by reference to transcripts rather than memories." See *id.* at 708-09. Thus, given recent advances in technology, it is hard to predict whether Judge Garland would continue to give the prosecution the benefit of doubt if a prosecutor made similar misstatements today or in the future.

²⁹¹ In 2015, for example, according to DOJ statistics, the federal government prevailed in 6,777 of 7,191 criminal appeals. See generally U.S. DOJ, Office of the United States Attorneys, *Annual Statistical Reports (Years 2013-2015)*, <https://www.justice.gov/usao/resources/annual-statistical-reports> (click on links for 2013, 2014, and 2015 and go to Table 7). In 2014, the government prevailed in 7,197 of 7,622 criminal appeals. *Id.* For an examination of this trend in federal criminal law, see Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015) ("[W]e like to boast that our criminal justice system is heavily tilted in favor of criminal defendants because we'd rather that ten men go free than an innocent man be convicted. There is reason to doubt it."); Angela J. Davis, *Federal Prosecutors [sic] Have Way Too Much Power*, NY TIMES (January 14, 2015), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power> (alleging that government prosecutors "control the criminal justice system"; the "Supreme Court has consistently deferred to prosecutors in a series of cases"; and charges are "rarely" brought against misbehaving prosecutors); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1227 (2013) (noting that most criminal defendants lose on direct appeal); Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 472-73 (2012) ("[T]he United States requires courts engaged in [appellate] review of a conviction to enter upon the task in a spirit of substantial deference to the trial court fact-finder.").

²⁹² For a discussion on why nonunanimous opinions may provide more insight into a nominee's prior judicial record, see "Predicting Nominees' Future Decisions on the Court."

in the field, with an eye toward protecting officers' safety. For example, over the dissent of Judge Judith Rogers,²⁹³ he ruled for the government in *United States v. Brown*, a fact-intensive case that evaluated whether a police officer, investigating reports of a shooting outside an apartment building, violated the Fourth Amendment²⁹⁴ when he opened the door of a car in a parking lot outside of the apartment and subsequently searched the car's trunk.²⁹⁵ Applying the totality of the circumstances approach set forth by the Supreme Court in *Terry v. Ohio*,²⁹⁶ Judge Garland concluded that the officer's belief that the occupants posed a danger to his safety was justified, given that (1) the search occurred in a high crime area and was conducted at night; (2) one of the vehicle's occupants exited the car prior to the search and appeared to be "eyeing" the police; and (3) another of the vehicle's occupants jumped into the front seat when the officer approached.²⁹⁷ Unlike Judge Rogers,²⁹⁸ Judge Garland emphasized that an objective assessment of reasonable suspicion, as opposed to a subjective inquiry into a law enforcement officer's particularized motive for a search, must govern *Terry* inquiries,²⁹⁹ a view he based on a 1996 opinion by Justice Scalia³⁰⁰ that some commentators have suggested affords law enforcement considerable discretion.³⁰¹ Similarly, in *United States v. Christian*, Judge Garland, in holding that a police officer's search of a defendant's car that was near the defendant at the time of his arrest was permissible as part of a weapons search under *Terry* and its progeny, rejected the argument that the police officer did not *truly* fear for his safety because he searched the defendant's car *before* frisking the defendant's body.³⁰² In so doing, Judge Garland, echoing themes from *Brown*, noted that "appellant judges do not second-guess a street officer's assessment about the order in which he should secure potential threats,"³⁰³ but rather evaluate the officer's "conduct objectively, not subjectively."³⁰⁴

²⁹³ 334 F.3d 1161, 1173 (2003) (Rogers, J., dissenting).

²⁹⁴ See U.S. CONST. amend. IV.

²⁹⁵ *Brown*, 343 F.3d at 1162-63. In *Brown*, two officers, arriving at the scene where a shooting had reportedly occurred several hours earlier, noticed a suspicious-looking car in the parking lot where the shooting is said to have occurred. *Id.* at 1162. Although this vehicle was not the one pointed out by a witness, the officers approached the vehicle after its occupants made several movements that the officers viewed as suspicious. *Id.* at 1162-63. Hearing no response when he tapped on the rear window, one officer opened the vehicle door, purportedly to ensure the officers' safety. *Id.* at 1163. Subsequently, the officer opened the car's locked trunk, finding a firearm that became the basis for the defendant's prosecution for being a felon in possession of a firearm in violation of federal statute. *Id.*

²⁹⁶ 392 U.S. 1 (1967). In *Terry*, the Supreme Court construed the Fourth Amendment as permitting police officers to undertake investigatory stops if they have a reasonable suspicion of criminal activity, and to conduct protective searches for weapons if they have a reasonable fear for their safety. See *id.* at 30.

²⁹⁷ *Id.* at 1165-68.

²⁹⁸ In dissent, Judge Rogers argued that, while the officers might have had a *generalized* suspicion that the car's occupants posed a danger to police, they did not have a sufficiently *particularized* suspicion of danger, as required under *Terry*. *Id.* at 1173 (Rogers, J., dissenting).

²⁹⁹ *Id.* at 1166.

³⁰⁰ *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

³⁰¹ See, e.g., Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 174 (1996) (arguing that the objective standard set forth in *Whren* increased the risk that the police will be able to conduct suspicionless stops through post-hoc pretextual justifications).

³⁰² 187 F.3d 663, 669 (D.C. Cir. 1999).

³⁰³ *Id.* ("To the contrary, we must defer to his 'quick decision as to how to protect himself and others from possible danger.'") (quoting *Terry*, 392 U.S. at 28).

³⁰⁴ *Id.* at 670 ("Thus, [the police officer's] actual motives for conducting the search were not relevant as long as his actions were objectively reasonable.").

At the same time, Judge Garland's constitutionally based criminal procedure rulings, perhaps in keeping with his broader judicial tendencies,³⁰⁵ have tended to be narrow in their scope and limited to the specific facts of the case at hand. For example, in *United States v. Powell*,³⁰⁶ Judge Garland sided with the majority in an en banc ruling upholding a search incident to arrest—a recognized exception to the Fourth Amendment warrant requirement³⁰⁷—that occurred *before* the suspect was formally or constructively placed under arrest.³⁰⁸ The dissent in *Powell* disagreed, arguing that the mere *possibility* of arrest is insufficient to justify a warrantless search incident to arrest,³⁰⁹ given a 1998 Supreme Court ruling that held that the search incident to arrest doctrine is inapplicable when the suspect is merely given a citation.³¹⁰ However, the majority concluded otherwise, finding that the search fell within the confines of earlier case law allowing an officer to conduct a warrantless search if the “formal arrest follow[s] quickly on the heels of the challenged search.”³¹¹ Judge Garland's vote with the majority in *Powell* could be seen to indicate a hesitancy to read later-in-time precedent broadly to overturn implicitly controlling case law.³¹²

In another en banc ruling, *United States v. Askew*, Judge Garland similarly showcased his penchant for relatively narrow rulings on constitutional criminal matters.³¹³ In *Askew*, the D.C. Circuit divided on the question of whether the police may—without a warrant—unzip a suspect's outer jacket to facilitate a witness's identification during a *Terry* stop, with five judges concluding that, as a matter of law, the police could not do so,³¹⁴ and four judges concluding that they could.³¹⁵ Two judges in *Askew* prevented either legal conclusion from gaining a majority of the 11-person en banc court needed to create circuit precedent; however, Judge Garland, along with Judge Douglas Ginsburg, joined only a narrow section of the eventual majority opinion that avoided the broader legal question, instead holding that based on the facts in the record, the police had no reasonable basis for believing that viewing the “generic blue sweatshirt” worn by the defendant underneath his jacket would establish or negate his connection with the underlying crime.³¹⁶ In this sense, as noted by the dissent in *Askew*, Judge Garland's vote was the “narrowest ground necessary for reversing” the underlying conviction,³¹⁷ suggesting the Nominee's hesitancy regarding broader rulings in constitutional criminal law matters.

³⁰⁵ See *supra* “Role of the Judiciary” (noting that Judge Garland's jurisprudence strives not to have the court overreach in any particular case).

³⁰⁶ 483 F.3d 836 (D.C. Cir. 2007).

³⁰⁷ See *United States v. Robinson*, 414 U.S. 218, 236 (1973).

³⁰⁸ 483 F.3d at 837.

³⁰⁹ *Id.* at 843-44 (Rogers, J., dissenting).

³¹⁰ *Knowles v. Iowa*, 525 U.S. 113 (1998).

³¹¹ *Powell*, 483 F.3d at 839-40 (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)).

³¹² This interpretation is supported by a passage from the majority opinion which noted that, even if subsequent Supreme Court jurisprudence could be read to undermine *Rawlings*, “[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” *Id.* at 841-42.

³¹³ 529 F.3d 1119 (D.C. Cir. 2008) (en banc).

³¹⁴ *Id.* at 1127 (Edwards, J., joined by Brown, Griffith, Rogers, & Tatel, JJ.).

³¹⁵ *Id.* at 1149 (Kavanaugh, J., dissenting, joined by Henderson, Randolph, & Sentelle, JJ.).

³¹⁶ *Id.* at 1141 (Edwards, J., joined by Garland & Ginsburg, JJ.).

³¹⁷ *Id.* at 1149 (Kavanaugh, J., dissenting) (“Unlike the other nine judges on the en banc panel, Judges Ginsburg and Garland have not reached that legal question: In their view, the facts of this case do not present it. They thus do not join Part III(A)-(C) of Judge Edwards's opinion on the show-up issue; but they also do not join Part II(B) of our opinion. On the show-up issue, they join only the single, fact-bound paragraph in Part III(D) of Judge Edwards's opinion, (continued...)”).

Beyond the context of the Fourth Amendment, Judge Garland has often ruled on narrow grounds when filling gaps left open by the Supreme Court's or D.C. Circuit's case law.³¹⁸ For example, when authoring an opinion involving an issue of first impression in the D.C. Circuit concerning the "actual innocence" standard in federal habeas corpus cases, Judge Garland, after reviewing Supreme Court precedent, cautioned that "we should hesitate before adding a condition [of proof] not included in the express language of the Supreme Court's opinion."³¹⁹ Similarly, in *United States v. Andrews*, when deciding whether to adopt a new rule for the court as to whether the application of a Federal Sentencing Guidelines recommendation issued after the date of the offense, which would have yielded a higher sentence, raised ex post facto issues—something that had divided the appellate courts before the Supreme Court's decision in *Peugh v. United States*³²⁰—Judge Garland concluded that the D.C. Circuit need not choose which side of the debate to join because, under plain error review, "there is no plain error unless the district court failed to follow an absolutely clear legal norm."³²¹ In addition, when opining on the novel issue of "how to treat an unobjected-to *Booker* error when the original sentencing judge is no longer available to preside over remand,"³²² Judge Garland declined to grant the government's request to create a new rule granting a limited remand before a new district judge to determine whether the original sentencing judge would have imposed the same sentence had he known the Sentencing Guidelines were advisory rather than mandatory.³²³ Instead, Judge Garland concluded that a plenary sentencing hearing was warranted because "district courts—no matter how collegial they may be—do not have a collective consciousness, one judge's conclusion as to what another would have done in a circumstance the latter never contemplated would truly be a legal fiction."³²⁴

With regard to statutory interpretation of criminal laws, Judge Garland has in divided cases tended to read criminal statutes more broadly than some of his colleagues on the D.C. Circuit to encompass the activities of charged defendants. For example, he sided with the government's position in several cases concerning whether a mens rea (i.e., mental state) element is required by a statute. In *United States v. Burwell*, Judge Garland joined the majority en banc opinion holding that the government need not prove that the defendant knew the firearm he carried was capable of firing automatically in a prosecution under Section 924(c)(1)(B)(iii) of Title 18 of the *U.S.*

(...continued)

thereby making Part III(D) the entirety of the majority's opinion on that issue.").

³¹⁸ See, e.g., *United States v. Caso*, 723 F.3d 215, 219 (D.C. Cir. 2013) (assuming, without deciding, two legal questions before ruling on a narrower third ground); *United States v. Andrews*, 532 F.3d 900, 909 (D.C. Cir. 2008) (declining to create a new circuit rule post-*United States v. Booker*, 543 U.S. 220 (2005), concerning whether the Ex Post Facto Clause prohibits the use of the version of the Guidelines Manual in effect at the time of sentencing if that manual would yield a sentence higher than that under the Guidelines Manual that was in effect at the time of the illegal conduct, and concluding that no plain error occurred).

³¹⁹ *Caso*, 723 F.3d at 219.

³²⁰ --- U.S. ---, 133 S. Ct. 2072 (2013) (holding that the Ex Post Facto Clause is violated when a defendant is sentenced under the version of the Guidelines that provides a higher sentencing range than the Guidelines in effect at the time when the defendant committed the illegal act).

³²¹ See *United States v. Andrews*, 532 F.3d 900, 909 (D.C. Cir. 2008) (internal quotation marks, alterations, and citations omitted).

³²² The term "*Booker* error" refers to the Supreme Court's landmark 2005 ruling in *United States v. Booker*, 543 U.S. 220 (2005), which held that the Sixth Amendment right to jury trial generally requires that only facts admitted by a defendant, or proved beyond a reasonable doubt to a jury, be used to calculate a sentence, making the sentencing guidelines functionally discretionary for trial judges. *Id.* at 226-27.

³²³ See *United States v. Branham*, 515 F.3d 1268, 1277-79 (D.C. Cir. 2008).

³²⁴ See *id.* at 1278.

Code,³²⁵ a result the majority concluded was in line with statute’s purpose of deterring future “offenders more generally through the imposition of a particularly severe penalty” with respect to the use of a machine gun in a federal felony.³²⁶ Judges Rogers, Kavanaugh, and David Tatel, however, dissented, arguing that the presumption that a mens rea element applies to every element of a criminal offense should apply to Section 924(c).³²⁷ Similarly, in *United States v. Blalock*, Judge Garland authored an opinion holding that the fact the defendant was high on phencyclidine (PCP) did not negate the mens rea element in the statute, as there were attendant circumstances demonstrating that the defendant was sufficiently in control of his faculties to meet the mens rea requirement.³²⁸ Nonetheless, Judge Garland has not uniformly sided with the government in mens rea cases, as he authored the majority opinion in *United States v. Project on Government Oversight*.³²⁹ In that case, the court held a federal statute, which bars nongovernmental persons from compensating federal employees for performing government services, requires proof that the money was given with the *intent* to compensate the employee for government services.³³⁰

Outside of statutory interpretation cases concerning mens rea requirements, in one notable en banc case, *Valdes v. United States*,³³¹ Judge Garland, in dissent, supported a fairly broad reading of a federal criminal law, arguing that the federal antigrauity statute encompassed the actions of a police officer who agreed to use police databases to find contact information for certain individuals in exchange for money.³³² While the majority in *Valdes* interpreted the term “official act” in the relevant federal statute as including only those acts that are formally before a government agency, or responses to questions that the agency had authority to answer,³³³ Judge Garland argued that the majority’s narrow construction of the term “official act” would not only limit prosecutions under this statute, but “would [also] strike at the core of bribery prosecutions under [another statute],” which relies on the same definition of “official act.”³³⁴ He cautioned that, under the majority’s approach, “successful bribery prosecutions under [this other statute] ... would not be possible.”³³⁵ Judge Garland’s dissent here could be seen as evidencing an inclination to give broad effect to criminal statutes, especially those aimed at public corruption. If so, such an approach would mark a departure from Justice Scalia’s often more favorable approach toward criminal defendants, which relied on the rule of lenity (i.e., the idea that persons must have sufficient notice of a law before they can be found in violation of it).³³⁶

³²⁵ *United States v. Burwell*, 690 F.3d 500, 515 (2012) (en banc).

³²⁶ *Id.* at 513. Nonetheless, while Judge Garland voted for the government’s position in these cases, his vote in *Burwell* could be attributable to the fact that the defendant had requested the court to overturn long-standing circuit precedent, rather than a penchant to agree with the government’s position. *Id.* at 515 (noting *stare decisis* concerns with the dissent’s position).

³²⁷ *Id.* at 519 (Rogers, J., dissenting); *id.* at 527 (Kavanaugh, J., dissenting, joined by Tatel, J.).

³²⁸ 571 F.3d 1282, 1288 (D.C. Cir. 2009).

³²⁹ 616 F.3d 544 (D.C. Cir. 2010).

³³⁰ *Id.* at 560.

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

³³² *Id.* at 1333 (Garland, J., dissenting).

³³³ *Id.* at 1324.

³³⁴ *Id.* at 1338 (Garland, J., dissenting).

³³⁵ *Id.*

³³⁶ See, e.g., *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 2555 (2015) (invalidating the residual clause of the Armed Career Criminal Act); *United States v. Santos*, 553 U.S. 507, 524 (2008) (interpreting a federal money-laundering statute narrowly to avoid constitutional infirmity).

Whether opinions like *Valdes* speak to a broader tendency of Judge Garland to favor the government systematically in criminal law matters, as has been suggested by some commentators,³³⁷ remains to be seen, however. It is important to note that many aspects of criminal law and procedure upon which Justice Scalia deeply influenced the Court's jurisprudence³³⁸—including the scope of Fifth Amendment's double jeopardy and self-incrimination prohibitions and the Sixth Amendment's Confrontation and Jury Clauses—have simply not been addressed by Judge Garland in any manner that would meaningfully reveal how he would approach such issues if he were to be confirmed to the Supreme Court.³³⁹ More broadly, while nearly two decades' worth of decisions in appeals on criminal law matters provides a large number of cases to examine in order to gauge Judge Garland's approach, the vast majority of these decisions have involved relatively straightforward applications of Supreme Court or circuit precedent,³⁴⁰ or adherence to the uniform approaches of sister circuits.³⁴¹ This means that any absolute pronouncements about how Judge Garland would approach criminal law, if he were appointed to a position where he would not necessarily be constrained by precedent or the views of other judges, should be viewed with some skepticism.

Environmental Law

The D.C. Circuit hears a large number of environmental law cases, in part because several major environmental statutes require challenges to certain types of agency actions to be brought exclusively in that court.³⁴² As a consequence, Judge Garland has participated in dozens of

³³⁷ See *supra* notes 288-289.

³³⁸ See CRS Scalia report, *supra* note 9, at 16-19.

³³⁹ See, e.g., *United States v. Coughlin*, 610 F.3d 89, 93 (D.C. Cir. 2010) (concluding, for a unanimous court, that the Double Jeopardy Clause barred the retrial of certain mail fraud claims); *United States v. Ginyard*, 511 F.3d 203, 204 (D.C. Cir. 2008) (holding, for a unanimous court, that a defendant can be retried on lesser-included charges without transgressing the Fifth Amendment's double jeopardy prohibition); *United States v. Jones*, 567 F.3d 712, 717 (D.C. Cir. 2009) (a unanimous ruling written by Judge Garland concluding that the public safety exception to *Miranda* applied to the defendant's statements); *United States v. Miller*, 738 F.3d 361, 375 (D.C. Cir. 2013) (a unanimous ruling joined by Judge Garland resolving a Sixth Amendment Confrontation Clause claim in a single paragraph); *United States v. Gurr*, 471 F.3d 144, 153 (D.C. Cir. 2006) (same); *United States v. Pettigrew*, 346 F.3d 1139, 1140 (D.C. Cir. 2003) (resolving an *Apprendi* claim on behalf of a unanimous court on harmless error grounds); *United States v. Lafayette*, 337 F.3d 1043, 1044 (D.C. Cir. 2003) (same).

³⁴⁰ See, e.g., *United States v. Law*, 806 F.3d 1103, 1107 (D.C. Cir. 2015) (concluding that the defendant's argument—that a life sentence violates Eighth Amendment—was foreclosed by *Harmelin v. Michigan*, 501 U.S. 957 (1991), and D.C. Circuit precedents following *Harmelin*); *United States v. Swangin*, 726 F.3d 205, 208 (D.C. Cir. 2013) (noting that Supreme Court and circuit precedents foreclosed the defendant's argument that he should receive the benefit of the Fair Sentencing Act's lower mandatory minimum sentence even though he was sentenced before its passage); *United States v. Blackson*, 709 F.3d 36, 40-42 (D.C. Cir. 2013) (collecting cases and reiterating the circuit's rules regarding the scope of remand); *United States v. Motley* 587 F.3d 1153, 1156-60 (2009) (noting that the Supreme Court decision in *Melendez v. United States*, 518 U.S. 120 (1996), foreclosed the defendant's argument that a district court must depart from the mandatory minimum sentence under the relevant federal statute when the government requests a downward variance under the sentencing guidelines); *United States v. Adewani*, 467 F.3d 1340, 1341-43 (D.C. Cir. 2006) (rejecting the defendant's request to ignore circuit precedent concerning the definition of "crime of violence" under the guidelines).

³⁴¹ See, e.g., *United States v. Salahmand*, 651 F.3d 21, 27-28 (2011) (joining nine circuits in concluding that the guidelines' definition of "vulnerable victim" extends to victims of the defendant's relevant conduct, as well as to victims of the crime of conviction); *United States v. Jones*, 567 F.3d 712, 719 (D.C. Cir. 2009) (joining the majority of circuits in remanding for resentencing in the first instance, instead of forcing the defendant to file a petition under the relevant federal statute, after the Sentencing Commission retroactively lowered guidelines ranges for certain crack-cocaine offenses).

³⁴² See, e.g., 42 U.S.C. §300j-7(a) (petitions for review of EPA actions pertaining to the establishment of national (continued...))

environmental cases in his time on the D.C. Circuit.³⁴³ Many environmental cases raise common issues of administrative law, such as standing to sue and standards for judicial review.³⁴⁴ However, environmental law statutes and cases can also raise their own unique issues. Where a number of observers have suggested that Justice Scalia evidenced a certain degree of skepticism toward arguments emphasizing environmental values,³⁴⁵ Judge Garland generally has been viewed as more receptive to such arguments,³⁴⁶ even though he has not always ruled in favor of environmental protections.³⁴⁷

Judge Garland has often applied *Chevron* deference³⁴⁸ in support of upholding agency interpretations of environmental statutes.³⁴⁹ Indeed, some have singled out what they see as his “long-standing commitment to *Chevron* deference” as a defining characteristic of his environmental jurisprudence.³⁵⁰ For example, in the 2002 case *American Corn Growers Association v. Environmental Protection Agency (EPA)*, which involved review of the EPA’s Regional Haze Rule,³⁵¹ Judge Garland’s partial dissent supported the position put forth by the agency. He wrote that, unlike the other two judges on the panel, who agreed with industry petitioners that language in the Clean Air Act (CAA) required each pollution source’s control requirements to be based on assessments of that source’s impact on haze, he would have deferred to the EPA’s interpretation that the act allowed the agency to base controls on collective assessments of groups of sources.³⁵² Judge Garland was also in the majority of a divided panel

(...continued)

primary drinking water regulations); 42 U.S.C. §6976 (petitions for review of EPA regulatory actions under the Resource Conservation and Recovery Act (RCRA)); 42 U.S.C. §7607(b)(1) (petitions for review of various EPA actions under the CAA).

³⁴³ For example, a search of the Lexis databases for cases involving Judge Garland whose text included at least five instances of the terms “EPA,” “FWS,” “NEPA,” or “environmental” gives 105 results; other search parameters give more or fewer results.

³⁴⁴ See *supra* “Administrative Law.”

³⁴⁵ See, e.g., Rebecca Wilhelm, *Standing, Administrative Law Define Scalia’s Legacy*, DAILY ENVTL. REP. (February 17, 2016), <http://www.bna.com/standing-administrative-law-n57982067391/> (subscription required) (quoting environmental law professors Jonathan Z. Cannon, Jonathan A. Adler, Richard J. Lazarus, Richard B. Flatt, and Jody Freeman); see also CRS Scalia report, *supra* note 9, at 19-22.

³⁴⁶ See generally, e.g., Rebecca Wilhelm, *Observers: Judge Garland Typically Deferential to EPA*, DAILY ENVTL. REP. (March 17, 2016), <http://www.bna.com/observers-judge-garland-n57982068626/> (subscription required); Keith Goldberg, *Garland Could Be Agency Ally In Energy, Enviro Rule Fights*, LAW360, (March 16, 2016), <http://www.law360.com/articles/772367/garland-could-be-agency-ally-in-energy-enviro-rule-fights> (subscription required).

³⁴⁷ See generally discussion and citations *infra*, “Environmental Law.”

³⁴⁸ See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *supra* “Administrative Law.”

³⁴⁹ See, e.g., *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015) (per curiam) (affirming “EPA’s reasonable interpretation of the ambiguous statutory term ‘nearby’”); *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215-26 (D.C. Cir. 2007) (Garland, J.) (upholding an EPA interpretation of RCRA); *UARG v. EPA*, 471 F.3d 1333 (2006) (upholding EPA’s 2005 Regional Haze Rule); *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 70 (D.C. Cir. 2000) (Garland, J.) (upholding an EPA interpretation allowing a “category-by-category” basis for regulating emissions).

³⁵⁰ See Scott Fulton, president of the Environmental Law Institute, as quoted in Wilhelm, *Observers*, *supra* note 346 (quoting).

³⁵¹ 291 F.3d 1 (D.C. Cir. 2002) (per curiam) (remanding the 1999 Regional Haze Rule to the EPA for reconsideration of certain issues, but rejecting challenges to certain other aspects of the rule).

³⁵² *Id.* at 15-16 (“[T]he court adopts an interpretation of the Act that, in the view of [EPA] and the National Academy of Sciences, will prevent the achievement of Congress’ goal. If that interpretation were required by the statutory language, we would of course be compelled to adopt it. But such an interpretation is not required.”).

that deferred to the EPA's interpretation of the phrase "appropriate and necessary" in a CAA provision on regulating hazardous emissions from power plants, and upheld the EPA's Mercury and Air Toxics (MATS) rule,³⁵³ a holding that was overturned by the Supreme Court, by a vote of 5-4, in its 2015 decision in *Michigan v. EPA*.³⁵⁴ Judge Garland has joined opinions applying *Chevron* deference to uphold agency interpretations against challenges from environmental groups as well.³⁵⁵ However, where he has voted to vacate or remand environmental rules on *Chevron* grounds, he has more often,³⁵⁶ but not exclusively,³⁵⁷ done so in response to challenges from environmental groups rather than industry.

Judge Garland's application of the "arbitrary and capricious" standard for judicial review of agency actions found in the APA³⁵⁸ and in environmental statutes such as the CAA³⁵⁹ further illustrates his tendency to defer to agencies, especially on highly technical environmental matters.³⁶⁰ For example, in *National Association of Home Builders v. EPA*, he wrote an opinion for the court that included a fairly in-depth review of the EPA's explanation and cost-benefit calculations, upholding a 2010 agency amendment that removed an "opt-out" provision from a

³⁵³ *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229-45 (D.C. Cir. 2014).

³⁵⁴ 576 U.S.—, 135 S. Ct. 2699 (2015). Justice Scalia wrote the opinion for the Court requiring the EPA to consider the costs of compliance and other costs in deciding whether the regulation was appropriate and necessary. Some viewed this holding as a narrowing of the *Chevron* doctrine. See, e.g., Jonathan R. Nash, *Michigan v. EPA and the Future of Chevron Deference*, THE HILL (July 16, 2015), <http://thehill.com/blogs/pundits-blog/the-judiciary/248040-michigan-v-epa-and-the-future-of-chevron-deference>. The Supreme Court left intact the D.C. Circuit's other rulings upholding other aspects of the rule, 748 F.3d at 1229-45; on remand, Judge Garland's panel unanimously remanded the rule to the agency for a cost determination without vacating it. *White Stallion Energy Ctr., LLC v. EPA*, No. No. 12-1100, 2015 U.S. App. LEXIS 21819 (D.C. Cir. December 15, 2015) (per curiam) (unpub. order).

³⁵⁵ See, e.g., *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 605-12 (D.C. Cir. 2015) (upholding an interpretation of the Outer Continental Shelf Lands Act in opening new areas for leasing); *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524, 525 (D.C. Cir. 2012) (rejecting challenges to the EPA's CAA mercury emission rule for gold mines); *La. Envtl. Action Network v. EPA*, 172 F.3d 65, 69-70 (D.C. Cir. 1999) (rejecting a challenge to a variance governing the treatment of hazardous waste landfills).

³⁵⁶ See, e.g., *Oceana, Inc. v. Locke*, 670 F.3d 1238, 1240-43 (D.C. Cir. 2011) (finding that a fishery management plan was impermissibly vague where a statute directed the FWS to "establish" a standardized methodology); *Sierra Club v. EPA*, 356 F.3d 296, 301-04 (D.C. Cir. 2004) (part II of op. by Garland, J., vacating the EPA's conditional approval of ozone control plans).

³⁵⁷ See *Appalachian Power Co. v. EPA*, 135 F.3d 791, 820-22 (D.C. Cir. 1998) (per curiam; section by Garland, J.) ("[W]hether a retrofitted cell burner can properly be classified as a wall-fired boiler turns upon [statutory language]. Neither party contends that this question can be resolved under *Chevron*'s step one ... and we therefore proceed to *Chevron*'s step two.... Because EPA has not adequately justified its treatment of retrofitted cell burners as wall-fired boilers, we vacate and remand....").

³⁵⁸ 5 U.S.C. §706.

³⁵⁹ 42 U.S.C. §7607(d)(9).

³⁶⁰ See, e.g., *UARG v. EPA*, 744 F.3d 741, 748-50 (D.C. Cir. 2014) (Garland, J.) (upholding the EPA's new source performance standards for particulate matter emissions from steam generating units against an industry challenge); *Coal. of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (panel upholding air standards for lead); *Catawba Cty. v. EPA*, 571 F.3d 20, 25 (D.C. Cir. 2009) (per curiam) (finding that the EPA "satisfied—indeed, quite often surpassed—its basic obligation of reasoned decisionmaking" for 224 of 225 area classifications for fine particulate matter pollution); *Sierra Club*, 356 F.3d at 301-10 (part III of opinion by Garland, J.) (denying claims that EPA's technical adjustments to models underlying its approvals of ozone control plans were arbitrary, capricious, or not in accordance with law); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 73-81 (D.C. Cir. 2000) (rejecting challenges to the reasonableness of a rule limiting the volatile organic compounds in architectural coatings); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 459-60 (D.C. Cir. 1998) (Garland, J.) ("Three of the four petitioners ... essentially argue that the FAA's rule [to reduce aircraft noise from sightseeing tours in a national park] does 'too much, too soon.' [One] charges that the rule does 'too little, too late.' We ... uphold the rule ... not because we necessarily believe the rule is 'just right,' but because we defer to the agency's reasonable exercise of its judgment and technical expertise....").

Toxic Substances Control Act regulation on renovation and remodeling hazards from lead paint.³⁶¹ On the other hand, Judge Garland has ruled against agency actions on the facts of some cases. In a per curiam decision in *American Farm Bureau Federation v. EPA*, for example, a panel including Judge Garland agreed with state and environmental petitioners that the EPA's 2006 CAA standard for fine particulate matter was "unsupported by adequately reasoned decisionmaking," and remanded the rule to the EPA for "further consideration of whether it is set at a level requisite to protect the public health while providing an adequate margin of safety from the risk of short-term exposure...."³⁶²

The National Environmental Policy Act (NEPA), which imposes procedural requirements on agencies to take a "hard look" at environmental consequences,³⁶³ has been a statutory vehicle for many challenges to agency actions and project approvals. It appears that where he has reached the merits of NEPA claims, Judge Garland has tended to uphold agencies' NEPA decisions unless they failed entirely to take a required step.³⁶⁴ In *Sierra Club v. Van Antwerp*, he joined an opinion holding that when the Army Corps of Engineers issued a permit authorizing the discharge of dredge and fill material into specified wetlands for construction of a mall, the Corps "did not address the impacts of habitat fragmentation" on the endangered eastern indigo snake, and "the Corps must make some determination on the issue" under NEPA and the Endangered Species Act (ESA).³⁶⁵

In the environmental context, Judge Garland has required agencies to adhere to other statutory procedural requirements as well.³⁶⁶ For example, in *Gerber v. Norton*, he authored an opinion agreeing with a plaintiff environmental group that the Fish and Wildlife Service (FWS) had

³⁶¹ 682 F.3d 1032, 1036-41 (D.C. Cir. 2012). As another example, Judge Garland also joined the 2013 decision in *In re Polar Bear Litigation* upholding the FWS's rule listing the polar bear as "threatened" under the Endangered Species Act, against challenges from industry groups, states, and environmental organizations. *See generally* 709 F.3d 1 (D.C. Cir. 2013) (affirming the district court's grant of summary judgment to the FWS).

³⁶² 559 F.3d 512, 524 (D.C. Cir. 2009). *See also, e.g.*, *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 10-19 (D.C. Cir. 2015) (panel holding that the EPA acted arbitrarily and capriciously when it modified CAA rules allowing backup generators to operate without emissions controls for up to 100 hours per year as part of an emergency demand-response program).

³⁶³ *See* 42 U.S.C. §§4321 *et seq.* While National Environmental Policy Act (NEPA) claims often overlap with substantive claims relating to reasoned decisionmaking, as a recent opinion joined by Judge Garland summarized, "NEPA's mandate 'is essentially procedural.'" *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) (internal citations omitted); *see id.* at 903-07 (finding reasonable the analysis underlying an agency's NEPA determinations in reducing white-tailed deer in Rock Creek Park). For background information on NEPA, *see* CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by Linda Luther.

³⁶⁴ *See, e.g., Grunewald*, 776 F.3d at 903-07; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507-20 (D.C. Cir. 2010) (panel finding standing for the challengers, as well as no violations of NEPA or other statutes in approval of the Atlantic Rim Natural Gas Field project); *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327-34 (D.C. Cir. 2004) (rejecting challenges to a NEPA environmental impact statement based on close review of the record).

³⁶⁵ 661 F.3d 1147, 1156-57 (D.C. Cir. 2011). Similarly, a per curiam decision by a panel including Judge Garland vacated a NEPA order where "there [wa]s no real dispute that [communication] towers 'may' have significant environmental impact," and, thus, applicable regulations required an environmental assessment to determine whether there was indeed an impact. *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032-34 (D.C. Cir. 2008) (upholding challenges to an FCC order denying a petition seeking protection of migratory birds from collisions with communications towers). The dissent would have dismissed the case on ripeness grounds. *Id.* at 1035-37 (Kavanaugh, J., dissenting).

³⁶⁶ *See, e.g., Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (Garland, J.) (holding that the FWS violated the ESA because it did not allow public comment on a key component of a developer's permit application and because the agency did not make a statutorily required finding).

violated the rather rigorous procedural requirements of the ESA³⁶⁷ by, among other errors, failing to make a site map available during the comment period.³⁶⁸ Other cases, though, appear to demonstrate more willingness to allow environmental agencies some procedural flexibility. Thus, in *In re Aiken County*, Judge Garland dissented from an opinion requiring the NRC to proceed to exhaust its previous appropriations to continue the Yucca Mountain licensing process.³⁶⁹ The applicable statute provides that the NRC “shall issue a final decision approving or disapproving” the application filed by the Department of Energy,³⁷⁰ and the majority in *In re Aiken County* stated that “where previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate,” even where all agreed it was impossible for the agency to complete the licensing.³⁷¹ Judge Garland, in contrast, looked to the court’s “discretion not to order the doing of,” what he viewed to be, “a useless act.”³⁷²

Access to courts has been another theme of recurring importance in environmental cases. One jurisdictional threshold that plaintiffs in federal courts must cross is establishing standing to sue under Article III of the Constitution.³⁷³ In cases challenging federal agencies’ environmental decisions, Judge Garland has been mindful of the constitutional requirements and prudential concerns of standing doctrines; he has authored³⁷⁴ and joined³⁷⁵ a number of opinions rejecting standing for environmental or industry plaintiffs or petitioners. However, he also has found standing in a number of cases,³⁷⁶ including some in which other judges did not.³⁷⁷ In addition to

³⁶⁷ 16 U.S.C. §1539.

³⁶⁸ 294 F.3d 173, 178-84 (D.C. Cir. 2002). The court also held that the map availability violation was not harmless, *id.*, and that the FWS had failed to make a statutorily required finding before issuing the permit. *Id.* at 184-86.

³⁶⁹ 725 F.3d 255 (D.C. Cir. 2013); *id.* at 268-70 (Garland, J., dissenting).

³⁷⁰ Nuclear Waste Policy Act, 42 U.S.C. §10134.

³⁷¹ *In re Aiken Cty.*, 725 F.3d at 260.

³⁷² *Id.* at 270 (quoting *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936)).

³⁷³ *See supra* “Administrative Law.”

³⁷⁴ *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1202 (D.C. Cir. 2013) (“This appeal concerns the straight-horned markhor, an impressive subspecies of wild goat.... As tempting as it may be to consider an arbitrary and capricious claim in a case involving a goat [describing etymological derivation of “capricious” from Italian word for “goat” in footnote], an array of justiciability problems—mootness, ripeness, and standing—require us to decline the opportunity.”); *Chamber of Commerce v. EPA*, 642 F.3d 192, 199-212 (D.C. Cir. 2011) (finding no jurisdiction due to standing limitations and mootness).

³⁷⁵ *See, e.g.*, *Del. Dep’t of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 7-10 (D.C. Cir. 2015) (holding that Delaware lacked standing to challenge an exemption from emissions controls for backup generators in low-density areas, but finding standing for other claims and other petitioners); *Swanson Grp. Mfg. v. Jewell*, 790 F.3d 235, 238-46 (D.C. Cir. 2015); *Commuter Rail Div. of Reg’l Transp. Auth. v. Surface Transp. Bd.*, 608 F.3d 24, 30-31 (D.C. Cir. 2010) (finding that an environmental group did not establish causation); *North Carolina v. EPA*, 587 F.3d 422, 426-29 (2009) (holding that a state did not establish redressability to challenge the EPA’s removal of part of Georgia from ozone regulation coverage); *Wilderness Soc’y v. Norton*, 434 F.3d 584, 593-94 (2006) (finding lack of redressability); *Town of Stratford v. FAA*, 285 F.3d 84, 88-89 (D.C. Cir. 2002) (finding lack of prudential standing).

³⁷⁶ *See, e.g.*, *UARG v. EPA*, 471 F.3d 1333, 1339-40 (D.C. Cir. 2006); *Fund for Animals v. Norton*, 322 F.3d 728, 733-38 (D.C. Cir. 2003) (Garland, J.) (holding a Mongolian agency had standing to intervene); *Nat’l Parks Conserv. Ass’n v. Manson*, 414 F.3d 1, 4-7 (D.C. Cir. 2005) (holding that groups had standing to challenge authorization for a power plant).

³⁷⁷ *See Sierra Club v. Jewell*, 764 F.3d 1, 3-9 (D.C. Cir. 2014) (finding standing to challenge the removal of Blair Mountain Battlefield from the National Register of Historic Places, over a dissent characterizing the majority’s application of the “injury” requirement as too broad); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (divided en banc opinion); *Amfac Resorts v. Dep’t of Interior (DOI)*, 282 F.3d 818 (D.C. Cir. 2002) (unanimous panel upholding Park Service regulation), *vacated sub nom.*, *Nat’l Park Hosp. Ass’n v. DOI*, 538 U.S. 803 (2003) (ruling the suit was not ripe); *La. Envtl. Action Network v. EPA*, 172 F.3d 65, 65 (D.C. Cir. 1999) (joining an (continued...))

standing, would-be plaintiffs seeking to bring lawsuits or petitions raising environmental issues may also have to satisfy legal requirements relating to ripeness, the finality or binding nature of the agency action challenged, and their exhaustion of administrative remedies.³⁷⁸ As with standing, in some cases Judge Garland has found causes of action ripe or otherwise appropriate to hear, even where other judges have disagreed.³⁷⁹ However, some practitioners have noted³⁸⁰ that he has fairly often written³⁸¹ or joined³⁸² opinions that applied these doctrines to bar challenges to agency environmental decisions before reaching the merits. In one notable example, in the 2014 case *Utility Air Regulatory Group (UARG) v. EPA*, Judge Garland wrote on exhaustion of administrative remedies that “the only objections that may immediately be raised upon judicial review are those that were raised during the public comment period. Objections raised for the first time in a petition for reconsideration must await EPA’s action on that petition.”³⁸³ Judge Garland also has joined opinions holding NEPA claims, in particular, to be premature or improper on several occasions.³⁸⁴

Finally, environmental cases may also implicate other constitutional issues. Judge Garland generally has not favored constitutional arguments against environmental regulations. In *American Trucking Associations v. EPA*, a D.C. Circuit panel that did not include him held, among other things, that a section of the CAA unconstitutionally delegated legislative power to the EPA on the grounds that the agency had interpreted the statute in a manner that provided no “intelligible principle” to guide the agency’s exercise of authority.³⁸⁵ Judge Garland dissented from the denial of rehearing en banc and joined a statement of dissent emphasizing Supreme

(...continued)

opinion that found standing, but rejected a challenge to EPA action under RCRA, over a dissent that would not have found standing).

³⁷⁸ See *supra* “Administrative Law.”

³⁷⁹ See, e.g., *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215-16 (D.C. Cir. 2007) (holding challenges to a rule ripe for review); *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (arguing that the claims were not ripe). Note that cases can often reach the merits without substantial discussion of ripeness or similar issues.

³⁸⁰ See, e.g., Thomas Lorenzen, as quoted by Wilhelm, *Observers*, *supra* note 346 (describing Judge Garland as a “stickler for exhaustion of administrative remedies”).

³⁸¹ *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1203-07 (D.C. Cir. 2013); *Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007) (Garland, J.) (“Because it is speculative whether the project will ever be able to proceed, we find the petitioners’ challenge unripe and direct that the case be held in abeyance.”); *Cement Kiln Recycling Coal.*, 493 F.3d at 226-28 (rejecting the argument that the Human Health Risk Assessment Protocol was a legislative rule and holding that it was not a final requirement over which the court had jurisdiction).

³⁸² See, e.g., *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256-58 (D.C. Cir. 2014) (per curiam) (finding one energy company to lack standing under the “zone of interests” test); *cf. id.* at 1266-73 (Kavanaugh, J., dissenting in part) (explaining concerns with “zone of interests” precedent); *Nat’l Ass’n of Home Builders v. Army Corps of Eng’rs*, 417 F.3d 1272 (D.C. Cir. 2006) (finding no “substantial probability” that the appellants fell within NEPA’s “zone of interest”); *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 283-85 (D.C. Cir. 2003) (sua sponte rejecting the petitions as unripe).

³⁸³ 744 F.3d 741, 747 (D.C. Cir. 2014). See also, e.g., *Vt. Dep’t of Pub. Serv. v. United States*, 684 F.3d 149 (D.C. Cir. 2012) (“conclud[ing] the petitioners waived their [objection to license renewal for the Vermont Yankee facility] because they repeatedly failed to present it directly to the [agency] and thereby failed to exhaust their administrative remedies”).

³⁸⁴ See, e.g., *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 599-600 (D.C. Cir. 2015) (holding that certain claims were not ripe because the obligation to comply fully with NEPA does not mature until leases are issued); *Wy. Outdoor Council v. Forest Serv.*, 165 F.3d 43, 47-51 (D.C. Cir. 1999) (dismissing a NEPA claim brought before any oil and gas leases had been issued).

³⁸⁵ *Am. Trucking Ass’n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

Court precedent on Congress's need to be able to delegate power to agencies "under broad general directives."³⁸⁶ The panel's decision on the nondelegation issue was unanimously overturned by the Supreme Court in 2001 in *Whitman v. American Trucking Associations*, in a decision written by Justice Scalia.³⁸⁷ Judge Garland similarly rejected a constitutional challenge to environmental protections in the 2003 case *Rancho Viejo, LLC v. Norton*, in which he wrote the opinion for the court finding that an agency's ESA determination—that a planned housing development was likely to jeopardize the continued existence of the arroyo southwestern toad—was a constitutional exercise of federal authority under the Commerce Clause.³⁸⁸ More recently, Judge Garland joined the opinion in *Mississippi Commission on Environmental Quality v. EPA*, which rejected arguments that the EPA's designation of areas in Texas and elsewhere as "nonattainment" areas under the CAA exceeded federal authority under the Commerce Clause, the Due Process Clause, Spending Clause, and the Tenth Amendment.³⁸⁹

Overall, it appears that agencies defending environmental rules could find their odds somewhat more favorable in many cases if Judge Garland were to be confirmed to replace Justice Scalia on the Supreme Court. Any such shift could be key to the outcome of major environmental law challenges that could eventually reach the Supreme Court after working their way through lower courts at the time of Judge Garland's nomination. Perhaps most notable among these are the consolidated challenges to the EPA's Clean Power Plan rule, which was stayed by Justice Scalia in one of his last votes for the Court³⁹⁰ and which is considered highly likely to be appealed to the Supreme Court by whichever side does not prevail before the current D.C. Circuit panel (this panel does not include Judge Garland).³⁹¹

Federalism

During his tenure on the D.C. Circuit,³⁹² Judge Garland has addressed issues of federalism and the scope of congressional power vis-à-vis the states in only a limited number of cases.³⁹³ Issues raised by these cases include the constraints imposed upon Congress's legislative power by the anticommandeering principles of the Tenth Amendment;³⁹⁴ the extent of the anticoercion

³⁸⁶ *Am. Trucking Ass'ns, Inc. v. EPA*, 195 F.3d 4, 16-17 (D.C. Cir. 1999) (denying of reh'ing en banc) (Tatel, J., dissenting from denial of reh'ing en banc).

³⁸⁷ 531 U.S. 457, 472-76 (2001).

³⁸⁸ 323 F.3d 1062, 1064-80 (D.C. Cir. 2003) (interpreting, *inter alia*, *United States v. Lopez*, 514 U.S. 549 (1995)); U.S. CONST. art. I, §8, cl. 3. Then Judge John Roberts dissented from a denial of en banc rehearing of the case on the grounds that the interpretation of the Commerce Clause, while in line with D.C. Circuit precedent, was too broad. *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of reh'ing en banc). See *infra* "Federalism."

³⁸⁹ 790 F.3d 138, 165, 174-84 (D.C. Cir. 2015). As previously noted, *supra* note 349, the court also rejected various other challenges. See generally 790 F.3d at 150-86.

³⁹⁰ See CRS Legal Sidebar WSLG1489, *UPDATED: Circuit Court Denies Stay of Clean Power Plan; States Ask Supreme Court to Step In (Part 2)*, by Alexandra M. Wyatt.

³⁹¹ For more information on the Clean Power Plan litigation, see CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al., at 35-40 (discussing judicial review).

³⁹² In his writings prior to being appointed to the D.C. Circuit, Judge Garland supported the application of federalism principles—at least in some circumstances—in arguing for more narrow applications of antitrust laws to preempt state and local economic regulations. See Garland, *Antitrust and State Action*, *supra* note 87, at 502.

³⁹³ See *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015); *Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Watters v. WMATA*, 295 F.3d 36 (D.C. Cir. 2002); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61 (2000).

³⁹⁴ See U.S. CONST. amend. X.

principles undergirding the Supreme Court's jurisprudence on the Spending Clause,³⁹⁵ the scope of the Commerce Clause,³⁹⁶ and the limits upon states' ability to invoke Eleventh Amendment immunity.³⁹⁷ Gleaning general trends from these few decisions is difficult, as it is unclear to what degree Judge Garland's conclusions may reflect his own approach to federalism questions, or what he perceives as adherence to Supreme Court precedent. However, it appears that in federalism cases in which there was some disagreement among the reviewing circuit judges, Judge Garland has tended to side with the federal government and narrowly construe judicial limits on Congress's power to act in a manner that could implicate the sovereign interests of the states.

In his judicial opinions, Judge Garland has had limited opportunity to assess the scope of the anticommandeering doctrine recognized by the Supreme Court. This doctrine posits that the Tenth Amendment prohibits Congress from "commandeering" states by compelling them to adopt laws³⁹⁸ or enforce federal regulatory schemes,³⁹⁹ by reserving to the states all powers not delegated to the federal government by the Constitution.⁴⁰⁰ In the one case before Judge Garland where an anticommandeering argument was raised, the precise issue appears to have been squarely resolved by Supreme Court precedent on conditional preemption. In that case, Judge Garland joined a per curiam opinion in *Mississippi Commission on Environmental Equality v. EPA* that rejected the argument that the CAA commandeers state officials by compelling them to enforce federal environmental requirements, on the grounds that the Supreme Court had "repeatedly affirmed the constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer [the program]."⁴⁰¹

Arguably more telling, however, are the cases where Judge Garland has adjudicated claims concerning the constraints the Tenth Amendment may impose upon the exercise of Congress's power under the Spending Clause.⁴⁰² For example, the *Mississippi Commission* court, having rejected plaintiffs' commandeering argument, likewise dismissed an argument that the CAA constitutes an impermissible and coercive use of Congress's spending powers insofar as it permits the EPA to withdraw funding for transportation projects in areas determined not to have met federal air quality standards.⁴⁰³ In so doing, the court examined the principle established by the Supreme Court in *South Dakota v. Dole*,⁴⁰⁴ and more recently refined in *National Federation of Independent Business (NFIB) v. Sebelius*,⁴⁰⁵ that when the "financial inducement offered by Congress [is] 'so coercive as to pass the point at which pressure turns into compulsion,'" the spending condition "runs contrary to our system of federalism."⁴⁰⁶ Adopting an arguably narrower

³⁹⁵ *Id.* at art. I, §8, cl. 1.

³⁹⁶ *Id.* at art. I, §8, cl. 3.

³⁹⁷ *Id.* at amend. XI.

³⁹⁸ See *New York v. United States*, 505 U.S. 144, 177 (1992).

³⁹⁹ See *Printz v. United States*, 521 U.S. 898, 919 (1997).

⁴⁰⁰ U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

⁴⁰¹ *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 174-75 (D.C. Cir. 2015) (per curiam opinion joined by Garland, C.J., Henderson & Srinivasan, JJ.) (internal citations and quotations omitted).

⁴⁰² See, e.g., *id.* at 176-80; *Barbour v. WMATA*, 374 F.3d 1161, 1164-70 (D.C. Cir. 2004).

⁴⁰³ *Miss. Comm'n*, 790 F.3d at 174-80.

⁴⁰⁴ *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

⁴⁰⁵ 567 U.S. ___, 132 S. Ct. 2566 (2012).

⁴⁰⁶ *Miss. Comm'n*, 790 F.3d at 176-77 (citing *NFIB*, 132 S. Ct. at 2604).

interpretation of *NFIB*, the D.C. Circuit panel in *Mississippi Commission* distinguished the CAA provision in question from the provisions of the Affordable Care Act (ACA) at issue in *NFIB*. In particular, the court reasoned that, whereas the ACA called for the entirety of a state's Medicaid funding to be withheld if the state failed to meet expanded health insurance coverage requirements, under the CAA, a state would not lose *all* its federal transportation funding, but a lower amount, which did "not even approach the 'over 10 percent of a State's overall budget' at issue in *NFIB*."⁴⁰⁷ Moreover, the per curiam opinion openly questioned in dicta whether a state could even challenge a spending condition as "unconstitutionally coercive" if it had "long accepted billions of dollars notwithstanding the challenged conditions," a possible limitation on state challenges to federal funding conditions not addressed by the Supreme Court in *Dole* and subsequent cases.⁴⁰⁸

In a slightly different context, Judge Garland more narrowly interpreted the *Dole* restrictions on the spending power in *Barbour v. WMATA*, affirming Congress's authority to condition federal transportation funding on a waiver of state sovereign immunity.⁴⁰⁹ *Barbour* centered on a Spending Clause argument divorced from the issue considered by the Supreme Court in *NFIB*. Namely, the state defendants in *Barbour*—Maryland and Virginia—argued that Congress, in conditioning acceptance of federal transportation funds on a state's agreement to waive sovereign immunity with regard to disability discrimination lawsuits lodged by state employees, had exceeded its powers under the Spending Clause by conditioning the monetary grants to the states on something "unrelated to the federal interest in transportation funds."⁴¹⁰ In an opinion joined by D.C. Circuit Judge and future Supreme Court Chief Justice John Roberts, Judge Garland concluded that *Dole*'s requirement that the conditions relate to the purpose of the funding was satisfied because Congress "did not want *any* federal funds to be used to facilitate disability discrimination, and ... exposing recipient entities to the threat of a federal damages action was an effective deterrent."⁴¹¹ Unlike Judge David Sentelle's dissent,⁴¹² Judge Garland's majority opinion in *Barbour*, relying on Supreme Court precedent regarding spending conditions that imposed restrictions on *racial* discrimination by state governments,⁴¹³ gave considerable deference to Congress's judgment that a waiver of sovereign immunity was appropriate to protect federal funds from being used—even if only indirectly⁴¹⁴—for intentional *disability* discrimination.⁴¹⁵ In

⁴⁰⁷ *Id.* at 178 (citing *NFIB*, 132 S. Ct. at 2604-05).

⁴⁰⁸ *Id.* at 179.

⁴⁰⁹ *Barbour v. WMATA*, 374 F.3d 1161, 1168 (D.C. Cir. 2004). Under 42 U.S.C. §2000d-7, federal funds are conditioned on a state's willingness to subject itself to damages lawsuits for discriminating against employees on the basis of disability.

⁴¹⁰ *Barbour*, 374 F.3d at 1168 (internal citations and quotations omitted). *Dole* established that conditions on federal grants are invalid if "unrelated" to the federal interest in the program. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). See also *New York v. United States*, 505 U.S. 144, 167 (1992) ("Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending....").

⁴¹¹ *Barbour*, 374 F.3d at 1168.

⁴¹² In dissent, Judge Sentelle stressed that a robust interpretation of *Dole*'s nexus requirement is a vital restraint on Congress's spending power and "essential to maintain some semblance of the Framers' original framework of a federal government of limited and enumerated regulatory power." *Id.* at 1172 (Sentelle, J., dissenting). Judge Sentelle found "no reasonably close relationship" between the federal grant of transportation funds and subjecting WMATA to lawsuits for disability discrimination in employment. *Id.* He further observed that "[t]he core of our disagreement is whether Congress's disapproval of disability discrimination is enough of a connection between the transportation funds and the condition imposed here." *Id.* at 1172 n.1.

⁴¹³ *Id.* at 1168-69 (citing *Lau v. Nichols*, 414 U.S. 563, 569 (1974) and *Grove City College v. Bell*, 465 U.S. 555, 575 (1984)).

⁴¹⁴ While acknowledging that the federal funds in question were not directly "tied" to disability related issues, the majority opinion in *Barbour* relied on *Sabri v. United States*, 541 U.S. 600 (2004), wherein the Supreme Court held (continued...)

this sense, the conclusions reached in *Mississippi Commission* and *Barbour* may signal that Judge Garland believes that *Dole* and its progeny impose relatively limited restrictions on Congress's spending powers.

Of the various federalism cases interpreting the scope of federal powers granted by the Constitution, perhaps Judge Garland's most extensive writings have been with respect to Congress's power under the Commerce Clause.⁴¹⁶ The Supreme Court has established, in cases such as *United States v. Lopez*⁴¹⁷ and *United States v. Morrison*,⁴¹⁸ that the Commerce Clause provides Congress with broad power to regulate "channels of interstate commerce"; "instrumentalities of interstate commerce"; and "those activities that substantially affect interstate commerce."⁴¹⁹ In interpreting the scope of the third category, Judge Garland, citing to both Supreme Court and circuit precedent, has reasoned that in order to evaluate potential interstate effects, federal courts must "focus[] on the activity that the federal government seeks to regulate," as well as "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce."⁴²⁰ In an opinion issued a little over a month after the Supreme Court decided *Morrison*, Judge Garland, writing on behalf of a unanimous circuit panel in *Allied Local & Regional Manufacturers Caucus v. EPA*, dismissed a challenge to a CAA provision authorizing the EPA to regulate architectural coatings for purposes of limiting volatile organic compound emissions.⁴²¹ In so doing, the court held that "none of the considerations" that had led the Supreme Court to find "Congress's authority wanting" in *Lopez* or *Morrison* had "any application to section 183(e) of the [CAA]."⁴²² In particular, Judge Garland concluded that the provisions in question were distinguishable from those legislative enactments recently invalidated in *Morrison* in that the CAA regulated economic activity; contained a jurisdictional element and express congressional findings describing the problems of "interstate transport of ozone"; and had a link to substantial effects on interstate commerce that was not "attenuated."⁴²³

In perhaps a closer case, Judge Garland wrote on behalf of a D.C. Circuit panel in *Rancho Viejo, LLC v. Norton*,⁴²⁴ a case involving a challenge to a FWS determination that a developer's construction of a fence as part of a planned commercial development resulted in a "take" of

(...continued)

that Congress could, under the Spending Clause, criminalize the bribery of state officials who receive federal funds even if federal funds are not directly implicated by a given bribe, in concluding that no direct connection is needed between the grant and the condition imposed. *Barbour*, 374 F.3d at 1170. Instead, Judge Garland concluded that the "connection between the congressional goal ... and the congressional means" at issue in *Barbour* was "close enough to be sustained." *Id.* at 1168.

⁴¹⁵ *Id.* at 1170.

⁴¹⁶ See Miss. Comm'n on Envtl. Quality v. EPA, 790 F.3d 138 (D.C. Cir. 2015); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61 (2000).

⁴¹⁷ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that provisions of the Gun-Free School Zones Act were beyond Congress's power under the Commerce Clause).

⁴¹⁸ *United States v. Morrison*, 529 U.S. 598 (2000) (holding that certain provisions of the Violence Against Women Act were beyond Congress's power under the Commerce Clause).

⁴¹⁹ *Lopez*, 514 U.S. at 558-59.

⁴²⁰ *Rancho Viejo*, 323 F.3d at 1069-70 (citing *Lopez*, 514 U.S. at 561).

⁴²¹ *Allied Local*, 215 F.3d at 61.

⁴²² *Id.* at 83.

⁴²³ *Id.* at 81-83.

⁴²⁴ *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1062 (D.C. Cir. 2003).

arroyo southwestern toads in violation of the ESA.⁴²⁵ Rejecting assertions that the federal government was regulating activities that were both wholly intrastate and noneconomic in nature,⁴²⁶ Judge Garland wrote that the fact that certain toads' habitat did not extend beyond the state of California did not serve as a basis for invalidating the provisions of the ESA, as these provisions regulated "takings, not toads."⁴²⁷ In Judge Garland's view, the "regulated activity" in question was not the harm to the toad, but rather the construction of the planned commercial development, an activity with a clear and substantial impact on interstate commerce.⁴²⁸ In so concluding, Judge Garland rejected claims that the ESA provided the federal government with power over land-use decisions that the plaintiffs alleged were "an area of traditional state concern."⁴²⁹ Relying heavily on an earlier decision by the U.S. Court of Appeals for the Fourth Circuit,⁴³⁰ Judge Garland ultimately concluded that "the protection of endangered species cannot fairly be described as a power 'which the Founders denied the National Government and reposed in the States.'"⁴³¹ Judge Garland's opinion in *Rancho Viejo* was relied upon almost a decade later by a D.C. Circuit panel in *Mississippi Commission*, where the panel (of which Judge Garland was a member) rejected a Commerce Clause challenge to Congress's authority to regulate local nitrogen oxide emissions on the grounds that the "regulated activity" under the CAA was not the release of emissions, but rather "the activities that produce the emission."⁴³² Applying this reasoning, the court held that the entities producing the emissions were "indisputably [] engaged in substantial interstate commerce."⁴³³

Judge Garland's opinion in *Rancho Viejo* prompted criticism when the plaintiffs unsuccessfully petitioned the D.C. Circuit for en banc rehearing of the case.⁴³⁴ In particular, Judge Sentelle disagreed that the Supreme Court's decisions *Lopez* and *Morrison* could be read to allow Congress to "regulate any activity if the act of regulating catches an entity or an action that is itself commercial independent of the noncommercial nature of the regulated entity and activity."⁴³⁵ Instead, Judge Sentelle contended that Judge Garland's approach could be seen to "continue[] [the D.C. Circuit's] divergence from contemporary Supreme Court Commerce Clause jurisprudence" because the "protection of a non-commercial, purely local toad is not within any of the *Lopez* categories."⁴³⁶ Judge Roberts applied similar reasoning in a separate dissent, arguing that to sustain the ESA on the grounds that the "commercial development constitutes interstate

⁴²⁵ *Id.* at 1065.

⁴²⁶ *Id.* at 1071.

⁴²⁷ *Id.* at 1072.

⁴²⁸ *Id.* ("That regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it threatens.").

⁴²⁹ *Id.* at 1079.

⁴³⁰ *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).

⁴³¹ *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1079 (D.C. Cir. 2003) (quoting *Gibbs*, 214 F.3d at 500).

⁴³² *Miss. Comm'n on Env'tl. Quality v. EPA*, 790 F.3d 138, 182 (D.C. Cir. 2015) (emphasis added).

⁴³³ *Id.* at 181.

⁴³⁴ *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (denying reh'ing en banc).

⁴³⁵ *Id.* at 1159 (Sentelle, J., dissenting from denial of reh'ing en banc).

⁴³⁶ *Id.* at 1158-59 (Sentelle, J., dissenting). Judge Sentelle also appears to have disagreed with Judge Garland's views of the scope of Congress's power under the Commerce Clause in dissenting from the D.C. Circuit's denial of en banc review in *Navegar, Inc. v. United States*, 200 F.3d 868 (D.C. Cir. 2000). Whereas Judge Garland voted to deny en banc review of a panel decision holding that the Violent Crime Control and Law Enforcement Act of 1994 was within Congress's power under the Commerce Clause, Judge Sentelle concluded that the decision "perpetuate[d] an approach to Commerce Clause jurisprudence hopelessly out of date under contemporary Supreme Court interpretations of the Constitution." *Rancho Viejo*, 334 F.3d at 869 (Sentelle, J., dissenting from denial of reh'ing en banc).

commerce” seemed “inconsistent” with *Lopez* and *Morrison* insofar as the majority effectively “ask[ed] whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does,”⁴³⁷ “effectively obliverat[ing]” the “limiting purpose” of the Commerce Clause.⁴³⁸ As a consequence, Judge Garland’s Commerce Clause jurisprudence suggests that he has adopted a construction of the clause that provides the federal government with broad authority to regulate various forms of activity that others have viewed as noneconomic, intrastate activity not subject to federal regulation.

Finally, with respect to the doctrine of state sovereign immunity that the Supreme Court has recognized underlies the Eleventh Amendment,⁴³⁹ Judge Garland has authored two arguably relevant opinions having divergent results. In *Watters v. WMATA*, he wrote a unanimous panel opinion holding that the state signatories to the WMATA interstate compact were immune from the imposition or enforcement of an attorney’s lien, narrowly reading the partial waiver of sovereign immunity contained in the compact.⁴⁴⁰ Nonetheless, in *Barbour*, Judge Garland concluded that the states participating in WMATA had waived immunity through their acceptance of federal transit money, as the “language” of the Civil Rights Remedies Equalization Act of 1986 “unambiguously conditions a state agency’s acceptance of federal funds on its waiver of Eleventh Amendment immunity.”⁴⁴¹ Importantly, Judge Garland’s majority opinion in *Barbour* held that a clear condition imposed in a federal statute suffices to waive sovereign immunity, and a state’s beliefs when accepting federal funds are irrelevant in considering whether a waiver of sovereign immunity was “knowing.”⁴⁴² Such an approach limits an alternate route to maintain an immunity defense recognized by another federal court of appeals.⁴⁴³ As a result, *Barbour*, like some other federalism cases discussed here, could be seen to manifest some skepticism on Judge Garland’s part about judicially imposed limits intended to protect the sovereign rights of states. However, because of the limited number of cases in which he ruled on the scope of federal power vis-à-vis

⁴³⁷ *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting from denial of reh’ing en banc) (emphasis in original).

⁴³⁸ *Id.* (quoting *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634–35 (5th Cir. 2003)). Judge Roberts’s dissent from rehearing was premised on the idea that *Lopez* and *Morrison* were facial challenges to a federal statute, which, under *United States v. Salerno*, 481 U.S. 739 (1987), meant that the Court in striking down these laws was of the view that there were no circumstances in which the laws could be constitutionally applied. 334 F.3d at 1160 (Roberts, J., dissenting). On this basis, Judge Roberts concluded that the appropriate focus could not be on whether the challenged regulation substantially affects interstate commerce; otherwise, “if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring,” there would be a circumstance where the law in *Lopez* could be applied constitutionally. *Id.*

Although the future Chief Justice felt Judge Garland’s approach was inconsistent with Supreme Court precedent, Judge Roberts himself differed in tone and approach from Judge Sentelle in his dissent, suggesting that Judge Garland had “faithfully applied” D.C. Circuit precedent as established in *National Association of Home Builders (NAHB) v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). *Rancho Viejo*, 334 F.3d at 1160 (Roberts, J., dissenting). Judge Roberts further noted, however, that he viewed en banc review as “appropriate” in this case because the panel’s approach in *NAHB* “conflicts with the opinion of a sister circuit—a fact confirmed by that circuit’s quotation from the *NAHB* dissent. Such review would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent.” *Id.* In particular, Judge Roberts suggested that the law in question in *Rancho Viejo* could be sustained on alternate grounds; namely, that a species that resides wholly within one state can have a substantial effect on interstate commerce. *Id.*

⁴³⁹ *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

⁴⁴⁰ *Watters v. WMATA*, 295 F.3d 36, 40 (D.C. Cir. 2002) (holding that a provision that made WMATA liable “for its contracts and for its torts and those of its ... agents” fell “far short of a clear and unequivocal waiver of WMATA’s immunity against attorney’s charging liens.”).

⁴⁴¹ *Barbour v. WMATA*, 374 F.3d 1161, 1164 (D.C. Cir. 2004).

⁴⁴² *Id.* at 1166–67.

⁴⁴³ *See Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001).

the states, it is difficult to conclude with certainty that Judge Garland would, if appointed to the Supreme Court, be less receptive to federalism-based arguments than Justice Scalia had been.⁴⁴⁴

Freedom of Religion

During Judge Garland's tenure on the D.C. Circuit, he has not authored any opinions indicating in any detail his substantive interpretation of constitutional or statutory religious freedom laws. However, he has joined opinions involving religious freedom issues, including constitutional and statutory challenges arising under the First Amendment and the Religious Freedom Restoration Act (RFRA).⁴⁴⁵ Arguably the most significant religious freedom case in which Judge Garland had a role is *Priests for Life v. HHS*, a case currently under review by the Supreme Court.⁴⁴⁶ The original decision in that case upheld a contraceptive coverage requirement of the Affordable Care Act that was generally applicable to employers, finding no violation of the protection for religious exercise by employers available under RFRA.⁴⁴⁷ Although he did not serve on the panel that originally heard the case, Judge Garland participated in the court's decision to deny a petition for en banc rehearing in the case.⁴⁴⁸ The decision to deny rehearing was issued per curiam, and Judge Garland did not join other judges' concurring or dissenting opinions for that decision.⁴⁴⁹

Although Judge Garland's role in *Priests for Life* provides little substantive insight into his legal reasoning on the issue of religious freedom,⁴⁵⁰ it may be notable depending on the High Court's eventual disposition of the consolidated contraceptive coverage cases.⁴⁵¹ The Court appeared evenly divided following oral arguments, which could lead it to hold the cases over to its next term for rehearing.⁴⁵² If Judge Garland were to be confirmed prior to the Court's potential rehearing, he may play an important role in deciding these cases.⁴⁵³

⁴⁴⁴ See CRS Scalia report, *supra* note 9, at 22-24 (noting that "Justice Scalia viewed federalism ... to be 'one of the Constitution's structural protections of liberty'" (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997) (Scalia, J.)).

⁴⁴⁵ See, e.g., *Levitan v. Ashcroft*, 281 F.3d 1313, 1315 (D.C. Cir. 2002) (Edwards, J., joined by Garland & Henderson, JJ.) (reversing the district court's decision, which had granted summary judgment to uphold a prison regulation prohibiting inmates' consumption of wine as a religious sacrament under the Free Exercise Clause and remanding the case for further consideration); *Henderson v. Kennedy*, 253 F.3d 12, 13-19 (D.C. Cir. 2001) (Randolph, J., Garland & Henderson, JJ.) (affirming the district court's decision, which had granted summary judgment upholding a generally applicable restriction limiting commercial transactions, including the sale of religious items, on the National Mall under constitutional and statutory religious freedom claims), *reh'g denied*, 265 F.3d 1072 (D.C. Cir. 2001), *cert. denied*, 535 U.S. 986 (2002).

⁴⁴⁶ 772 F.3d 229 (D.C. Cir. 2014), *reh'g en banc denied*, 808 F.3d 1 (D.C. Cir. 2015), *cert. granted*, --- U.S. ---, 136 S. Ct. 446 (2015).

⁴⁴⁷ *Priests for Life*, 772 F.3d at 237. For further discussion of the requirement and related litigation, see CRS Report R44422, *Nonprofit Challenges to the Contraceptive Coverage Requirement: The Meaning of Substantial Burdens on Religious Exercise Under the Religious Freedom Restoration Act*, by Cynthia Brown.

⁴⁴⁸ See *Priests for Life v. UHHS*, 808 F.3d 1 (D.C. 2015) (denying reh'ing en banc).

⁴⁴⁹ *Id.*

⁴⁵⁰ See *supra* "Predicting Nominees' Future Decisions on the Court" (discussing the value of interpreting a judge's votes to grant or deny a rehearing en banc).

⁴⁵¹ In addition to *Priests for Life*, the Court has consolidated six other cases for its review, each raising similar claims. See *Zubik v. Burwell*, No. 14-1418, 577 U.S. ___, 136 S. Ct. 444 (2015).

⁴⁵² See CRS Legal Sidebar WSLG1534, *Supreme Court, Seemingly Divided at Oral Arguments, Requests Potential Compromises in Contraceptive Coverage Challenges*, by Cynthia Brown.

⁴⁵³ Nonetheless, Judge Garland's previous role in considering the case at the D.C. Circuit could result in him electing to recuse himself from the Court's reconsideration of the cases. Supreme Court Justices are not formally subject to a code (continued...)

Freedom of Speech

While serving on the D.C. Circuit, Judge Garland has ruled in a number of major free speech cases. In particular, because the D.C. Circuit has exclusive jurisdiction over certain election law appeals,⁴⁵⁴ the bulk of these matters have involved free speech issues arising in the context of campaign finance regulations and rules governing political parties.⁴⁵⁵ Perhaps most significantly, Judge Garland wrote the opinion for a unanimous en banc court in *Wagner v. FEC*,⁴⁵⁶ upholding the prohibition on campaign contributions by certain federal government contractors⁴⁵⁷ against a challenge under the First Amendment and the Equal Protection clause of the Fifth Amendment. The court's ruling in *Wagner* was narrow in the sense that it was limited to a ban on contractors making contributions to candidates, parties, and traditional political action committees (PACs)⁴⁵⁸ during the negotiation or performance of a government contract.⁴⁵⁹ The *Wagner* court concluded that the federal ban serves "sufficiently important" government interests by guarding against quid pro quo corruption (and the appearance thereof) and protecting merit-based administration.⁴⁶⁰ Relying on the Supreme Court's 2003 ruling in *FEC v. Beaumont*, Judge Garland's opinion applied the less rigorous "closely drawn" standard and rejected the argument that the Supreme Court's 2010 ruling in *Citizens United v. FEC* cast doubt on *Beaumont*.⁴⁶¹ Perhaps revealing

(...continued)

of judicial conduct that governs recusal. See Admin. Office of the U.S. Courts, *Code of Conduct for United States Judges*, <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (last visited April 13, 2016); see also Letter from John Roberts, Chief Justice, U.S. Supreme Court, to Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary (February 17, 2012) (copy on file with CRS Legislative Attorney Cynthia Brown). Federal law generally requires federal judges to recuse themselves in proceedings in which their impartiality may be questioned, among other reasons. See 28 U.S.C. §455. While this disqualification statute applies to Supreme Court Justices, it lacks an enforcement mechanism at that stage of litigation, meaning that there is no process by which Justices may be forced to recuse themselves. See CRS Legal Sidebar WSLG600, *Judicial Ethics and the U.S. Supreme Court*, by Cynthia Brown.

⁴⁵⁴ See *FEC v. Nat'l Right to Work Comm'n*, 459 U.S. 197 (1983) (noting exclusive jurisdiction in the D.C. district court under Section 309(a)(8)(A) of the Federal Election Campaign Act (FECA) of 1971 (codified, as amended, in 52 U.S.C. §30109(a)(8)(A)).

⁴⁵⁵ On matters outside the context of First Amendment law, but touching on election law more broadly, it is notable that Judge Garland was a member of a three-judge panel of the U.S. District Court for the District of Columbia which issued an unsigned opinion that, among other things, denied preclearance under the Voting Rights Act (VRA), 52 U.S.C. §10304; 28 C.F.R. §51.10, to proposed changes in Florida voting law. See *Florida v. United States*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (per curiam). For further discussion on preclearance and the VRA, see CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

⁴⁵⁶ 793 F.3d 1 (D.C. Cir. 2015) (en banc), cert. denied sub nom., *Miller v. FEC*, 136 S. Ct. 895 (2016).

⁴⁵⁷ 52 U.S.C. §30119(a); 11 C.F.R. §115.1(b). This FECA prohibition applies at any time between the earlier of when the request for proposals is sent out or contract negotiations commence, and the termination of negotiations or the completion of contract performance, whichever is later. See *id.* The term "contract" includes "[a] sole source, negotiated, or advertised procurement." 11 C.F.R. §115.1(c)(1).

⁴⁵⁸ Under FECA, a traditional political action committee or PAC (also known as a "separate segregated fund"), as opposed to a super PAC, is permitted to make contributions to political parties and candidates, and is subject to contribution limits. 52 U.S.C. §§30116(a)(2); 30118(b)(2)(C).

⁴⁵⁹ See *Wagner*, 793 F.3d at 3-4 ("In short, the plaintiffs challenge § 30119 only insofar as it bans campaign contributions by individual contractors to candidates, parties, or traditional PACs that make contributions to candidates and parties.").

⁴⁶⁰ *Id.* at 21-26. For further discussion, see CRS Legal Sidebar WSLG1335, *D.C. Circuit Upholds Ban on Campaign Contributions by Federal Contractors*, by L. Paige Whitaker.

⁴⁶¹ 793 F.3d 1, 6 (D.C. Cir. 2015) (citing *FEC v. Beaumont*, 539 U.S. 146, 161-63 (2003); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("But the reason for applying strict scrutiny [in *Citizens United*] was not that the case involved a ban, but that it involved independent expenditures rather than contributions.")).

aspects of Judge Garland's views on the constitutionality of campaign finance regulation more broadly, the opinion deferred to Congress's judgment on how best to serve the government's interests. Quoting from *Beaumont*, the opinion observed that "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'"⁴⁶² In contrast, judicial deference to congressional determinations has arguably not been as evident in the Supreme Court's more recent campaign finance jurisprudence.⁴⁶³ At the same time, because of the unanimity of the *Wagner* decision and the decision's relatively narrow scope, it may be difficult to draw any firm conclusions regarding Judge Garland's views on judicial deference toward congressional determinations respecting campaign restrictions from the *Wagner* decision, in and of itself.

Nonetheless, in another context, Judge Garland generally took a favorable view of the regulation of federal lobbyists. Specifically, in *National Association of Manufacturers (NAM) v. Taylor*,⁴⁶⁴ he authored a unanimous opinion rejecting a First Amendment challenge to a federal lobbying disclosure law. The court found no evidence of harassment connected to lobbying disclosures⁴⁶⁵ that might justify more skepticism with regard to the disclosure requirements, and, in a display of deference to Congress arguably like that in *Wagner*, ultimately concluded that there was "no reason why Congress cannot enact a scheme that plausibly yields a significant portion of the information it seeks."⁴⁶⁶

On the other hand, during Judge Garland's tenure on the D.C. Circuit, the appellate court issued a well-known campaign finance ruling that resulted in the establishment of super PACs, political committees that spend independently of any candidate or party and are permitted to receive unlimited contributions.⁴⁶⁷ In *SpeechNow.org v. FEC*,⁴⁶⁸ Judge Garland joined, but did not author, a unanimous en banc opinion holding that limits on contributions to groups that make only independent expenditures are unconstitutional.⁴⁶⁹ Relying on the Supreme Court's ruling in *Citizens United*, the court reasoned that if independent expenditures do not give rise to corruption, then contributions to groups making only independent expenditures do not give rise to corruption.⁴⁷⁰ Thus, the court held that contribution limits are unconstitutional as applied to such

⁴⁶² 793 F.3d at 14 (quoting *Beaumont*, 539 U.S. at 162 n.9 (2003)).

⁴⁶³ See, e.g., *McCutcheon v. FEC*, --- U.S. ---, 134 S. Ct. 1434, 1459 (2014) (observing that, instead of the law that the Court held unconstitutional, Congress has "numerous alternative approaches available" to accomplish the same goals); *Davis v. FEC*, 554 U.S. 724, 742 (2008) (cautioning that it is "a dangerous business for Congress to use the election laws to influence the voters' choices"). See also *Citizens United v. FEC*, 558 U.S. 310, 460 (2010) (Stevens, J., concurring in part and dissenting in part) (characterizing the majority as not "show[ing] any deference to a coordinate branch of Government" and being "dismissive of Congress").

⁴⁶⁴ 582 F.3d 1 (D.C. Cir. 2009).

⁴⁶⁵ See *id.* at 22.

⁴⁶⁶ *Id.* at 18. Judge Garland has exhibited similar sympathies for Congress's broader interests with respect to campaign finance regulation in cases outside of the context of the First Amendment. For instance, in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), Judge Garland joined a unanimous court in requiring the FEC to rewrite more stringent campaign finance regulations. Addressing one regulation, the court found it insufficient to further Congress's goal of prohibiting unregulated "soft money" from being used in connection with federal elections. *Id.* at 925.

⁴⁶⁷ Although generally regulated as political committees under federal campaign finance law, super PACs, which are also known as independent expenditure-only committees, are not subject to contribution limits. For further discussion, see CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker, at 8.

⁴⁶⁸ 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom.*, *Keating v. FEC*, 562 U.S. 1003 (2010).

⁴⁶⁹ See *id.* at 696.

⁴⁷⁰ See *id.* (citing *Citizens United*, 558 U.S. at 310).

groups.⁴⁷¹ In view of the Supreme Court's binding precedent in *Citizens United*, the analysis in *SpeechNow.org* was necessarily "straightforward," in the court's view.⁴⁷² Therefore, although the ruling was consequential, it is difficult to infer Judge Garland's campaign finance philosophy from this case.⁴⁷³

Regarding the rights of political parties, Judge Garland's opinions have produced mixed results for the parties themselves, while generally interpreting the First Amendment as having limited import in deciding such disputes. In *Libertarian Party v. District of Columbia Board of Elections*,⁴⁷⁴ he joined a unanimous opinion holding that a Washington, D.C. law which prevented write-in votes for a third-party candidate from being officially tallied and reported did not amount to a severe burden on that individual's associational rights and, therefore, did not require the application of strict scrutiny.⁴⁷⁵ On the other hand, in *LaRouche v. Fowler*,⁴⁷⁶ Judge Garland's opinion favored a political party's right to decide its own nominees. Among other things, the court rejected a First Amendment challenge to a party's effort to limit who can run as a candidate of the party on the grounds that the party's effort was a rational means of advancing its interest in winning elections.⁴⁷⁷ With possible relevance to the current presidential party nominating process, Judge Garland wrote, "A party may, of course, pay heavily at the polls for the perception that it treats its members, delegates, or candidates unfairly. But that is a matter for the party to weigh, and for the people to decide in the general election. It is not a basis upon which a court can intervene as long as the party's processes rationally advance its legitimate interests."⁴⁷⁸

Outside the election law context, Judge Garland has, relative to other areas of law, authored or joined few opinions analyzing the Free Speech Clause of the First Amendment.⁴⁷⁹ Of these cases,

⁴⁷¹ See *id.* at 689.

⁴⁷² *Id.* at 693.

⁴⁷³ See, e.g., Richard L. Hasen, *Garland Is No Sure Bet on Overturning Citizens United*, DAILY J. (March 21, 2016), <http://electionlawblog.org/wp-content/uploads/hasen-garland-citizens.pdf> ("We should not read too much into Garland's vote in the *SpeechNow v. Federal Election Commission* (2010) case, which established Super PACs. That unanimous ruling was essentially compelled by the Supreme Court's *Citizens United* decision.").

⁴⁷⁴ 682 F.3d 72 (D.C. Cir. 2012).

⁴⁷⁵ See *id.* at 76-77.

⁴⁷⁶ 152 F.3d 974 (D.C. Cir. 1998).

⁴⁷⁷ See *id.* at 998.

⁴⁷⁸ *Id.* at 997-98.

⁴⁷⁹ For examples of Judge Garland's written opinions on free speech, see, e.g., *Mpoy v. Rhee*, 758 F.3d 285, 287 (D.C. Cir. 2014) (Garland, J.) (affirming the dismissal of a First Amendment retaliation lawsuit brought by a District of Columbia special education teacher); *Lee v. U.S. Dep't of Justice (DOJ)*, 428 F.3d 299, 302 (D.C. Cir. 2005) (en banc) (Garland, J., dissenting from denial of reh'ing en banc) (contending, in the context of a Privacy Act lawsuit, that the First Amendment requires balancing the public interest in protecting a reporter's sources against the private need for civil discovery); *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1302 (D.C. Cir. 2005) (Garland, J.) (reversing a district court order upholding a regulation banning certain solicitations on Postal Service property); *Schoenbohm v. FCC*, 204 F.3d 243, 249 (D.C. Cir. 2000) (Garland, J.) (rejecting a First Amendment challenge to an FCC decision not to renew a radio station operator's license). Outside of cases interpreting the Free Speech Clause of the First Amendment, Judge Garland upheld, against a First Amendment Petition Clause challenge, a provision in an appropriations act barring the Federal Transit Administration from enforcing certain regulations related to charter bus service. See *Am. Bus. Ass'n v. Rogoff*, 649 F.3d 734, 736-37 (D.C. Cir. 2011).

For examples of free speech cases that Judge Garland participated in while on the D.C. Circuit, see, e.g., *Navab-Safavi v. Glassman*, 637 F.3d 311, 313 (D.C. Cir. 2011) (Sentelle, C.J., joined by Garland & Williams, JJ.); *Thompson v. District of Columbia*, 428 F.3d 283 (D.C. Cir. 2005) (Tatel, J., joined by Edwards & Garland, JJ.); *Trans Union, LLC v. FTC*, 295 F.3d 42, 53 (D.C. Cir. 2002) (Henderson, J., joined by Edwards & Garland, JJ.); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584 (D.C. Cir. 2002) (Tatel, J., joined by Garland & Silberman, JJ.); *Americable Int'l v. Dep't of Navy*, 129 F.3d 1271, 1275 (D.C. Cir. 1997) (Henderson, J., joined by Garland & Wald, JJ.).

(continued...)

his most notable majority opinion was perhaps the 2005 case⁴⁸⁰ *Initiative and Referendum Institute (IRI) v. United States Postal Service*.⁴⁸¹ In that case, Judge Garland, on behalf of the court, held that a Postal Service regulation wholly prohibiting the solicitation of signatures outside postal buildings did not withstand First Amendment scrutiny as a valid “time, place, and manner” regulation of speech, as the rule was “neither ... narrowly tailored nor ensure[d] ample alternative channels of communication.”⁴⁸² The Postal Service had defended the prohibition on the grounds that solicitors “at times” become disruptive, “occasionally” distracting postal employees from their duties.⁴⁸³ In Judge Garland’s opinion, this argument all but conceded that the “across-the-board” prohibition “necessarily bars much solicitation that is not disruptive,” leading to the conclusion that a “substantial portion of the burden on speech does not serve to advance” the government’s interest.⁴⁸⁴ The ruling in *IRI* was not only unanimous, but rested on two separate and independent grounds casting doubt on the constitutionality of the underlying regulation,⁴⁸⁵ suggesting that the case was not terribly controversial and may not provide any broad insights into Judge Garland’s approach to free speech questions.

At the same time, a few trends do appear in Judge Garland’s free speech rulings outside the context of election law. On the issue of commercial speech⁴⁸⁶—an area of law where narrow majorities of the Supreme Court have struck down state and federal regulations on the marketing of certain products in recent years⁴⁸⁷—he has joined majority opinions affirming the Federal Trade Commission’s authority to prohibit commercial speech it finds to be misleading,⁴⁸⁸ and otherwise protect certain consumer interests.⁴⁸⁹ And in *American Meat Institute v. USDA*, an en

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For an example of Judge Garland’s scholarship that touched upon freedom-of-speech principles prior to his tenure on the D.C. Circuit, see Garland, *Antitrust and State Action*, *supra* note 87, at 516-18.

⁴⁸⁰ See, e.g., Jeffrey Rosen, *The Nomination of Merrick Garland Is a Victory for Judicial Restraint*, THE ATLANTIC, (March 17, 2016), available at <http://www.theatlantic.com/politics/archive/2016/03/why-merrick-garland-is-a-judges-judge/474246/> (citing the ruling in *IRI* as evidence that Garland is a “robust defender ... of the First Amendment rights of speech and petition”).

⁴⁸¹ See *Initiative & Referendum Inst.*, 417 F.3d at 1302.

⁴⁸² *Id.* at 1312. The *IRI* court ultimately remanded the case—which involved a facial challenge to the Postal Service regulation—for a determination as to whether the regulation abridged a substantial amount of protected free speech in public forums. *Id.* at 1318.

⁴⁸³ *Id.* at 1307-08.

⁴⁸⁴ *Initiative & Referendum Inst. v. USPS*, 417 F.3d 1299, 1307-08 (D.C. Cir. 2005) (quoting *Am. Library Ass’n v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994)).

⁴⁸⁵ See *id.* at 1306-07 (concluding that the regulation in question, while being content neutral and serving a significant interest, was not narrowly tailored and did not preserve ample alternative channels of communication).

⁴⁸⁶ Commercial speech is “speech that *proposes* a commercial transaction.” *Board of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original). For more information on the commercial speech doctrine, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane, at 14-17.

⁴⁸⁷ See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) (6-3 decision) (striking down a Vermont law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors for marketing purposes); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (5-4 decision) (striking down a federal restriction on the advertising or promotion of compounded drugs).

⁴⁸⁸ See, e.g., *POM Wonderful v. FTC*, 777 F.3d 478, 500 (D.C. Cir. 2015) (“[I]nsofar as the FTC imposed liability on petitioners for the nineteen ads found to be deceptive by the administrative law judge, the Commission sanctioned petitioners for misleading speech unprotected by the First Amendment.”).

⁴⁸⁹ See, e.g., *Trans Union, LLC v. FTC*, 295 F.3d 42, 53 (D.C. Cir. 2002) (holding that the government’s interest in “protecting the privacy of consumer credit information” is a substantial one that justifies the regulation of commercial speech).

banc ruling reviewing whether a regulation mandating disclosure of country-of-origin information for certain meat products was improperly compelled speech in violation of the First Amendment, Judge Garland joined a majority of the court in upholding the regulation.⁴⁹⁰ In so doing, the D.C. Circuit concluded that the government can require disclosures not only to remedy potential consumer deception, but also in the context of a long history of consumer interest in the particular disclosure.⁴⁹¹ These decisions have led some to suggest that Judge Garland may prefer a more deferential approach to the government with respect to analyzing the constitutionality of commercial speech regulations.⁴⁹² In the context of public employee speech,⁴⁹³ an area of First Amendment law in which—in contrast to commercial speech cases—narrow majorities of the High Court have, at times, tended to *favor* the authority of the government over the rights of employees,⁴⁹⁴ Judge Garland has joined several majority opinions siding with public employees who alleged that their employers retaliated against them for engaging in protected speech.⁴⁹⁵ And in *Mpoy v. Rhee*, Judge Garland authored an opinion that, while ultimately ruling for the government on qualified immunity grounds,⁴⁹⁶ acknowledged that controlling D.C. Circuit precedent “could be in tension” with a recent Supreme Court case that may have “narrow[ed] ... the realm of employee speech left unprotected” by the Constitution.⁴⁹⁷ Collectively, his rulings on commercial speech and public employee speech may signal areas of First Amendment law where he could, if elevated to the High Court, depart from recent majorities of the Court that have included Justice Scalia.

Perhaps Judge Garland’s most noteworthy writings on free speech issues outside the context of election law involve the rights of the press to gather and maintain confidential sources.⁴⁹⁸

⁴⁹⁰ *Am. Meat Inst. v. USDA*, 760 F.3d 18, 20 (D.C. Cir. 2014) (en banc) (holding that a rational basis standard of review for commercial disclosure requirements of “purely factual and uncontroversial information” could be applied to requirements beyond those intended to remedy consumer deception).

⁴⁹¹ *Id.* at 23 (“But here we think several aspects of the government’s interest in country-of-origin labeling for food combine to make the interest substantial: the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak.”).

⁴⁹² Timothy Noah & Brian Mahoney, *How Liberal is Merrick Garland?*, POLITICO (March 16, 2016), <http://www.politico.com/story/2016/03/supreme-court-merrick-garland-220904> (“Invoking First Amendment rights has become a common vehicle for conservatives to challenge agency regulations, but [Judge] Garland has shown little receptivity to that argument.”).

⁴⁹³ For more information on the public employee speech doctrine, see Ruane, *supra* note 486, at 30-36.

⁴⁹⁴ See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that statements made by public employees pursuant to their official duties receive no First Amendment protection); *but see Lane v. Franks*, --- U.S. ---, 134 S. Ct. 2369, 2378 (2014) (holding that the First Amendment “protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities”).

⁴⁹⁵ See, e.g., *Navab-Safavi v. Glassman*, 637 F.3d 311, 313 (D.C. Cir. 2011) (affirming the district court’s denial of qualified immunity on a public employee’s First Amendment claim); *LeFande v. District of Columbia*, 613 F.3d 1155, 1161 (D.C. Cir. 2010) (holding that a First Amendment retaliation lawsuit was improperly dismissed because the underlying speech touched on matters of public concern); *Thompson v. District of Columbia*, 428 F.3d 283, 284 (D.C. Cir. 2005) (reversing the dismissal of a claim that the D.C. Lottery Control Board fired a public employee because he engaged in activity protected by the First Amendment); *but see Baumann v. District of Columbia*, 795 F.3d 209, 219 (D.C. Cir. 2015) (affirming the dismissal of a public employee’s First Amendment retaliation claim on the grounds that the employee was disclosing confidential information that could jeopardize the work of his employer).

⁴⁹⁶ 758 F.3d 285, 295 (D.C. Cir. 2014).

⁴⁹⁷ *Id.* at 294.

⁴⁹⁸ The existence and extent of journalists’ privilege to refuse to divulge confidential sources has long been debated. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a majority of the Supreme Court held that there is no journalists’ privilege under the First Amendment in grand jury investigations. However, Justice Powell, who had joined the majority opinion, (continued...)

Specifically, in *Lee v. DOJ*,⁴⁹⁹ he dissented from the denial of rehearing en banc in a case examining journalists' qualified privilege to refuse to testify in civil suits to which they are not parties.⁵⁰⁰ While the panel had concluded that the plaintiff had overcome the journalists' qualified privilege,⁵⁰¹ Judge Garland, in dissenting from the denial of rehearing, argued that the "significance of the court's decision in [the] case should not be underestimated."⁵⁰² He contended that the standard applied by the panel gave insufficient weight to the public's interest in protecting the confidential sources of journalists.⁵⁰³ In particular, Judge Garland argued that, without robust protections for journalists during civil discovery in cases to which they are not parties, potential sources will be reluctant to disclose information to the press.⁵⁰⁴ Such a result, according to Judge Garland, would ultimately chill the speech of journalists, undermining the "Founders' intentions to protect the press 'so that it could bare the secrets of the government and inform the people.'"⁵⁰⁵ Similarly, in *Boehner v. McDermott*,⁵⁰⁶ he joined the dissenting opinion of Judge David Sentelle, which maintained that the government cannot, consistent with the First Amendment, punish the publication of information that was *lawfully* obtained from a source who obtained it *unlawfully*.⁵⁰⁷ This position provides far more protection for the publication of information that is of public interest than the position asserted by Judge Raymond Randolph's majority opinion, which maintained that the government can "forbid individuals from disclosing information they have lawfully obtained" in certain contexts.⁵⁰⁸ Judge Garland's decisions favoring stronger protections for the rights of journalists and the disclosure of information have

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also wrote a concurring opinion in which he found that journalists do have a qualified privilege to refuse to testify in criminal cases under certain circumstances. *Id.* at 710 (Powell, J., concurring). Furthermore, *Branzburg* dealt with a criminal investigation. Most circuit courts of appeals have limited *Branzburg* to its context (i.e., criminal proceedings, or, even more specifically, grand jury investigations) and have held that a qualified testimonial privilege does exist for journalists in the context of private civil litigation. *See e.g.*, *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *Zerelli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

⁴⁹⁹ 428 F.3d 299, 302 (D.C. Cir. 2005) (Garland, J., dissenting from denial of reh'ing en banc).

⁵⁰⁰ *Id.* The appellate panel had upheld a number of contempt orders against journalists who refused to divulge confidential sources of information on the investigation into whether Wen Ho Lee was a spy for the Chinese government in the context of Lee's private civil suit for damages.

⁵⁰¹ *Lee v. DOJ*, 413 F.3d 53, 61 (D.C. Cir. 2005) (affirming contempt orders against four of the journalists, and reversing the contempt order against one journalist); *see also id.* at 56-57 (concluding that the privilege had been overcome because the information sought went to the heart of the matter, and the plaintiff had exhausted all other reasonable sources of the information that were not the journalists).

⁵⁰² *Lee*, 428 F.3d at 302.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

⁵⁰⁶ *See* 484 F.3d 573 (D.C. Cir. 2007) (en banc).

⁵⁰⁷ *See id.* at 581 (Sentelle, J., dissenting). Judge Sentelle's dissent garnered a majority of the D.C. Circuit for the proposition that the First Amendment prohibits the punishment of a publisher who discloses information obtained lawfully from a source who obtained the underlying information unlawfully. *Id.* However, Judge Thomas Griffith disagreed on the question of whether the publisher did indeed obtain the underlying information lawfully. *Id.* at 581 (Griffith, J., concurring) ("I believe it is worth noting that a majority of the members of the Court—those who join Part I of Judge Sentelle's dissent—would have found his actions protected by the First Amendment. Nonetheless, because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment.").

⁵⁰⁸ *See id.* at 578 (noting gag orders with respect to grand jury proceedings and several federal laws that criminalize the publication of information lawfully obtained).

led some observers to argue that he has a broad view of the First Amendment's free speech protections.⁵⁰⁹ Nonetheless, because of the limited number of free speech cases outside the context of election law in which he has participated, the record may be too thin to make firm pronouncements about Judge Garland's overall views on free speech issues.

International and Foreign Law

Whereas Justice Scalia's written work and public speeches reflected distinct attitudes toward the use of contemporary foreign law and practice, ratified treaties, and international custom to inform understanding of the U.S. Constitution and federal statutes,⁵¹⁰ Judge Garland's jurisprudence offers comparatively little guidance as to his likely approach on such matters if appointed to the Supreme Court. For example, while Justice Scalia was a vociferous critic of using contemporary foreign law and practice to interpret the meaning of the Constitution, Judge Garland has not opined on the appropriateness of using foreign law as an interpretative aid beyond observing, in ruling that a federal judge had not committed misconduct by criticizing judicial reliance on foreign law to interpret the U.S. Constitution, that the practice was "the subject of a spirited debate among the Justices of the Supreme Court, and it cannot constitute misconduct for an appellate judge to choose one side or the other."⁵¹¹ In other cases, Judge Garland appears to have eschewed reaching issues of international law when he believed it unnecessary to address such matters to resolve the case before the court.⁵¹²

During his tenure on the D.C. Circuit, Judge Garland has decided a number of cases involving the primacy of conflicting requirements imposed by federal statutes and international legal

⁵⁰⁹ See, e.g., Mark Joseph Stern, *Supreme Court Breakfast Table*, SLATE (March, 16, 2016), http://www.slate.com/blogs/browbeat/2016/04/06/what_s_fact_and_what_s_fiction_in_the_people_v_oj_simpson_finale.html ("He takes a fairly broad view of the First Amendment without swinging toward free speech absolutism and typically sides with transparency over the government's efforts to maintain internal secrecy."); James R. Copland, *Merrick Garland Is a 'Qualified' Supreme Court Nominee—But He Doesn't Pass Obama's Test*, FORBES (March 16, 2016), <http://www.forbes.com/sites/realspin/2016/03/16/merrick-garland-supreme-court-nominee-obama/#17fc58922d6a> ("In First Amendment free speech cases, Judge Garland has tended to take a broad view—except when it comes to campaign-finance regulations.").

⁵¹⁰ See generally CRS Scalia report, *supra* note 9, at 30-32.

⁵¹¹ *In re Charges of Judicial Misconduct*, 769 F.3d 762, 780 (D.C. Cir. 2014). Judge Garland has, on occasion, applied or examined foreign law in circumstances that have not involved matters of constitutional interpretation, including in litigation concerning the recognition of foreign judgment or arbitration awards, as well as cases where the D.C. Circuit applied the District of Columbia's choice-of-law rules in civil litigation involving activities occurring abroad. See, e.g., *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835 (D.C. Cir. 2009) (applying District of Columbia choice-of-law rules and concluding that French rather than U.S. law governed the plaintiff's claims under the Foreign Sovereign Immunities Act); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (declining to enforce an arbitration award that had been issued in Colombia, when the award had been lawfully nullified by Colombia's highest administrative court).

⁵¹² See *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. 2010) (denying reh'ing en banc) (joining an opinion by Judge Sentelle which stated that "[w]e decline to en banc this case to determine the role of international law-of-war principles in interpreting the [2001 statutory authorization to use military force against those responsible for the September 11, 2001, terrorist attacks] because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits"); *Saleh v. Titan Corp.*, 580 F.3d 1, 35 n.30 (D.C. Cir. 2009) (Garland, J., dissenting) (dissenting from a panel opinion that dismissed claims brought by Iraqi nationals against military contractors for abuse inflicted at the Abu Ghraib detention facility, but only expressing clear disagreement with the majority's conclusion that federal law preempted petitioners' state tort claims, and not the majority's conclusion that the alleged torture by private actors was not a violation of the law of nations actionable under the Alien Tort Statute (ATS); "because I conclude that we should permit the state-law claims to go forward at this stage, and because the plaintiffs do not contend that their [ATS] claims would provide them with different relief ... I do not address the latter.").

agreements.⁵¹³ In adjudicating such cases, the circuit court often has been called upon to employ two canons of construction. One of these canons is the “last-in-time” rule, which generally provides that, if a conflict exists between a federal statute and a ratified treaty, then the requirements of the most recently enacted measure are controlling.⁵¹⁴ The other is the canon against abrogation, which recognizes that courts should, to the extent possible, construe ambiguous statutory language in a manner that does not abrogate international legal agreements.⁵¹⁵

Judge Garland appears reluctant to construe statutory provisions in a manner that would abrogate earlier international agreements if another interpretation is possible. While he has written or joined opinions holding that provisions of a particular federal statute effectively abrogate provisions of a previously ratified treaty,⁵¹⁶ he has also joined panel opinions interpreting later-in-time federal statutes in a manner that avoids abrogating earlier international agreements.⁵¹⁷ One notable example occurred in *Owner-Operator Independent Drivers Association, Inc. v. U.S. Department of Transportation*,⁵¹⁸ where Judge Garland joined another member of a three-judge panel in upholding the Federal Motor Carrier Safety Administration’s (FMCSA’s) exemption of commercial vehicle operators licensed by Mexico or Canada from generally applicable medical certification requirements. The exemption from statutory requirements was made by the FMCSA to avoid violating earlier reciprocal licensing agreements made by the United States with Mexico and Canada.⁵¹⁹ While the majority acknowledged that the federal statute spoke “in general yet textually unambiguous terms”⁵²⁰ that could be construed to abrogate the earlier agreements, it found insufficient evidence that Congress intended the statute to have this effect. “[A]bsent some

⁵¹³ See, e.g., *Roeder v. Islamic Republic of Iran (Roeder II)*, 646 F.3d 56 (D.C. Cir. 2011) (2008 amendments to the Foreign Sovereign Immunities Act did not preclude the continued effect of the Algiers Accords, an executive agreement between the United States and Iran that had settled claims relating to the 1979-1981 Iran hostage crisis); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006) (Migratory Bird Treaty Reform Act superseded requirements established by earlier bird treaties and their implementing legislation); *Roeder v. Islamic Republic of Iran (Roeder I)*, 333 F.3d 228 (D.C. Cir. 2003) (2002 amendments to the Foreign Sovereign Immunities Act did not abrogate the earlier Algiers Accords); *Kappus v. Comm’r of Internal Revenue*, 337 F.3d 1053 (D.C. Cir. 2003) (Garland, J.) (provisions of the Internal Revenue Code superseded conflicting provisions in an earlier United States-Canada Tax Treaty).

⁵¹⁴ *Whitney v. Robinson*, 120 U.S. 190, 194 (1888) (“[I]f there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.”).

⁵¹⁵ See *Kempthorne*, 472 F.3d at 878-79 (discussing the relationship between the two canons). While both canons derive from Supreme Court opinions concerning the relationship between federal statutes and ratified treaties, see, e.g., *Whitney v. Robinson*, 120 U.S. 190, 194 (1888) and *Cook v. United States*, 288 U.S. 102, 120 (1933), courts including the D.C. Circuit have applied the canon of abrogation to avoid nullifying provisions of international legal compacts taking the form of executive agreements rather than treaties. See, e.g., *Roeder II*, 646 F.3d at 61-62 (concerning an executive agreement settling claims with Iran); *Roeder I*, 333 F.3d at 237 (“[N]either a treaty nor an executive agreement will be considered abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”) (internal quotations omitted).

⁵¹⁶ See *Kempthorne*, 472 F.3d at 879; *Kappus*, 337 F.3d at 1057-60.

⁵¹⁷ *Roeder II*, 646 F.3d at 59-50; *Roeder I*, 333 F.3d at 238 (panel opinion holding the Algiers Accords were not abrogated by general language in amendments to the Foreign Sovereign Immunities Act; “Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President—have considered the consequences.”).

⁵¹⁸ 724 F.3d 230 (D.C. Cir. 2013) (Brown, J., joined by Garland, J.).

⁵¹⁹ *Id.* at 232.

⁵²⁰ *Id.* at 234.

clear and overt indication from Congress,” the court declared, “we will not construe a statute to abrogate existing international agreements even when the statute’s text is not itself ambiguous.”⁵²¹

Judge Garland’s approach in *Owner-Operator Independent Drivers Association*, where “general yet textually unambiguous terms” employed by a statute were presumed not to have been intended to abrogate an earlier agreement, might immediately appear to be in tension with Justice Scalia’s textualist approach to statutory interpretation.⁵²² But Justice Scalia recognized that background presumptions may sometimes inform a court’s interpretation of a statute, and he indicated his support for interpreting federal statutes in a manner consistent with international legal obligations whenever possible.⁵²³ Adding a further layer of uncertainty is the variation in contexts in which Judge Garland and Justice Scalia presumed that Congress did not intend for a legislative enactment to contravene an international legal norm or agreement. In *Owner-Operator Independent Drivers Association*, for example, Judge Garland joined an opinion that applied the canon against abrogation in a case that primarily concerned activities within the United States. On the other hand, Justice Scalia appeared to most forcefully advocate interpreting federal statutes consistently with international legal norms in cases where a federal statute potentially reached conduct recognized under international law as primarily subject to the jurisdiction of a foreign sovereign.⁵²⁴ Justice Scalia was arguably less likely to interpret a statute addressing wholly domestic activities so as to avoid potential conflicts with international legal norms and agreements.⁵²⁵

The relatively limited number of cases considered by Justice Scalia and Judge Garland concerning arguably conflicting provisions in federal statutes and international agreements makes it difficult to assess whether they would have generally reached the same conclusions in similar

⁵²¹ *Id.* Writing in dissent, Judge Sentelle criticized the majority for looking beyond the clear text of the statute for evidence of “ambiguity” that would warrant interpreting the law in a manner that would not supersede the earlier agreements. He argued that no Supreme Court decision required that a superseding statute offer a clear statement of its intent to abrogate an agreement, and that the majority’s recognition of such a requirement “elevates treaties above statutes by making it more difficult for Congress to abrogate prior treaties than prior statutes.” *Id.* at 240 (Sentelle, J., dissenting).

⁵²² See generally CRS Scalia report, *supra* note 9, at 30-32.

⁵²³ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (approvingly citing Chief Justice John Marshall’s statement in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains”).

⁵²⁴ See *Hartford Fire Ins. Co.*, 509 U.S. at 814-15 (1993) (Scalia, J., dissenting) (arguing that an antitrust statute should be construed consistently with international principles concerning respect for foreign sovereignty); *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring) (concurring in judgment because the majority’s construction of the relevant statute was “consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries’ laws within their own territories”).

⁵²⁵ For example, Justice Scalia joined a number of Supreme Court opinions which recognized that the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, and related protocols, along with judgments issued by the International Court of Justice instructing U.S. authorities to reconsider the capital sentences issued to foreign nationals who were not properly notified of their ability to contact consular officials upon arrest, did not carve out an exception to later-in-time federal and state procedural default rules that denied reconsideration of many of these criminal sentences. See *Medellin v. Texas*, 552 U.S. 491 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam). These cases may be distinguishable because they involved matters where the requirements of the earlier *international agreements* were arguably perceived to be ambiguous, rather than the later-in-time federal and state statutes. See *Medellin*, 552 U.S. at 552-53 (declining to interpret a protocol to the Vienna Convention on Consular Relations as rendering a judgment by the International Court of Justice into enforceable U.S. law; “[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests” the underlying agreement was intended to give domestic effect to International Court of Justice judgements); *Sanchez-Llamas*, 548 U.S. at 337 (expressly declining to “resolve the question whether the Vienna Convention grants ... enforceable rights” relating to consular notification to foreign nationals).

circumstances. Judge Garland's jurisprudence suggests that, like Justice Scalia, he would strive to interpret federal statutes consistently with international legal obligations whenever statutory requirements were deemed ambiguous, though it seems possible that the two jurists' more general approach to statutory interpretation could lead to different conclusions on matters of statutory ambiguity.⁵²⁶

Right to Bear Arms

During his tenure on the D.C. Circuit, Judge Garland has not authored any judicial opinions or writings outside the court that directly address the Second Amendment or the constitutionality of firearms regulations.⁵²⁷ He has, however, cast votes in cases addressing these issues, and some commentators have debated the extent to which they indicate his broader views on this area of law.⁵²⁸ The most notable of these votes is arguably his 2007 vote dissenting from the denial of en banc review in *Parker v. District of Columbia*.⁵²⁹ In *Parker*, a panel of the D.C. Circuit had held, by a vote of 2-1, that the Second Amendment protects an individual's right to possess a firearm and that the District of Columbia's laws—which functionally prevented handgun ownership—violated the Second Amendment.⁵³⁰ The District sought en banc review of this decision, which the D.C. Circuit denied by a vote of 6-4.⁵³¹ Judge Garland was among those dissenting. However, the order denying en banc review gave no indication of the views of any voting judge as to why the D.C. Circuit should or should not reconsider the case.⁵³² Subsequently, the Supreme Court granted review,⁵³³ and in a 2008 decision authored by Justice Scalia, affirmed the decision of the D.C. Circuit panel by a vote of 5-4.⁵³⁴

Earlier votes by Judge Garland also touched on Second Amendment issues. In 2005, he was among a majority of judges who voted against en banc review of *Seegars v. Ashcroft*, a case challenging the same D.C. gun restrictions that were eventually overturned in *Heller*.⁵³⁵ Previously, in *National Rifle Association of America, Inc. (NRA) v. Reno*, Judge Garland voted as part of a three-judge panel to uphold a DOJ rule that permitted the federal government to retain

⁵²⁶ See *supra* "Statutory Interpretation."

⁵²⁷ See CRS Legal Sidebar WSLG1519, *Merrick B. Garland: Selected Primary Material*, by Emily E. Roberts and Eva M. Tarnay.

⁵²⁸ See, e.g., Chris Eger, *Merrick Garland Termed "Most Anti-Gun Nominee in Recent History,"* GUNS.COM (March 17, 2016), <http://www.guns.com/2016/03/17/merrick-garland-termed-most-anti-gun-nominee-in-recent-history/> (quoting a commentator of the view that "a basic analysis of Merrick Garland's judicial record shows that he does not respect our fundamental, individual right to keep and bear arms for self-defense"); Nina Totenberg, *Why Merrick Garland's Judicial Record Slips Through Critics' Fingers*, NAT'L PUB. RADIO (March 27, 2016), <http://www.npr.org/2016/03/27/472051889/a-look-at-garlands-judicial-record-reveals-few-hot-buttons> (quoting a commentator to the effect that "[t]he evidence that is being cited for the accusation that Judge Garland has some bias against Second Amendment rights is from thin to nonexistent").

⁵²⁹ 2007 U.S. App. LEXIS 11029 (D.C. Cir. May 8, 2007) (per curiam) (order denying en banc review).

⁵³⁰ 478 F.3d 370 (D.C. Cir. 2007).

⁵³¹ See 2007 U.S. App. LEXIS 11029, at *4.

⁵³² See *id.*; see also *supra* "Predicting Nominees' Future Decisions on the Court" (discussing the difficulties of inferring a nominee's views from votes on procedural matters, particularly where the nominee did not author an opinion).

⁵³³ *District of Columbia v. Heller*, 552 U.S. 1035 (2007).

⁵³⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁵³⁵ *Seegars v. Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005), *reh'g denied sub nom.*, *Seegars v. Gonzales*, 413 F.3d 1 (D.C. Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 1049 (January 23, 2006). The D.C. Circuit panel had dismissed this case for lack of justiciability.

temporarily firearms background check information, a regulation that had been promulgated after the enactment of the Brady Handgun Violence Prevention Act.⁵³⁶ The *NRA* majority concluded that the Brady Act did not bar DOJ from temporarily retaining such information and that DOJ had permissibly construed the statute when it promulgated the rule.⁵³⁷ However, neither the *NRA* court nor the *Seegars* court evaluated the constitutionality of the underlying firearm laws being challenged. As a result, these few cases would seem a tenuous basis for any firm conclusions as to Judge Garland's approach to the Second Amendment and firearms restrictions if he were to be confirmed to the Supreme Court.

Separation of Powers

Judge Garland's writing from the bench to date has not revealed in express terms whether he approaches questions involving the separation of powers as resolvable mainly through an evaluation of strict delineations of governmental powers set forth in the Constitution (what scholars frequently term a "formalist" approach), or by determining whether a challenged law or action significantly upsets the equilibrium of powers the Framers hoped to achieve (a more flexible "functionalist" approach).⁵³⁸ There may, however, be a few clues to be drawn from his written opinions, as well as his joining (or refusing to join) the opinions of his fellow judges. For example, in an order denying a petition to have the entire D.C. Circuit rehear a case challenging the Affordable Care Act on Origination Clause⁵³⁹ grounds, Judge Garland did not join Judge Brett Kavanaugh's dissent, which articulated a formalist rationale for vacating the original panel decision⁵⁴⁰ in order to reach the same result by interpreting the Clause in a way that Judge Kavanaugh viewed as truer to its text.⁵⁴¹ On the other hand, Judge Garland declined to sign on to a statement concurring in the denial of rehearing that endorsed the "purposive" test the original panel had applied and suggested the dissent's proposed test would turn the Origination Clause into an "empty formalism,"⁵⁴² which in itself reveals very little about Judge Garland's views.⁵⁴³

⁵³⁶ 216 F.3d 122 (D.C. Cir. 2000) (Tatel, J., majority opinion), *cert. denied*, 533 U.S. 928 (2001). Since FY2004, Congress has included provisions in the Commerce, Justice, Science, and Related Agencies appropriations act that require the Federal Bureau of Investigation to destroy within 24 hours the background check records on persons who are eligible to receive firearms. This provision was crafted in response to the rule that was at issue in the *NRA* decision. *See, e.g.*, P.L. 108-199, §617(a)(2), 118 Stat. 95 (January 23, 2004); P.L. 112-55, §511(2), 125 Stat. 632 (November 18, 2011) (including futurity language ("hereafter") in this appropriations provision); *but see* 3 FEDERAL APPROPRIATIONS LAW at 2-34-35 (3d. ed. 2004) (noting that "use of the word hereafter may not guarantee that an appropriation act provision will be found to constitute permanent law.").

⁵³⁷ 216 F.3d at 132, 137. A dissent, however, opined that Congress did not authorize, and in fact prohibited, DOJ from taking such action. *Id.* at 141 (Sentelle, J., dissenting).

⁵³⁸ For an overview of the functionalist and formalist lines of separation of powers analysis, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

⁵³⁹ *See* U.S. CONST. art. 1, §7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

⁵⁴⁰ *Sissel v. HHS*, 760 F.3d 1 (D.C. Cir. 2014). The plaintiff asserted that the Affordable Care Act (ACA) is unconstitutional as a revenue-raising measure that was introduced in the Senate. To resolve what it viewed as a dispute involving the separation of powers between the House of Representatives and the Senate, the panel held unanimously that the ACA does not fall under the Origination Clause because "the paramount aim of the ACA is 'to increase the number of Americans covered by health insurance and decrease the cost of health care,' ... not to raise revenue by means of the shared responsibility payment." *Id.* at 8 (citing *NFIB v. Sebelius*, --- U.S. ---, 132 S. Ct. 2566, 2580 (2012)).

⁵⁴¹ *Sissel v. HHS*, 799 F.3d 1035, 1049 (D.C. Cir. 2015) (Kavanaugh, J., joined by Henderson, Brown, & Griffith, JJ., dissenting from denial of reh'ing en banc).

⁵⁴² *Id.* at 1036 (Rogers, J., joined by Pillard & Wilkins, JJ., concurring in the denial of reh'ing en banc).

Why Judge Garland voted to stay out of this particular fray is impossible to discern from the record, but his silence could suggest his support for the original panel opinion and its functionalist approach, or perhaps a preference for avoiding the constitutional issue and leaving the matter to Congress, in contrast to the formalist view espoused by the dissent.⁵⁴⁴ Or perhaps he simply regarded the issue as not sufficiently important to warrant a grant of rehearing. Supreme Court Justices may have had similar thoughts, as suggested by the denial of certiorari in this case.⁵⁴⁵

Judge Garland did not significantly participate in the *Zivotofsky* series of cases at the D.C. Circuit, which involved a statute that was ultimately viewed by the Supreme Court as impinging on executive branch power in the realm of foreign affairs, except to vote with the majority to deny en banc review of the circuit court's decision to decline to review the case on political question grounds.⁵⁴⁶ That decision was subsequently reversed by the Supreme Court on the grounds that the judiciary has a duty to resolve significant separation of powers questions regarding Congress's authority to legislate in matters touching upon the executive power to recognize foreign sovereigns.⁵⁴⁷ Judge Garland's vote to deny en banc review could indicate a preference for applying the political question doctrine to establish the proper role of the court in such cases—that is, to avoid its involvement—but there is no way of knowing from the record.

Perhaps less speculation is required to draw inferences from Judge Garland's dissent in *In re Aiken County*.⁵⁴⁸ In that case, the majority considered the question of whether to require the NRC to fulfill a statutory mandate to process a license application for the construction of a permanent nuclear waste repository at Yucca Mountain as one to be resolved by applying a simple formula: absent any objection regarding the constitutionality of an act of Congress, the President is required to give it effect.⁵⁴⁹ Stating that the NRC's failure to complete review of the application "raises significant questions about the scope of the Executive's authority to disregard federal statutes,"⁵⁵⁰ the majority granted a petition for mandamus to order compliance. Judge Garland

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⁵⁴³ The concurrence is essentially a defense of the original panel's opinion, written by its authors, against points raised by the dissent.

⁵⁴⁴ *Sissel*, 799 F.3d at 1049 (Kavanaugh, J., dissenting from denial of reh'ing en banc) ("The panel opinion sets a constitutional precedent that is too important to let linger and metastasize. Although no doubt viewed by some today as a trivial or anachronistic annoyance, the Origination Clause was an integral part of the Framers' blueprint for protecting the people from excessive federal taxation.... By newly exempting a substantial swath of tax legislation from the Origination Clause, the panel opinion degrades the House's origination authority in a way contrary to the Constitution's text and history, and contrary to congressional practice.").

⁵⁴⁵ *Sissel v. HHS*, 136 S. Ct. 925 (2016).

⁵⁴⁶ *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *reh'g en banc denied*, 610 F.3d 84 (D.C. Cir. 2010). Judge Edwards filed a statement objecting to the denial of en banc review on the basis that the courts have a responsibility to decide the constitutionality of statutes that are alleged to impinge on presidential powers. 610 F.3d at 85 (Edwards, J., statement on denial of reh'ing en banc) ("[T]he court has effectively conflated the distinction between cases involving justiciable separation of powers issues and nonjusticiable political questions....").

⁵⁴⁷ *Zivotofsky v. Clinton*, --- U.S. ---, 132 S. Ct. 1421 (2013). For more information and analysis of the *Zivotofsky* cases, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole; CRS Report R43773, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers*, by Jennifer K. Elsea.

⁵⁴⁸ 725 F.3d 255, 268 (D.C. Cir. 2013) (Garland, C.J., dissenting). For more information about the Yucca Mountain litigation, see CRS Report R44151, *Yucca Mountain: Legal Developments Relating to the Designated Nuclear Waste Repository*, by Todd Garvey and Alexandra M. Wyatt.

⁵⁴⁹ *In re Aiken Cty.*, 725 F.3d. at 259.

⁵⁵⁰ *Id.* at 257 (Kavanaugh, J., majority opinion). The statute at issue was the Nuclear Waste Policy Act, which provides that the NRC "shall consider" the Yucca Mountain license and "shall issue a final decision approving or disapproving" the application within three years of its submission. 42 U.S.C. §10134(d).

dissented, suggesting the court should take into account circumstances he believed made the NRC's noncompliance with the letter of the law reasonable.⁵⁵¹ Citing circuit precedent establishing that a court has discretion to withhold a writ of mandamus that would order the doing of a "useless thing" (albeit one that is technically required by law),⁵⁵² he contended that the court ought not to second-guess the NRC's determination that it had insufficient funds available to pursue further consideration of the license. In Judge Garland's view, forcing the NRC to expend what was left of the amounts previously appropriated to it for this purpose without any real chance of moving the project forward would "do nothing to safeguard the separation of powers."⁵⁵³ In contrast to the majority's strict construction of the statute and adherence to constitutional roles, Judge Garland's pragmatic approach may suggest that he leans toward the functionalist school of separation of powers thought.

In *re Aiken County* may be indicative of another trend in Judge Garland's approach to separation of powers questions, namely, a hesitancy to have the court interfere with the executive branch. In interpreting the meaning of the term "agency records" in the context of the Freedom of Information Act (FOIA),⁵⁵⁴ Judge Garland imputed separation of powers concerns to Congress in determining that White House access records are not releasable even if they are in the possession of the Secret Service.⁵⁵⁵ To decide otherwise, he wrote, "could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public. And that could render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations."⁵⁵⁶

In the decade and a half since September 11, 2001, the D.C. Circuit has confronted a host of issues touching on separation of powers principles regarding the wartime role of the judicial branch in relation to the political branches in cases brought by detainees held at the U.S. Naval Station, Guantanamo Bay, Cuba.⁵⁵⁷ In *Al Odah v. United States*,⁵⁵⁸ the court held itself to be without jurisdiction to examine the lawfulness of executive detention of foreign nationals held at Guantanamo, relying on Supreme Court precedent that enemy aliens held abroad are not entitled to pursue habeas writs, in part due to the interference with military operations such judicial examination would entail.⁵⁵⁹ Judge Garland joined the majority opinion in that decision, which was later reversed by the Supreme Court in *Rasul v. Bush*.⁵⁶⁰ After Congress altered the habeas statute to preclude jurisdiction⁵⁶¹ and the Supreme Court held that effort to be unconstitutional,⁵⁶²

⁵⁵¹ *Id.* at 268-69 (Garland, C.J., dissenting).

⁵⁵² *Id.* (citing *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936)).

⁵⁵³ *Id.* at 269-70. Judge Garland suggested it might be the court rather than the Commission that was overstepping its constitutional authority. *Id.* at 270 ("[W]e are not in a position—nor do we have any basis—to second-guess [the NRC's] conclusion [that progress on the application was impossible given the available funds].").

⁵⁵⁴ 5 U.S.C. §552.

⁵⁵⁵ *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013).

⁵⁵⁶ *Id.* at 226 (Garland, C.J., opinion for the court).

⁵⁵⁷ For an overview of detainee cases at the D.C. Circuit, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

⁵⁵⁸ 321 F.3d 1134 (D.C. Cir. 2003).

⁵⁵⁹ *Id.* at 1139 ("Judicial proceedings would engender a 'conflict between judicial and military opinion' and 'would diminish the prestige of' any field commander as he was called 'to account in his own civil courts' and would 'divert his efforts and attention from the military offensive abroad to the legal defensive at home.'") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

⁵⁶⁰ 542 U.S. 466 (2004) (holding that the habeas statute, 28 U.S.C. §2241, extends to Guantanamo Bay, Cuba).

⁵⁶¹ Congress first passed the Detainee Treatment Act, P.L. 109-148, Title X, 119 Stat. 2739-2745 (December 30, 2005); P.L. 109-163, Title XIV, 119 Stat. 3474-80 (January 6, 2006). After the Supreme Court interpreted the habeas-stripping (continued...)

Al Odah's petition worked its way back to the D.C. Circuit. Judge Garland then voted with a unanimous three-judge panel to uphold a less rigorous evidentiary standard than the detainee urged—namely, a preponderance of the evidence standard with admission of reliable hearsay—and to affirm the denial of the writ.⁵⁶³ While he also voted as part of a panel that found habeas jurisdiction available to challenge not only the legality of detention but also the conditions of detention at Guantanamo, rejecting the government's contention that Congress had effectively precluded such challenges,⁵⁶⁴ the court in that case ultimately deferred to the government's view that the challenged prison procedures were "rationally related to security," reversing the court below.⁵⁶⁵

Judge Garland's opinion for a unanimous panel in *Parhat v. Gates*⁵⁶⁶ may be read to suggest that his willingness to defer to the executive branch in military matters goes only so far, at least where Congress has prescribed a role for the courts. In that case, the court declined to validate the decision of a Combatant Status Review Tribunal (CSRT) based on the insufficiency of evidence proffered by the government to prove the petitioner's affiliation with an "associated force" fighting alongside Al Qaeda or the Taliban. To do otherwise, Judge Garland wrote, "would [] place a judicial imprimatur on an act of essentially unreviewable executive discretion. That is not what Congress directed us to do when it authorized judicial review of enemy combatant determinations under the [Detainee Treatment] Act."⁵⁶⁷

Noting the controversy still pending in *Bismullah v. Gates*⁵⁶⁸ regarding the scope of evidence that the government was required to produce in CSRT challenges, the *Parhat* court evaluated the case on the record alone and found that the reliance on intelligence documents in question was unsupported.⁵⁶⁹ While the Supreme Court's decision in *Boumediene v. Bush* effectively obviated

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language inapplicable to pending cases, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress enacted a new measure as part of the Military Commissions Act of 2006, P.L. 109-366, 102 Stat. 2600 (October 17, 2006).

⁵⁶² *Boumediene v. Bush*, 553 U.S. 723, 764 (2008). Judge Garland did not participate in this case or the *Hamdan* case when they were considered by the D.C. Circuit.

⁵⁶³ *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011).

⁵⁶⁴ *Hatim v. Obama*, 760 F.3d 54, 57-58 (D.C. Cir. 2014) (Griffith, J., majority opinion) (relying on *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014)).

⁵⁶⁵ *Id.* at 59.

⁵⁶⁶ 532 F.3d 834 (D.C. Cir. 2008).

⁵⁶⁷ *Id.* at 836 (Garland, J., opinion for the court) (directing the government to release the detainee, transfer him, or "expeditiously convene a new Combatant Status Review Tribunal to consider evidence submitted in a manner consistent with this opinion"). The detainee, an ethnic Uighur who had conceded that he attended a training camp in Afghanistan run by a Chinese dissident group, argued that the tribunal based its determination on insufficient evidence to demonstrate his affiliation with an "associated force" as the government defined the term. *Id.*

⁵⁶⁸ *Bismullah v. Gates*, 503 F.3d 137 (D.C. Cir. 2007) (holding that the record on review of CSRT decisions must include all information reasonably available to the government), *reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008). The circuit split 5-5 in denying a rehearing to the government, which had urged the court to order narrowly circumscribed review of CSRT determinations considering only information that had been presented to the tribunal. All 10 circuit judges wrote or joined opinions explaining why they would grant or deny rehearing. Judge Garland alone wrote separately to concur in the denial but take no position on the merits, explaining the case ought to move forward so that the Supreme Court could take it into consideration in its then pending *Boumediene* decision. 514 F.3d at 1299 (Garland, J., concurring in the denial of reh'ing en banc).

⁵⁶⁹ *Parhat*, 532 F.3d at 846-47 (Garland, J., opinion for the court) ("The documents repeatedly describe [] activities and relationships [among asserted enemy forces] as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, and as things that 'may' be true or are 'suspected of' having taken place. But in virtually every instance, the documents do not say who 'reported' or 'said' or 'suspected' those things. Nor do they provide any of the underlying reporting upon which the documents' bottom-line assertions are founded, nor any assessment of the reliability of that (continued...)

reviews under the Detainee Treatment Act,⁵⁷⁰ Judge Garland's *Parhat* opinion continues to be cited in detainee habeas cases for the proposition that evidence presented by the government must be in a form that permits a reviewing court to assess its reliability.⁵⁷¹ Still, in subsequent cases, no detainee has prevailed on the grounds that the evidence put forth by the government was unreliable.⁵⁷² Moreover, the court has repeatedly upheld the government's use of hearsay evidence, explaining that hearsay in such cases is always admissible, but that judges must assess its reliability.⁵⁷³ It appears that the D.C. Circuit, after some prodding from the Supreme Court, has, to some degree, more closely scrutinized the executive branch in detainee habeas cases, but for detainees at Guantanamo, prevailing in court remains an uphill battle. Judge Garland's participation in these cases seems to indicate his position in the mainstream of D.C. Circuit judicial thought with respect to the court's role in evaluating executive branch detention, as approved by Congress.

In one notable case⁵⁷⁴ interpreting the Military Commission Act (MCA) of 2006⁵⁷⁵ and its enumerated charge of material support for terrorism, the D.C. Circuit declined to defer to Congress's assertion that the charge is one that has traditionally been triable by military commission and therefore may be tried even if the underlying conduct took place prior to the MCA's enactment.⁵⁷⁶ The court explained its role where Congress's view on the subject was

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reporting.”).

⁵⁷⁰ The Detainee Treatment Act permitted a limited review by the D.C. Circuit of “whether the status determination of the [CSRT] ... was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and ... to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” 10 U.S.C. §801 note. The Supreme Court held that this limited review was an inadequate substitute for habeas corpus review. *Boumediene v. Bush*, 553 U.S. 723, 787-93 (2008).

⁵⁷¹ When *Bismullah* returned to the D.C. Circuit after *Boumediene*, the appellate court implied that, despite its determination that the Detainee Treatment Act review process was no longer available, the circuit court's ruling in *Parhat* remained in force. *Bismullah v. Gates*, 551 F.3d 1068, 1075 (D.C. Cir. 2009); see also *Bensayah v. Obama*, 610 F.3d 718, 725-26 (D.C. Cir. 2010) (“In *Parhat* we made clear that the reliability of evidence can be determined not only by looking at the evidence alone but, alternatively, by considering ‘sufficient additional information ... permit[ting] the fact finder’ to assess its reliability.”).

⁵⁷² See, e.g., *Khan v. Obama*, 655 F.3d 20, 27 (D.C. Cir. 2011) (Garland, J.) (finding Army intelligence collectors' declarations added sufficient indicia of reliability to meet the *Parhat* test); *Al Alwi v. Obama*, 653 F.3d 11, 20 (D.C. Cir. 2011) (Garland, J.) (detainees' own statements may be deemed reliable without corroboration if other indicia of reliability exist, such as the failure of the detainee to retract statements, the consistency of the statements, and the supporting evidence from which relevant inferences may be drawn); *Alsabri v. Obama*, 684 F.3d 1298, 1308 (D.C. Cir. 2012) (Garland, J., opinion for the court) (confirming that it is proper for the district court to afford the government an opportunity to supplement evidence with sufficient additional information to permit the fact finder to assess the reliability of a document that, by itself, lacked sufficient indicia of reliability); *Obaydullah v. Obama*, 688 F.3d 784, 792 (D.C. Cir. 2012) (per curiam) (affirming the district court's finding that the government's evidence was reliable despite minor discrepancies between the intelligence report and corroborating information).

⁵⁷³ See, e.g., *Awad v. Obama*, 608 F.3d 1, 7 (D.C. Cir. 2010) (Sentelle, C.J.) (“[T]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay.”).

⁵⁷⁴ *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc), *overruling* *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

⁵⁷⁵ P.L. 109-366, 102 Stat. 2600 (October 17, 2006).

⁵⁷⁶ 10 U.S.C. §950p (2006) (declaring the MCA “codif[ies] offenses that have traditionally been triable by military commissions,” and that “because the provisions ... codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred (continued...)”).

mistaken, stating “it is not our task to rewrite the statute to conform with the actual state of the law but rather to strike it down insofar as the Congress’s mistake renders the statute unconstitutional.”⁵⁷⁷ Accordingly, assuming without deciding that the Ex Post Facto Clause of the Constitution⁵⁷⁸ applies at Guantanamo,⁵⁷⁹ the court vacated the accused’s conviction for material support of terrorism and solicitation on ex post facto grounds, but sent his conspiracy conviction back to a three-judge panel to consider his other constitutional challenges to the MCA.⁵⁸⁰ Judge Garland cast his vote with the majority and did not write separately. Although he did not join Judge Judith Rogers’s concurring opinion emphasizing the separation of powers implications of delegating to the executive branch an arguably judicial role,⁵⁸¹ Judge Garland’s vote with the majority might be viewed as an assertion of the judiciary’s primacy in interpreting the law in this regard. On remand, the panel reversed the remaining charge for conspiracy, holding that Congress had encroached upon Article III judicial power by authorizing military commissions to try the purely domestic crime of inchoate conspiracy.⁵⁸² The full court vacated this decision and ordered rehearing en banc, possibly setting up another opportunity to consider Judge Garland’s approach to separation of powers clashes.⁵⁸³

Substantive Due Process

Because the docket of the D.C. Circuit tends to focus less on social issues than the dockets of the regional circuit courts of appeals do,⁵⁸⁴ Judge Garland has had few opportunities to express his views on the scope of the substantive component of the Due Process Clauses of the Fifth and Fourteenth Amendments, the source for various unenumerated rights that have been recognized by the Supreme Court over the years, including the right to privacy,⁵⁸⁵ the right to an abortion,⁵⁸⁶ and the right to marry.⁵⁸⁷ As several commentators have noted, Judge Garland has never heard a case interpreting the propriety of an abortion regulation in his tenure on the D.C. Circuit.⁵⁸⁸ In the

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before the date of the enactment....”). When Congress replaced this statute with the Military Commission Act of 2009, P.L. 111-84, div. A, Title XVIII, it included substantially the same language. 10 U.S.C. §950p(d).

⁵⁷⁷ *Al Bahlul*, 767 F.3d at 16 (citing *Ass’n of Am. R.R.s v. Dep’t of Transp.*, 721 F.3d 666, 673 n.7 (D.C. Cir. 2013)).

⁵⁷⁸ U.S. CONST. art. I, §9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

⁵⁷⁹ *Al Bahlul*, 767 F.3d at 18. The government had taken the position that the Clause applies, while the judges on the court took different views. Judge Garland would have found the Clause applicable. *Id.* at 18 n.9.

⁵⁸⁰ *Id.* at 31. The questions to be addressed included (1) whether Congress exceeded its Article I, §8, authority by defining crimes triable by military commission to include conduct that does not violate the international law of war, and (2) whether Congress violated Article III by vesting the executive branch with authority to try crimes that are not violations of the international law of war.

⁵⁸¹ *Id.* at 35 (Rogers, J., concurring in the judgment in part and dissenting in part) (“Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts....”) (quoting *Reid v. Covert*, 354 U.S. 1, 21 (1957)).

⁵⁸² *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015).

⁵⁸³ For more information about the *Al Bahlul* case, see CRS Legal Sidebar WSLG1309, *Al Qaeda Propagandist’s Remaining Military Commission Conviction Voided*, by Jennifer K. Elsea.

⁵⁸⁴ See *supra* notes 38-41 and accompanying text.

⁵⁸⁵ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵⁸⁶ See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

⁵⁸⁷ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁵⁸⁸ See, e.g., Charlotte Alter, *Nobody Knows Where Merrick Garland Stands on Abortion Rights* (March 17, 2016), <http://time.com/4261844/merrick-garland-the-abortion-rights-sphinx/> (“Yet nobody seems to know what Judge Garland thinks about abortion.”); Laura Bassett, *Merrick Garland’s Abortion Stance Is a Big Question Mark* (March 16, 2016), (continued...)

few cases that have raised substantive due process issues in which the Nominee has participated, Judge Garland's votes suggest an arguably moderate view of the scope of the doctrine. For example, in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, he voted with the majority in an 8-2 en banc decision, reversing a panel decision and holding that the Due Process Clause does not include a substantive right for the terminally ill to access experimental drugs.⁵⁸⁹ Moreover, in keeping with his writings prior to joining the D.C. Circuit wherein he voiced deep skepticism at the *Lochner* era⁵⁹⁰ view that the Due Process Clauses protect economic liberties, such as freedom to contract,⁵⁹¹ Judge Garland joined a majority opinion that accorded the economic legislation in question—the Coal Industry Retiree Health Benefit Act of 1992—a “presumption of constitutionality.”⁵⁹² Further, the majority opinion concluded that the presumption could not be overcome because the legislation, which retroactively imposed liability on certain mining companies, was justified by a rational legislative purpose to remedy a health care funding crisis in the coal industry.”⁵⁹³

Nonetheless, in contrast to Justice Scalia, who openly questioned the substantive due process doctrine and criticized cases like *Roe v. Wade*,⁵⁹⁴ Judge Garland does not appear to have rejected the concept wholly. He did not, for example, join Judge Laurence Silberman's concurrence in *Lightfoot v. District of Columbia*, in which the senior circuit judge described the doctrine of substantive due process as an “invention” of the Supreme Court with “unstable boundaries.”⁵⁹⁵ Potentially more telling, Judge Garland joined the panel opinion in *Butera v. District of Columbia*, a 2001 case which recognized that the substantive component of the Due Process Clauses can, in certain circumstances, impose affirmative duties to act on state officials when the officials create dangerous situations or render citizens more vulnerable to harm,⁵⁹⁶ a rule creating an exception to the long-standing principle that the “Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests....”⁵⁹⁷ Moreover, in *Hutchins v. District of Columbia*, an en banc decision of the D.C. Circuit upholding the District of Columbia's juvenile curfew law,⁵⁹⁸ Judge Garland, while voting to uphold the law and declining to strike the law down on due process grounds, did not join a key section of Judge Silberman's majority opinion.⁵⁹⁹ In that section,

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http://www.huffingtonpost.com/entry/merrick-garland-abortion-rights_us_56e9a58be4b065e2e3d8378d (“The ninth Supreme Court justice could determine the fate of reproductive rights for millions of American women—but Merrick Garland, President Barack Obama's nominee to fill the vacancy on the court, has not specified where he stands on abortion or whether he would uphold the decision made in the landmark abortion rights case *Roe v. Wade*.”).

⁵⁸⁹ 495 F.3d 695, 697 (D.C. Cir. 2007).

⁵⁹⁰ The *Lochner* era refers to the 1908 case of *Lochner v. New York*, 198 U.S. 45 (1908), and its progeny in the early 20th century, where the Court struck down state economic regulations on substantive due process grounds.

⁵⁹¹ Garland, *Antitrust and State Action*, *supra* note 87, at 499-500, 507-09 (criticizing a limitation on the state action doctrine in antitrust law and comparing it to the *Lochner* era).

⁵⁹² *Ass'n of Bituminous Contrs. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998).

⁵⁹³ *Id.*

⁵⁹⁴ See CRS Scalia report, *supra* note 9, at 37-39.

⁵⁹⁵ See 448 F.3d 392, 403 (D.C. Cir. 2006) (Silberman, J., concurring).

⁵⁹⁶ See 235 F.3d 637, 651 (D.C. Cir. 2001) (“[A]n individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm.”).

⁵⁹⁷ *Deshaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989).

⁵⁹⁸ 188 F.3d 531, 534 (D.C. Cir. 1999).

⁵⁹⁹ *Id.* at 552 (Wald & Garland, JJ., concurring in part and concurring in result).

Judge Silberman argued that judicial examinations of due process rights need to begin with a “careful description of the asserted right”⁶⁰⁰—a reference to a 1988 opinion by Justice Scalia which asserted that due process rights must be viewed narrowly by the courts in terms of the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”⁶⁰¹—and concluded that “juveniles do not have a fundamental right to be on the streets at night without adult supervision.”⁶⁰² Instead, Judge Garland, joined by Judge Patricia Wald, concurred only in the ultimate result reached by Judge Silberman, arguing that while the curfew law implicated the “constitutional rights of children and their parents,” the law passed “intermediate constitutional scrutiny.”⁶⁰³ In this sense, while very little is known about how Judge Garland might approach particular issues respecting substantive due process rights, like the right to an abortion, the Nominee seems to have a broader view of the doctrine than the man whom he could succeed on the Court.

Takings

Relative to Justice Scalia, who, during his tenure on the Supreme Court, authored and joined several opinions that can be interpreted as strengthening the protection of private property rights afforded by the Takings Clause of the Fifth Amendment of the U.S. Constitution,⁶⁰⁴ Judge Garland has said little on the subject and adjudicated very few cases raising takings issues.⁶⁰⁵ This is unsurprising, as the D.C. Circuit does not hear many takings claims since the Tucker Act vests the U.S. Court of Federal Claims (CFC) with jurisdiction over such claims when the plaintiff seeks more than \$10,000 in compensation from the federal government.⁶⁰⁶ With limited exceptions,⁶⁰⁷ the CFC’s jurisdiction over such claims is exclusive,⁶⁰⁸ and appeals from the CFC are to the U.S. Court of Appeals for the Federal Circuit, not the D.C. Circuit.⁶⁰⁹ While the Fifth Amendment has been construed to apply to states and localities, such as the District of Columbia,⁶¹⁰ there are few takings cases that have arisen against the District during Judge Garland’s time on the court,⁶¹¹ and none in which he has participated. As a result, there is an

⁶⁰⁰ *Id.* at 538 (part II-A).

⁶⁰¹ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1988) (Scalia, J., joined by Rehnquist, C.J.).

⁶⁰² 188 F.3d at 538.

⁶⁰³ *Id.* at 552 (Wald and Garland, JJ., concurring in part and concurring in result).

⁶⁰⁴ See CRS Scalia report, *supra* note 9, at 39-41. The Takings Clause limits government action by providing that private property shall not be “taken for public use” without “just compensation.” See U.S. Const. amend. V.

⁶⁰⁵ In one of the few cases that CRS identified which raised takings claims in which he participated, Judge Garland joined an opinion rejecting a facial takings challenge to an FCC rule that forbid landlords from restricting tenants’ installation or use of certain over-the-air reception devices on property leased to the tenants. *Bldg. Owners & Managers Assoc. Int’l v. FCC*, 254 F.3d 89, 91, 97-100 (D.C. Cir. 2001).

⁶⁰⁶ See 28 U.S.C. §§1346(a)(2), 1491(a)(1). The \$10,000 amount specified here would encompass most claims for just compensation against the federal government.

⁶⁰⁷ For example, the D.C. Circuit has exercised jurisdiction over a facial takings challenge to a federal agency rule. *E.g.*, *Bldg. Owners & Managers Assoc. Int’l*, 254 F.3d at 97-100; see generally *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (“[T]he Claims Court is not a proper venue if a statute creates an identifiable class of cases in which application of the statute will necessarily constitute a taking.”) (internal citations and quotations omitted).

⁶⁰⁸ The CFC has exclusive jurisdiction over such claims “by default.” In other words, no federal law vests another federal court with jurisdiction over these claims. Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1161 (2000).

⁶⁰⁹ 28 U.S.C. §1295(a)(3).

⁶¹⁰ See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 234-35 (1897).

insufficient basis to predict with confidence Judge Garland's views regarding the extent to which the Takings Clause protects private property rights.

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⁶¹¹ See, e.g., *Tate v. District of Columbia*, 627 F.3d 904, 909 (D.C. Cir. 2010); *Roth v. King*, 449 F.3d 1272, 1283 (D.C. Cir. 2006).

Appendix. Judge Garland and the D.C. Circuit

Table A-1. Judges Who Have Served with Judge Garland on the D.C. Circuit

Judges Listed Alphabetically by Their Last Names

Name	Years with Garland	Nominating President	Prior Position	Key Cases Noted in the Report Involving Judge Garland and One or More Colleagues
Janice Rogers Brown	11	George W. Bush	Associate justice, Supreme Court of California	<i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015); <i>United States v. Bigley</i> , 786 F.3d 111 (D.C. Cir. 2015); <i>Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Trans.</i> , 724 F.3d 230 (D.C. Cir. 2013); <i>United States v. Askew</i> , 529 F.3d 1119 (D.C. Cir. 2008) (en banc).
James Lane Buckley	19	Ronald W. Reagan	President, Radio Free Europe/Radio Liberty	n/a
Harry Thomas Edwards	19	Jimmy E. Carter	Chairman of the board, National Railroad Passenger Corporation	<i>Fox v. Clinton</i> , 684 F.3d 67 (D.C. Cir. 2012); <i>United States v. Askew</i> , 529 F.3d 1119 (D.C. Cir. 2008) (en banc); <i>Levitan v. Ashcroft</i> , 281 F.3d 1313 (D.C. Cir. 2002); <i>United States v. Watson</i> , 171 F.3d 695 (D.C. Cir. 1999).
Douglas Howard Ginsburg	19	Ronald W. Reagan	Assistant attorney general, Antitrust Division, U.S. DOJ	<i>In re Johnson</i> , 760 F.3d 66 (D.C. Cir. 2014); <i>United States v. Askew</i> , 529 F.3d 1119 (D.C. Cir. 2008) (en banc); <i>Rancho Viejo LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003).
Thomas Beall Griffith	11	George W. Bush	General counsel, Brigham Young University	<i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015); <i>Hatim v. Obama</i> , 760 F.3d 54 (D.C. Cir. 2014); <i>Parhat v. Gates</i> , 532 F.3d 834 (D.C. Cir. 2008); <i>Boehner v. McDermott</i> , 484 F.3d 573 (D.C. Cir. 2007).
Karen LeCraft Henderson	19	George H.W. Bush	Judge, U.S. District Court, District of South Carolina	<i>Miss. Comm'n on Env'tl. Quality v. EPA</i> , 790 F.3d 138 (D.C. Cir. 2015); <i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015); <i>Al Bahlul v. United States</i> , 767 F.3d 11 (D.C. Cir. 2014) (en banc); <i>Trans Union, LLC v. FTC</i> , 295 F.3d 42 (D.C. Cir. 2002); <i>Levitan v. Ashcroft</i> , 281 F.3d 1313 (D.C. Cir. 2002); <i>Henderson v. Kennedy</i> , 253 F.3d 12 (D.C. Cir. 2001); <i>United States ex rel. Yesudian v. Howard Univ.</i> , 153 F.3d 731 (D.C. Cir. 1998); <i>Americable Int'l v. Dep't of Navy</i> , 129 F.3d 1271 (D.C. Cir. 1997).

Name	Years with Garland	Nominating President	Prior Position	Key Cases Noted in the Report Involving Judge Garland and One or More Colleagues
Brett Michael Kavanaugh	10	George W. Bush	Assistant to the President and staff secretary, George W. Bush	<i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015); <i>White Stallion Energy Ctr., LLC v. EPA</i> , 748 F.3d 1222 (D.C. Cir. 2014) (per curiam); <i>Util. Air Regulatory Grp. (UARG) v. EPA</i> , 744 F.3d 741 (D.C. Cir. 2014); <i>In re Aiken Cty.</i> , 725 F.3d 255 (D.C. Cir. 2013); <i>United States v. Burwell</i> , 690 F.3d 500 (2012) (en banc); <i>Sierra Club v. Van Antwerp</i> , 661 F.3d 1147 (D.C. Cir. 2011); <i>Am. Bird Conservancy, Inc. v. FCC</i> , 516 F.3d 1027 (D.C. Cir. 2008) (per curiam); <i>United States v. Askew</i> , 529 F.3d 1119 (D.C. Cir. 2008) (en banc).
Patricia Ann Millett	2	Barack H. Obama	Private practitioner	<i>People for the Ethical Treatment of Animals (PETA) v. Dep't of Agric. (USDA)</i> , 797 F.3d 1087 (D.C. Cir. 2015)
Cornelia Thayer Livingston Pillard	2	Barack H. Obama	Professor, Georgetown University Law Center	<i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015).
Arthur Raymond Randolph	19	George H.W. Bush	Special assistant attorney general	<i>Boehner v. McDermott</i> , 484 F.3d 573 (D.C. Cir. 2007); <i>Henderson v. Kennedy</i> , 253 F.3d 12 (D.C. Cir. 2001).
John Glover Roberts Jr.	2	George W. Bush	Private practitioner (currently Chief Justice of the Supreme Court)	<i>United States ex rel. Totten v. Bombardier Corp.</i> , 380 F.3d 488 (D.C. Cir. 2004); <i>Barbour v. Washington Metropolitan Transit Authority (WMATA)</i> , 374 F.3d 1161 (D.C. Cir. 2004); <i>Rancho Viejo LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003).
Spottswood William Robinson III	1	Lyndon B. Johnson	Judge, U.S. District Court for the District of Columbia	n/a
Judith Ann Wilson Rogers	19	William J. Clinton	Chief Judge, District of Columbia Court of Appeals	<i>Sissel v. U.S. Dep't of Health & Human Servs.</i> , 799 F.3d 1035 (D.C. Cir. 2015); <i>Al Bahlul v. United States</i> , 767 F.3d 1 (D.C. Cir. 2014) (en banc).

Name	Years with Garland	Nominating President	Prior Position	Key Cases Noted in the Report Involving Judge Garland and One or More Colleagues
David Bryan Sentelle	19	Ronald W. Reagan	Judge, U.S. District Court, Western District of North Carolina	Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Trans., 724 F.3d 230 (D.C. Cir. 2013); Al-Bihani v. Obama, 619 F.3d 1 (D.C. 2010) (denying reh'ing en banc); Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008); United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2008) (en banc); Boehner v. McDermott, 484 F.3d 573 (D.C. Cir. 2007) (en banc); Barbour v. WMATA, 374 F.3d 1161 (D.C. Cir. 2004); Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (denying reh'ing en banc); Sec'y of Labor v. Excel Mining, LLC, 334 F.3d 1 (D.C. Cir. 2003); Navegar, Inc. v. United States, 200 F.3d 868 (D.C. Cir. 2000); Nat'l Rifle Ass'n of Am., Inc. v. Reno, 216 F.3d 122 (D.C. Cir. 2000); <i>In re Sealed Case No. 97-312</i> , 181 F.3d 128, 144 (D.C. Cir. 1999).
Laurence Hirsch Silberman	19	Ronald W. Reagan	Senior fellow, American Enterprise Institute; private practitioner	Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999).
Padmanabhan Srikanth "Sri" Srinivasan	3	Barack H. Obama	Principal deputy solicitor general, U.S. DOJ	Miss. Comm'n on Env'tl. Quality v. EPA, 790 F.3d 138 (D.C. Cir. 2015).
David S. Tatel	19	William J. Clinton	Private practitioner	United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012) (en banc); United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2008) (en banc); Nat'l Rifle Ass'n of Am., Inc. v. Reno, 216 F.3d 122 (D.C. Cir. 2000); Am. Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (denial of reh'ing en banc); Kolstad v. Am. Dental Ass'n, 139 F.3d 958 (D.C. Cir. 1998) (en banc).
Patricia McGowan Wald	2	Jimmy E. Carter	Assistant Attorney General for Legislative Affairs, U.S. DOJ	Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999).
Robert Leon Wilkins	2	Barack H. Obama	Judge, U.S. District Court for the District of Columbia	Sissel v. U.S. Dep't of Health & Human Servs., 799 F.3d 1035 (D.C. Cir. 2015).
Stephen Fain Williams	19	Ronald W. Reagan	Professor of law, University of Colorado	Fox v. Clinton, 684 F.3d 67 (D.C. Cir. 2012); Navab-Safavi v. Glassman, 637 F.3d 311 (D.C. Cir. 2011).

Source: Congressional Research Service, based on information from the Federal Judicial Center database, available at <http://www.fjc.gov/history/home.nsf/page/judges.html>.

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