



LAWYERS' COMMITTEE FOR  
**CIVIL RIGHTS**  
U N D E R L A W

REPORT ON THE NOMINATION  
OF JUDGE MERRICK B. GARLAND  
AS AN ASSOCIATE JUSTICE OF THE  
UNITED STATES SUPREME COURT



MAY 5 2016

## **ABOUT THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS**

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity – work that continues to be vital today.

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Judge Merrick Garland  
Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit  
Nominated March 16, 2016 to United States Supreme Court

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## **I. EXECUTIVE SUMMARY**

On March 16, 2016, President Obama nominated Judge Merrick Garland, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, to the United States Supreme Court. This nomination followed the sudden death of Justice Antonin Scalia. The question of whether Judge Garland would be considered by the Senate in a presidential election year has been the subject of much public dialogue.<sup>1</sup> This report focuses on Judge Garland as a nominee, and examines his record on issues central to the Lawyers' Committee's mission. As Judge Garland has been on the Court of Appeals for 18 years, the analysis is based primarily on the opinions he has authored or joined as a judge on that court.

### **A. JUDGE GARLAND'S JURISPRUDENCE IN CIVIL RIGHTS CASES**

We believe that Judge Garland has demonstrated views that are consistent with core civil rights principles. Most of the civil rights opinions he has authored are in employment cases. He has generally found grounds to overcome motions to dismiss. These suggest support for the notion that cases alleging actionable discrimination should advance at least to the discovery stage. Opinions reviewing summary judgments and trial verdicts are mixed, with some favoring employees and some favoring employers.

In other categories of civil rights cases – housing, voting, education and environmental justice – Judge Garland does not have as many written opinions. But those he has written are consistent with his opinions in employment cases. He supports the claims to the extent they are actionable under the relevant statute and binding precedent. We also note that safeguarding access to the courts is a key element of respect for civil rights. There is no hint in Judge Garland's written opinions of any interest on his part in creating judicial policy regarding discrimination beyond that established by clear precedent, apart from the indication that, in unsettled questions regarding statutory interpretation, he may be guided by a statute's remedial purpose and other indications of legislative history and intent. As with all nominees, we believe that Judge Garland's civil rights record is an area appropriate for evaluation during Senate hearings.

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<sup>1</sup> The Senate Republican leadership has reaffirmed its intention not to consider the nomination. Other Senators, however, and approximately two-thirds of voters polled, favor a hearing for Judge Garland.

## **B. JURISPRUDENCE ON CRIMINAL JUSTICE**

With respect to the criminal justice issues currently in center focus for the Lawyers' Committee – racial disparities in arrest, conviction and sentencing rates, clemency for nonviolent offenders, barriers to reentry, right to counsel, debtors' prisons, etc. – Judge Garland has not written any opinions directly on point. With respect to the scores of opinions he has written in criminal appeals, however, he appears to lean toward an understanding of the cases from the perspective of the prosecutor. This is perhaps not surprising given the decade Judge Garland spent as a federal prosecutor. In any event, Judge Garland, in voting to affirm criminal convictions about which questions were raised, has found many prosecutorial and judicial errors to have been “harmless.” He has also rejected claims of ineffective assistance of counsel where he has found strong evidence of guilt, on the basis that even effective counsel could not have achieved an acquittal.

Similarly, in cases reviewing departures up or down from mandatory sentencing guidelines, Judge Garland's opinions show rigorous attention to what the statute does or does not permit to be considered, and very little to the equities of the individual defendant's situation. His opinions tend not to create or expand any law or precedent favoring prosecutors as much as they find a way to affirm convictions on narrow grounds.

Of particular concern for some progressives has been Judge Garland's positions on appeals from detainees at Guantanamo. On the first panel to hear such an appeal, Judge Garland joined a majority opinion holding that the District Court lacked jurisdiction to issue writs of habeas corpus to aliens detained outside the United States. That position was later reversed by the United States Supreme Court. Judge Garland has also ruled for the government in other Guantanamo cases, although in one opinion he found that the government had failed adequately to establish that a detainee was an enemy combatant.

Related to the category of criminal justice, however, Judge Garland has shown appropriate sensitivity in prison condition cases to plaintiffs who appeared to have meritorious claims.

## C. OTHER CONSIDERATIONS

### 1. EXPERIENCE AND EDUCATION

After college (*summa*) and law school (*magna*) at Harvard, Judge Garland clerked for Judge Henry Friendly and then Justice William Brennan. He then spent a year as an assistant to Attorney General Benjamin Civiletti, who said that Garland had a “resume that makes you cry.”<sup>2</sup> His subsequent years as an associate and then a partner at Arnold & Porter, as a federal prosecutor in extremely high profile cases and as a very well respected federal appellate judge for almost two decades also shape the experience he would likely bear as a jurist on the Court.

### 2. JUDICIAL PHILOSOPHY AND STYLE

The hallmark of Judge Garland’s approach to resolving statutory claims is absolute fidelity to the intent of the statutory text, as clarified by binding or persuasive precedent. Where the text does not provide a clear answer, he will examine the purpose of the statute, taking into account the legislative history. Judge Garland is typically cautious in deciding just the issues which must be decided to resolve the case before the panel, although on rare occasions, he has offered guidance on legal issues he deems important where doing so was not necessary to the outcome of an appeal. His opinions typically demonstrate detailed familiarity with the factual record. His recitation of detailed facts of each case in applying the law has effectively limited the precedential scope of many of his authored opinions.

During his time on the D.C. Circuit, Judge Garland has been focused on having cases decided in accordance with established precedent. Given his preference for deciding cases on the facts, he tends to favor allowing cases to proceed beyond the motion-to-dismiss stage, allowing discovery and the development of a full factual record for the trial court’s consideration. Judge Garland as noted has shown deference to the government and prosecutors in criminal cases. He has likewise shown deference to government agencies (with some exceptions) in the many such cases that have come before him as a member of the D.C. Circuit.

Separately, we note that Judge Garland’s apparent prosecutorial leanings in criminal cases and in particular his rulings in the Guantanamo cases would seem to merit

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<sup>2</sup> Sheryl Gay Stolberg, Matt Apuzzo, Katherine Q. Seelye, *Obama Court Choice Is a Deft Navigator of Washington’s Legal Circles*, NY Times, Mar. 27, 2016, at A1.

appropriate questioning at a hearing. The Lawyers' Committee could not support a nominee who would sacrifice the Bill of Rights in the battle against terrorism. Judge Garland's opinions certainly do not reflect this approach.

In summary, Judge Garland could be expected on the Court to support the positions finding the most cogent support in the statutory language at issue and in the Court's precedents, as applied to the facts of any given matter. Most of his written decisions are unanimous, which reflects his ability to build a consensus, even on difficult legal issues. It is instructive that despite a huge body of written opinions in the D.C. Circuit – several hundred – there is no reflection of his personal views on political or social issues. His consistent mission seems to be to get the case before his panel resolved correctly, based on careful application of settled law to the facts, as narrowly as possible.

## **D. CONCLUSION**

Every term, critical cases come before the Supreme Court concerning issues of great public importance, including cases concerning the interpretation and application of the Constitution and federal civil rights laws. In evaluating nominees to the Court, the Lawyers' Committee has employed a rigorous standard with two distinct components: (1) exceptional competence to serve on the Court, and (2) a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. The Lawyers' Committee believes that Judge Garland possesses the exceptional competence necessary to serve on the Court. Judge Garland's credentials are impressive and his experience broad and extensive. He has a record that demonstrates careful, astute analysis and fidelity to the intent of Congress, and reveals a commitment to fairness. In our view, and based on his distinguished record, we do not believe that any reasonable Senator of any party could find Judge Garland unqualified to sit on the United States Supreme Court.

In applying the second prong of this standard, the Lawyers Committee has historically required a demonstrated record based on a large body of opinions statements or other sources of information. Unfortunately, this record is not available for Judge Garland. While the current record does not provide extensive information for the Lawyers' Committee to assess whether he meets the high standards of commitment to civil rights principles that we have historically considered in our review of nominees, we believe that Judge Garland has demonstrated views that are consistent with core civil rights principles. In his authored opinions in civil rights cases, the record reveals him to be fair, moderate and careful. His main focus is fidelity to application of the law to the



facts, whether that cuts for or against a plaintiff in a discrimination case. In open questions of statutory interpretation, he is likely to be guided by the remedial purpose of, and legislative history supporting, the civil rights statute in question where the answer is not clear on the face of the statute. For all of the reasons noted above, we believe Judge Garland is exceptionally highly qualified and should be given an immediate hearing on his nomination to the Supreme Court.

## **II. THE LAWYERS' COMMITTEE'S POLICY REGARDING NOMINATIONS TO THE SUPREME COURT**

Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States. For more than four decades, our nation has been transformed as we have taken important strides in confronting racial discrimination and injustice. Yet the challenges of unlawful discrimination remain, with significant inequities and disparities throughout our society, and they continue to obstruct and undermine the principle of equal justice for all.

Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Supreme Court to determine if the nominee demonstrates views that are manifestly hostile to the core civil rights principles for which the Lawyers' Committee has advocated. With this report, the Lawyers' Committee also evaluates whether Judge Garland's record demonstrates that he possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

### III. BIOGRAPHY

Merrick Brian Garland was born on November 13, 1952 in Chicago, Illinois, to parents Cyril and Shirley Garland. His father founded Garland Advertising in Chicago, run for some years out of the family home's basement, while his mother became director of volunteer services at the Counsel for Jewish Elderly.

Judge Garland grew up in the upper-middle-class suburb of Lincolnwood, Illinois, where he attended Niles West High School. He excelled academically, becoming a member of the Presidential Scholars Program and a National Merit Scholar, and graduating in 1970. He attended Harvard College on a scholarship, graduating *summa cum laude* and Phi Beta Kappa with a bachelor's degree in Social Studies in 1974. He then attended Harvard Law School, serving as an editor of the *Harvard Law Review*, and as articles editor from 1976 to 1977, and graduated with a J.D. *magna cum laude* in 1977. Judge Garland earned room and board while attending Harvard Law School by counseling undergraduates.

Following graduation, Judge Garland served as a law clerk for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit from 1977 to 1978, and then Justice Brennan of the U.S. Supreme Court from 1978 to 1979.

Judge Garland was special assistant to Attorney General Benjamin Civiletti from 1979 to 1981. After the Carter administration ended in 1981, Judge Garland joined the law firm Arnold & Porter as an associate, and was a partner at the firm from 1985 to 1989. While at Arnold & Porter, Judge Garland mostly practiced corporate litigation.

In 1989, he became an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia. As a line prosecutor, Judge Garland represented the government in criminal cases ranging from drug trafficking to complex public corruption matters. Following his two year tenure at the U.S. Attorney's Office, he returned to Arnold & Porter for another year.

In 1993, Judge Garland joined the new Clinton Administration as Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice. The following year, then-Deputy Attorney General Jamie Gorelick asked him to serve as her Principal Associate Deputy Attorney General.

In that role, Judge Garland's responsibilities included the supervision of high-profile

domestic-terrorism cases, including the Oklahoma City bombing, Ted Kaczynski, and the Atlanta Olympics bombings. He oversaw the investigation in preparation for the prosecution. He represented the government at the preliminary hearings of the two main defendants, Timothy McVeigh and Terry Nichols. The Governor of Oklahoma at the time, Frank Keating, later stated to the Senate leadership in connection with Judge Garland's nomination to the D.C. Court of Appeals:

Last April, in Oklahoma City, Merrick was at the helm of the Justice Department's investigation following the bombing of the Oklahoma City Federal Building, the bloodiest and most tragic act of terrorism on American soil. During the investigation, Merrick distinguished himself in a situation where he had to lead a highly complicated investigation and make quick decisions during critical times. Merrick Garland is an intelligent, experienced and evenhanded individual. I hope you give him full consideration for confirmation to the United States Court of Appeals for the D.C. Circuit.<sup>3</sup>

On September 6, 1995, President Bill Clinton nominated Judge Garland to the D.C. Circuit seat vacated by his longtime mentor Abner J. Mikva. The American Bar Association (ABA) Standing Committee on the Federal Judiciary gave Judge Garland a "unanimously well-qualified" committee rating, its highest, in connection with this nomination to the D.C. Circuit. On December 1, 1995, Judge Garland received a hearing before the U.S. Senate Judiciary Committee; however, Senate Republicans did not then schedule a vote on Judge Garland's confirmation, not because of concerns over his qualifications but because of a dispute over whether to fill the seat. After winning the November 1996 presidential election, President Clinton re-nominated Judge Garland on January 7, 1997, and he was later confirmed in a 76–23 vote. He came to national attention when he was considered a possible candidate for the Court when Justice John Paul Stevens retired in 2010. Judge Garland became Chief Judge in 2013.

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3 Congressional Record, Vol. 143 at 4233-34 (March 19, 1997).

## IV. TESTIMONY FROM PREVIOUS CONFIRMATION HEARINGS

The hearings and floor debate regarding Judge Garland's nomination to the D.C. Circuit took place in September 1995 and March 1997. In 1995, Judge Garland was nominated to fill the seat vacated by Judge Mikva, was reported favorably out of the Judiciary Committee by a vote of 14-4, but never received consideration and a vote by the full Senate, due in large part to the disagreement in the Senate over whether the D.C. Circuit's caseload warranted filling the 12th seat on the court. In 1997, Judge Garland was nominated to fill the seat vacated by Judge Buckley upon his retirement, which left only ten sitting judges on the court.

Judge Garland's confirmation hearings were not illuminative regarding his positions on civil rights issues. Of interest in that regard, though we caution against reading too much into the statement, is the following language in a letter of support to the Judiciary Committee by Charles J. Cooper, a former clerk to then-Justice Rehnquist:

I've known Merrick since 1978, when we served as law clerks to Supreme Court Justices – he for Justice Brennan and I for Justice (now Chief Justice) Rehnquist. Like our respective bosses, Merrick and I disagreed on many legal issues. Still, I believe that Merrick possesses the qualities of a fine judge.<sup>4</sup>

Perhaps the most illuminative questions and answers in the hearing concerned Judge Garland's views about *stare decisis*. He made very clear in the following passages during the hearing that he firmly believes in adhering to precedent:

Senator SPECTER: . . . Let me rephrase that question to say that if you had strong differences with the Supreme Court, would you look at the case before you closely in an effort to distinguish that case from applying a precedent that you had substantial misgivings about?

Mr. GARLAND: The obligation of a judge in either the district or the circuit is to follow the Supreme Court's precedent. That is what following the law is about, Your Honor.

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<sup>4</sup> Hearings Before the Committee on the Judiciary, United States Senate, 104th Congress, S. Hrg. 104-512, Pt. 2 at 1079 (1995) ("Judiciary Committee Hearings").

Senator SPECTER: Well, that is true as a generalization, Mr. Garland, but isn't there some temptation by judges to slice the apple away from holdings they don't like, distinguish the facts, try to circle the issue a bit?

Mr. GARLAND: There may be some tendency by some judges to do that. I think that is wrong.

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Senator KOHL: . . . Under what circumstances, if any, do you believe that an appellate judge should overturn precedent within his or her own circuit?

Mr. GARLAND: The obligation of the judge in the circuit is to follow the previous decisions in the circuit unless those decisions are overruled by an en banc panel of the court.<sup>5</sup>

The only other point of interest came when Judge Garland was asked if there were any Supreme Court Justices for whom he had great admiration, and why. He identified Justice Brennan, for whom he has "great personal affection," Chief Justice John Marshall, "who decided *Marbury v. Madison*, and in so deciding established that the Constitution is the supreme law of the land," and Justice Oliver Wendell Holmes, because he aspires "to be able to write as well as" Justice Holmes.<sup>6</sup>

Finally, in connection with the hearing, lawyers from prominent law firms, the American Bar Association, and various former national, state, and local government officials, reflecting a healthy mix of Republican and Democratic past office holders, wrote in support of Judge Garland's qualifications and integrity. The only objection made by anyone to Judge Garland's confirmation was that there was no need to fill the vacancy on the court, an objection that some senators made even in 1997.

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5 *Id.* at 1061-62, 1065.

6 *Id.* at 1064.

## **V. ANALYSIS OF JUDGE GARLAND'S D.C. CIRCUIT OPINIONS**

The Lawyers' Committee identified and reviewed the relatively few civil rights cases in which Judge Garland has participated during his tenure on the D.C. Circuit. In addition, the Lawyers' Committee reviewed cases that, while not directly addressing core civil rights claims, deal with issues that often are implicated in civil rights cases, in order to assess how Judge Garland's approach might impact his analysis of civil rights claims. Below is a discussion of his decisions in core civil rights areas, including employment discrimination, housing, voting rights, environmental law and environmental justice, and criminal justice.

### **A. EMPLOYMENT**

Although Judge Garland has not participated in a particularly large volume of employment discrimination cases, he has published more opinions dealing with employment discrimination issues than with most other areas of interest to the Lawyers' Committee. We therefore begin our substantive analysis of his civil rights cases with this area.

In employment cases, Judge Garland does not evidence an ideology tending to favor either employees or employers with respect to the merits, but at the pleading stage, his decisions tend to find that plaintiffs have sufficiently alleged a claim to survive an initial motion to dismiss. His summary judgment and post-trial decisions reflect an impressive command of the facts in each case, with a number of cases decided in favor of both employees and employers. His tendency to do a deep dive on the facts in any given case could explain why he seems to favor allowing plaintiffs a chance to proceed beyond the initial pleadings stage. In other words, he appears far more comfortable as a matter of judicial philosophy having cases decided on the facts, whether at the summary judgment stage or in connection with post-trial appeals, rather than affirming dismissals at the pleading stage. Finally, and this could be further instructive as to his judicial philosophy, he has been willing in some employment cases to be guided by the purpose or intent of a statute, including by means of a detailed analysis of legislative history, in ruling on open questions of law.

## 1. TITLE VII CASES

One of the more interesting employment opinions is the dissent in *Kolstad v. American Dental Association*.<sup>7</sup> Although he is not the author, Judge Garland joined in a dissent from a denial of rehearing *en banc* in a case where a D.C. Circuit panel limited the availability of punitive damages in a claim for sex discrimination under Title VII of the Civil Rights Act of 1964. The majority held that punitive damages were not available where a plaintiff only showed, without more, that she was the victim of intentional discrimination. Rather, according to the panel, the plaintiff would have to show an element of egregiousness to justify a punitive damages award. The dissenters, including Judge Garland, vehemently rejected the majority's conclusions and argued that such a strained interpretation contravened not only the plain language of the statute itself, but also Congress' intent.<sup>8</sup> Ultimately, the case was petitioned to the Supreme Court where the majority decision of the D.C. Circuit was subsequently reversed and the logic of the dissenting opinion was adopted.<sup>9</sup>

Although *Kolstad* was a case where the scope of a remedy under Title VII was fundamentally at issue, the majority of Judge Garland's employment discrimination cases involve application of fairly well-established precedent to certain sets of facts. One significant theme that emerges from Judge Garland's authored employment discrimination opinions is a reluctance to grant motions to dismiss, coupled with the view that plaintiffs are entitled to develop a thorough record upon which the court may then determine the sufficiency of the claims.

In *Sparrow v. United Air Lines, Inc.*,<sup>10</sup> the D.C. Circuit reversed the district court's dismissal of a race discrimination claim. The district court granted United Air Lines' motion to dismiss for failure to state a claim, holding that the complaint failed to "make out a prima facie case of discrimination;" that is, it failed to plead that plaintiff was (1) a member of a protected class; (2) similarly situated to an employee who was not a member of the protected class; and (3) treated disparately from the similarly situated employee. Judge Garland's opinion rejected the district court's articulation of the pleading requirement for employment discrimination claims and held that a plaintiff need not plead the precise elements of a prima facie case but merely needs to allege that

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7 139 F.3d 958 (D.C. Cir. 1998), decision vacated by *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

8 *Id.* at 970-79.

9 *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999).

10 216 F.3d 1111 (D.C. Cir. 2000).



she was turned down for a job based on her race. That alone would survive a motion to dismiss because “racial discrimination in employment is a claim upon which relief can be granted.”<sup>11</sup>

*Sparrow* was decided prior to the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*<sup>12</sup> and *Ashcroft v. Iqbal*,<sup>13</sup> which articulated a new federal pleading standard requiring allegations demonstrating that a claim is plausible rather than merely possible. Although Judge Garland’s decision in *Sparrow* could conceivably have come out differently under the newer pleading standard, Judge Garland’s recent decision in *Harris v. District of Columbia Water & Sewer Auth.*<sup>14</sup> evinces a continuing tendency toward allowing plaintiffs to proceed with the merits of the claim past the motion to dismiss phase. Finding that the complaint failed to adequately allege causation, the district court dismissed a complaint alleging, *inter alia*, retaliatory discharge from employment for complaining about race discrimination by the employer. The D.C. Circuit reversed, finding that, even under the more demanding pleading standard of *Twombly* and *Iqbal*, the complaint “alleged sufficient facts going to causation to render his claim plausible.”<sup>15</sup> In so finding, Judge Garland conducted a thorough and detailed examination of the complaint and flagged numerous allegations that, in his view, adequately alleged causation.

Moreover, the *Sparrow* and *Harris* decisions reflect a preference for allowing the plaintiff an opportunity to conduct discovery. Although the plaintiff’s complaint in *Sparrow* contained certain facts tending to support the employer’s position that its adverse employment action was made for legitimate, non-discriminatory reasons, that was insufficient to justify dismissal because plaintiff had not been given an opportunity to prove that those reasons were simply pretext for illegal, discriminatory motives, as discovery had been stayed during the pendency of the motion to dismiss.<sup>16</sup>

With respect to decisions on the merits favoring one side or the other, Judge Garland has come down fairly evenly on the side of both employees and employers. For plaintiffs, Judge Garland has in a number of cases decided that the trial court improperly granted summary judgment against a plaintiff’s discrimination claims given the

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11 *Id.* at 1113, 1115.

12 550 U.S. 544 (2007).

13 556 U.S. 662 (2009).

14 791 F.3d 65 (D.C. Cir. 2015).

15 *Id.* at 69.

16 216 F.3d at 1117.

existence of a triable issue of fact for a jury to decide.<sup>17</sup> In these cases, Judge Garland meticulously reviews the record evidence to determine whether the standard for summary judgment has been met. Even though the D.C. Circuit Court can review *de novo* the district court's grant of summary judgment, Judge Garland has been cautious to do so absent confidence that the record is complete and would justify such a review. For example, in *Steele v. Schafer*, a government employer acknowledged that the district court erred, but encouraged the D.C. Circuit to review the evidence *de novo* and affirm on other grounds the district court's dismissal of plaintiff's claims on summary judgment. Judge Garland declined the government's invitation due to a lack of confidence that a tangled appellate record would contain all of the information necessary to render a just and fair opinion.<sup>18</sup>

Alternatively, there are several contrary examples where Judge Garland has ruled that the record did not support findings that employers discriminated against their employees. For example, in *McGill v. Munoz*,<sup>19</sup> the D.C. Circuit found that it was not discriminatory to require an employee to make up time she spent beyond her allotted one-hour lunch period taking an aerobics class, even though it was purportedly necessary given her diagnosis of depression. The plaintiff based her claim on the fact that non-disabled employees were not required to make up time they spent at the aerobics class. The evidence, however, showed that other similarly situated employees, although not members of plaintiff's protected class, were not taking more than their allotted one-hour lunch break to attend the class. Thus, in Judge Garland's view, no reasonable jury could find intentional discrimination on the basis of disparate treatment. Similarly, requiring the plaintiff to provide a doctor's note for chronic absences from work did not amount to discrimination where the company's policies expressly allowed supervisors to request doctor's notes if an employee appears to be abusing the sick leave policy.<sup>20</sup>

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17 See, e.g., *Steele v. Schafer*, 535 F.3d 689 (D.C. Cir. 2008) (reversing grant of summary judgment and reinstating plaintiff's hostile work environment and retaliation claims based on race discrimination); *Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007) (reversing grant of summary judgment to employer on plaintiff's claim that her reassignment constituted a discriminatory demotion based on gender).

18 See *Steele*, 535 F.3d at 693.

19 203 F.3d 843 (D.C. Cir. 2000).

20 *Id.* at 846-48 (finding no reasonable jury could have found the employer intentionally discriminated against its employee on the basis of disability); see also *Borgo v. Goldin*, 204 F.3d 251 (D.C. Cir. 2000) (reversing trial court's grant of summary judgment in favor of plaintiff's claim for race and gender discrimination finding a triable issue on a mixed motive analysis).

## 2. OTHER EMPLOYMENT CASES

There are several employment cases arising outside of the Title VII context that are also worthy of note. In *Fontana v. White*,<sup>21</sup> two former Army physicians sought an injunction to prevent enforcement of a decision by the Army Board for Correction of Military Records that calculated the physicians' separation from service dates under the Active Duty Service Obligations rules in return for undergraduate and medical school educations. The physicians had received their undergraduate and graduate medical educations at West Point and the Uniformed Services University of the Health Services ("USUHS"), respectively, and attempted to circumvent the Active Duty Service Obligations rules by arguing that they could concurrently satisfy their two service obligations and that their time at USUHS receiving their medical education satisfied part of their commitment associated with West Point. Defendant's motion for summary judgment was granted by the district court and the two physicians appealed. Judge Garland held that the physicians' service obligations, with respect to their undergraduate and medical school educations, could not be served concurrently and that time spent in medical school could not count toward their undergraduate obligations. His decision was based squarely on a direct application of the explicit language of the applicable statutes.

In the decision, Judge Garland noted that "if [the court] were to accept their alternative argument that the two service obligations were served concurrently, they would owe *no* additional service for their free undergraduate education. Such a windfall would be inconsistent with one of the Army's primary purposes . . . for requiring such obligations in exchange for educational assistance: ensuring 'a reasonable return to the Army following the expenditure of public funds.'"<sup>22</sup> The emphasis on the regulatory purpose, which arguably was not necessary given the express language of the rules, is noteworthy. Judge Garland focused extensively on statutory purpose and legislative history in the next case discussed below.

In *United States ex rel. Yesudian v. Howard University*,<sup>23</sup> a former employee of a university's purchasing department brought allegations against the university and a supervisor, alleging the submission of false claims in violation of the False Claims Act ("FCA") and retaliation for the employee's reporting of such claims. The former employee also brought a breach of contract claim. After a jury ruled favorably for the former employee

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21 334 F.3d 80 (D.C. Cir. 2003).

22 334 F.3d at 87 (emphasis in original).

23 153 F.3d 731 (D.C. Cir. 1998)

on certain claims, the lower court judge granted the supervisor's motion for judgment as a matter of law on the retaliation claim, but denied the university's motion for judgment as a matter of law on the contract claim. Ultimately, the lower court held that the employee's conduct was unprotected because he never initiated a private *qui tam* suit. On appeal, Judge Garland held that the employee's failure to initiate a private *qui tam* suit did not defeat the FCA retaliation claim against the supervisor, pointing to the language of the FCA which protects "investigation for . . . an action filed or to be filed." It was sufficient for the employee to investigate matters that could reasonably lead to a viable FCA case because the FCA does not require an action to be filed.<sup>24</sup>

The case also focused on whether Howard University knew that the employee was engaged in protected activity, which is an essential element of a retaliation claim. The district court held that this element was not satisfied because the employee had never suggested to the defendant that he intended to pursue an FCA action or report the improprieties to government officials. Judge Garland, however, reasoned that, since a plaintiff need not know his investigation could lead to an FCA action in order to be protected, there could be no requirement that the employee notify the university that such an action was being contemplated. His opinion concluded that, regardless of whether the employee knew such claims would violate the FCA itself, all the university need know is that the employee was engaged in activity that could reasonably lead to an FCA case. In reaching this conclusion, Judge Garland observed that the language of the statute "manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before* they have put all the pieces of the puzzle together."<sup>25</sup>

Perhaps the most interesting aspect of *Yesudian* for present purposes is that Judge Garland went out of his way to analyze an open issue under the False Claims Act that was not essential to the issues before the court, and did so with heavy reliance on congressional intent as reflected in the legislative history. The jury decided against the plaintiff on his *qui tam* claim against one of the defendants for submitting a false claim to Howard University, and the plaintiff did not appeal that adverse decision. Nevertheless, Judge Garland wrote extensively on the following issue despite its lack of relevance to the issues on appeal: whether an action lies for a false claim when submitted to a grantee of the United States (*i.e.*, Howard University), rather than the United States itself.<sup>26</sup>

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24 *Id.* at 739-40.

25 *Id.* (emphasis in original).

26 *Id.* at 737-39.

In analyzing the text of the statute with respect to this issue, Judge Garland found that, even after a 1986 amendment that expanded the definition of “claim” under the False Claims Act, one could argue both sides of the issue based on the language of the statute. That is, one could make a credible argument both (i) that the false claim must be submitted to an officer or employee of the United States, and (ii) that the false claim can also be submitted to a recipient of federal funds, in order to trigger an action under the statute. In looking at both the Senate and House Reports on the amendment, however, Judge Garland found that the purpose of the new definition of “claim,” as stated in the reports, was to “clarif[y] that the statute permits the Government to sue under the False Claims Act for frauds perpetrated on Federal grantees, including States and other recipients of federal funds.” He also noted that the Senate Judiciary Committee indicated that the new language was inserted in response to earlier court decisions holding that a fraud against a grantee does not constitute a fraud against the United States. Thus, Judge Garland concluded that reading the statute to apply to a grantee’s receipt of a false claim is “in harmony with the legislative history.” He then relied further on the legislative history in observing, in the absence of guidance from the language of the statute, that before a false claim to a grantee can be considered a false claim to the United States, there should be a “sufficiently close nexus between the two such that a loss to the former is effectively a loss to the latter.”<sup>27</sup>

The reference to the purpose of the rule in *Fontana* and use of legislative history in *Yesudian* may be indicative of Judge Garland’s receptivity to an argument that civil rights statutes should be broadly construed in accordance with their remedial purposes, taking into account the statutory purpose and any specific indicators of congressional intent as derived from the legislative history, in ruling on an issue of first impression, absent statutory language that is clear on the subject.

In *Miller v. Clinton*,<sup>28</sup> Judge Garland’s opinion held that the State Department is not exempt from the Age Discrimination in Employment Act (“ADEA”), rejecting the State Department’s argument that the Basic Authorities Act (“BAA”) permits the Department to exempt employees hired under the BAA from the protections of the ADEA. Over a lengthy dissent by Judge Kavanaugh, Judge Garland reversed the district court’s dismissal of the complaint, characterized the ADEA as “one of the signature pieces of legislation prohibiting discrimination in the workplace,” and rejected the Department’s argument that the BAA contains an exemption from the ADEA, finding that the ambiguous language of the BAA was insufficient to indicate the intent of Congress to exempt this

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27 *Id.*

28 687 F.3d 1332 (D.C. Cir. 2012).

class of federal employees from the ADEA, or any other federal antidiscrimination law.<sup>29</sup>

In *Howard v. The Office of the Chief Admin. Officer of the U.S. House of Representatives*,<sup>30</sup> Judge Garland joined an opinion by Judge Edwards construing whether the Speech or Debate Clause of the Constitution barred a race discrimination suit by a former employee of the Office of the Chief Administrative Officer of the U.S. House of Representatives under the Congressional Accountability Act (“CAA”), which creates a cause of action for covered employees in the legislative branch. The court noted that the disputed adverse employment actions, demotion and termination of the plaintiff, were not legislative activities shielded from review under the Speech or Debate Clause, and that the plaintiff was entitled to proceed with her claims.<sup>31</sup>

Another case contains an interesting discussion of the First Amendment in the employment context. In *Mpoy v. Rhee*,<sup>32</sup> a special education teacher working in the D.C. public school system brought an action against his school principal and the school district chancellor, alleging retaliation in violation of the First Amendment because he was allegedly terminated for complaining about the condition of his classroom and pressured by his principal to falsify students' test scores. The district court granted the defendants' motion for judgment on the pleadings and the teacher appealed. Judge Garland ultimately held that the pertinent e-mail that the teacher sent to the D.C. school district chancellor complaining about his classroom conditions constituted employee speech that is not protected by the First Amendment, but affirmed the lower court's judgment primarily because the principal and chancellor were entitled to qualified immunity.

In his analysis of whether the teacher's e-mail constituted protected First Amendment speech, Judge Garland was sensitive to the need to balance the interest of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs. Although Judge Garland recognized that teachers do not relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest, he followed established precedent holding that a public employee does not speak with First Amendment protection when reporting conduct that interferes with job responsibilities, regardless of whether the report is made outside the chain of command.<sup>33</sup>

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29 *Id.* at 1236-38.

30 720 F.3d. 939 (D.C. Cir. 2013)

31 *Id.* at 404-07.

32 758 F.3d 285 (D.C. Cir. 2014).

33 *See id.* at 290-91.

Finally, although falling in a somewhat different category of employment jurisprudence, Judge Garland's opinions in cases involving the National Labor Relations Board ("NLRB") evidence a tendency to defer to agency decision-making. The D.C. Circuit, in an opinion by Judge Garland, has held that an "agency's interpretation of its own precedent is entitled to judicial deference,"<sup>34</sup> and it will "not reverse the [NLRB's] adoption of an ALJ's credibility determinations unless. . . those determinations are hopelessly incredible, self-contradictory, or patently unsupportable."<sup>35</sup> In *Northeast Beverage Corp. v. NLRB*,<sup>36</sup> Judge Garland, in a dissenting opinion, applied these deference principles to find that the NLRB's "determination that an employee engaged in protected concerted activity is entitled to considerable deference if it is reasonable." This pattern of administrative deference has continued in Judge Garland's more recent opinions.<sup>37</sup>

Although Judge Garland's deference to the NLRB frequently flows to the benefit of employees in unfair labor claims, his deference to agency decision-making appears to be a philosophical approach divorced from a particular agency's subject matter expertise. One could posit various scenarios where a deferential approach to agency decision-making could be helpful or not helpful to the cause of civil rights.

## B. HOUSING

We identified only one case in the housing area that raises civil rights issues. In *Feemster v. BSA Ltd. P'ship*,<sup>38</sup> certain tenants of the Bates Street Townhomes residential properties in Washington, D.C., brought an action against their landlord, BSA Limited Partnership ("BSA"), alleging that BSA violated the federal housing statutes and the Human Rights Act by refusing to accept Section 8 rental assistance vouchers, in lieu of cash, as payment for rent.<sup>39</sup> The district court granted summary judgment in favor of the tenants on the federal claims but granted summary judgment in favor of BSA on the claims under the Human Rights Act.

34 *Ceridian Corp. v. N.L.R.B.*, 435 F.3d 352, 355 (D.C. Cir. 2006) (citations omitted).

35 *Shamrock Foods Co. v. N.L.R.B.*, 346 F.3d 1130, 1134 (D.C. Cir. 2003) (internal quotation marks and citations omitted).

36 554 F.3d 133 (D.C. Cir. 2009).

37 See, e.g., *Spurlino Materials, LLC v. N.L.R.B.*, 805 F.3d 1131 (D.C. Cir. 2015); *Pacific Coast Supply, LLC v. N.L.R.B.*, 801 F.3d 321 (D.C. Cir. 2015).

38 548 F.3d 1063 (D.C. Cir. 2008).

39 Section 8 refers to Section 8 of the United States Housing Act of 1937, administered by the United States Department of Housing and Urban Development (HUD).

Under the Human Rights Act, refusal to conduct real estate transactions “for a discriminatory reason...[including an individual’s] source of income,” is unlawful.<sup>40</sup> Section 1402.21(e) of the Human Rights Act further provides that assistance under “[S]ection 8 of the United States Housing Act...shall be considered a source of income.”<sup>41</sup> In dismissing the claims of the tenants, the district court agreed with BSA that its refusal to accept the rental assistance vouchers did not constitute “source of income” discrimination since BSA’s motivation for not accepting the vouchers was its “desire[] to withdraw the Bates Street Townhomes from the rental market and sell the property to a third party who plans to convert the property into residential housing for home owners[]” and not because of “anti-voucher animus.”<sup>42</sup> The tenants and BSA cross appealed to the D.C. Circuit.

In Judge Garland’s view, the district court “erred in resolving [the] case based on its assessment of BSA’s motive.”<sup>43</sup> The district court noted that after an exhaustive search, the court did not find (and the parties did not cite) any District of Columbia cases involving claims of discrimination under the Human Rights Act based on source of income. Instead the district court looked to other jurisdictions, including a case decided by the Connecticut Supreme Court, involving alleged discrimination on the basis of “source of income.”<sup>44</sup> Judge Garland, however, viewed the issue from a civil rights perspective and relied on cases where, in interpreting the Human Rights Act, the District of Columbia Court of Appeals had looked to federal cases involving claims under Title VII of the Civil Rights Act of 1964. In Judge Garland’s opinion, “under Title VII, when a policy is ‘discriminatory on its face,’ the defendant’s motive is irrelevant.” He found that BSA’s refusal to accept the Section 8 rental assistance vouchers (but willingness to accept rent from their own funds) constituted a “facial violation of the Human Rights Act” just as it would be a “facial violation of Title VII to discriminate in leasing on the basis of a renter’s race.” Moreover, permitting BSA to refuse to accept the Section 8 vouchers simply because BSA found the Section 8 procedures burdensome, would, in Judge Garland’s opinion, “vitate [the express provisions of the Human Rights Act] and the legal safeguard it was intended to provide.”<sup>45</sup>

Viewed in the context of the cases discussed in the prior employment section, Feemster is further indicative of a focus on the remedial purposes of the civil rights laws, and

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40 D.C. Code § 2-1402.21(a)(1), (2)

41 *Id.*, § 1402.21(e).

42 *Feemster v BSA Ltd. P’ship*, 471 F. Supp. 2d 87, 99, 102 (2007).

43 548 F.3d at 1070.

44 471 F. Supp. 2d at 100.

45 548 F.3d at 1070-71.



a willingness to rely on precedent from other civil rights laws with a similar remedial purpose in construing open issues.

## C. VOTING RIGHTS

Of the handful of cases involving voting rights (or closely related to the election process) in which Judge Garland was directly involved, he drafted an opinion in only three of them. Specifically, Judge Garland drafted one such opinion on a three-judge panel in the D.C. District Court and two opinions in the D.C. Circuit. In the remaining few cases involving Judge Garland he participated as a member of the panel and joined the opinion of the court.

It is difficult to draw definitive conclusions regarding Judge Garland's stance on voting rights given the relatively small number of opinions and, for the opinions that are available, the varying posture of the cases. In general, however, Judge Garland appears interested in ensuring that voting rights cases are adjudicated on the merits and not dismissed out of hand (as was noted with respect to employment cases above); tends to focus on the facts of the case, applicable precedent, and relevant statutory language; and has demonstrated concern about the First Amendment's impact on voting issues, such as ballot initiatives.

In several of the voting rights opinions reviewed, Judge Garland favored allowing the cases to proceed rather than being dismissed at the pleadings stage. In *Little v. King*,<sup>46</sup> presiding over a panel in the D.C. District Court, Judge Garland denied the Alabama Attorney General's motion to dismiss a claim under the Voting Rights Act regarding whether an Alabama law had been properly subjected to the Voting Rights Act's preclearance provisions.<sup>47</sup> Judge Garland did, however, transfer the case from the D.C. District Court to the Middle District of Alabama, which was "where the challenged statute was passed and would be implemented."<sup>48</sup>

Similarly, in *Kingman Park Civic Association v. Williams*,<sup>49</sup> the panel (including Judge Garland) held that the lower court should not have dismissed the case for failure to state a claim, finding that the plaintiffs had clearly stated sufficient allegations to meet the federal pleading standards. The plaintiffs had alleged that the Ward Redistricting

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46 768 F. Supp. 2d 56 (D.D.C. 2011).

47 *Id.* at 59.

48 *Id.* at 67.

49 348 F.3d 1033 (D.C. Cir. 2003).

Amendment Act of 2001, which redrew the boundaries of D.C.'s eight electoral wards following the 2000 census, diluted African-American voting strength in violation of the Voting Rights Act. Specifically, the plaintiffs alleged that the removal of 1,840 residents of Ward Six reduced the African-American population from 68.7% to 62.3%. In assessing the allegations, the panel demonstrated a nuanced understanding of vote dilution claims and an interest in preventing vote dilution, stating that such claims: "must be assessed in light of the demographic and political context, [as] it is conceivable that minority voters might have 'less opportunity . . . to elect representatives of their choice' even where they remain an absolute majority in a contested voting district." Despite the panel's rejection of the lower court's dismissal for failure to state a claim, however, the panel dismissed the case on summary judgment due to a lack of evidence that the minority voters at issue were politically cohesive or that the wards were characterized by racially polarized voting.<sup>50</sup>

In *LaRouche v. Fowler*,<sup>51</sup> Judge Garland (writing for the panel) held that a single district court judge should not have dismissed the entire complaint under the Voting Rights Act but that a three-judge panel ought to have been convened. In *LaRouche*, the plaintiff contended that the application of the Democratic Party's internal rules, which he asserted deprived him of two delegates to the 1996 Democratic National Convention, violated the Voting Rights Act because they were not submitted to preclearance. The lower court denied the application for a three-judge panel and dismissed the entire complaint. In addition to remanding the claims to district court for the convening of a three-judge panel, Judge Garland held that the claims were not moot, that they did not concern nonjusticiable political questions, and that they were not "obviously frivolous" or "wholly insubstantial." Judge Garland hewed closely to precedent and to relevant statutory language.<sup>52</sup>

In a *per curiam* district court decision involving a three-judge panel joined by Judge Garland, *Florida v. United States*,<sup>53</sup> the court evaluated two election law changes in Florida under the then-valid preclearance procedures of Section 5 of the Voting Rights Act: (1) changes in the available days and hours that Florida counties may use for early in-person voting, and (2) changes in voting procedures for registered voters who move between Florida counties and seek to vote in their new county of residence. As to the first change, the court held that Florida failed to meet its burden of proving that

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50 *Id.* at 1036-38, 1041

51 152 F.3d 974 (D.C. Cir. 1998).

52 *Id.* at 975-83, 986.

53 885 F. Supp. 2d 299 (D.D.C. 2012).

the early voting changes “will not have a retrogressive effect on minority voters.” As to the second, the court held that Florida satisfied its burden and the changes were entitled to pre-clearance.<sup>54</sup> The opinion is quite lengthy and detailed, demonstrating a deep and thorough understanding of the facts. With respect to the rejected early voting changes, the opinion conclusively found, based on the available statistical evidence, that “minority voters disproportionately use early in-person voting, and therefore will be disproportionately affected by the changes in early voting procedures.”<sup>55</sup>

Despite Judge Garland’s apparent preference that voting rights cases be decided on the merits, he has on several occasions sided with the defendants on the merits. As discussed above, although the panel in *Kingman Park Civic Association* found that the complaint should not have been dismissed for failure to state a claim, the panel nevertheless ruled for defendant on summary judgment.<sup>56</sup> Similarly, in *Libertarian Party v. D.C. Board of Elections and Ethics*,<sup>57</sup> the panel (including Judge Garland) affirmed the granting of summary judgment to the defendant. The Libertarian Party and its write-in candidate in the 2008 election, Bob Barr, alleged that the D.C. Board of Elections’ failure to publish the number of votes cast for Barr (as opposed to the number of write-in votes cast in general) violated the First and Fifteenth Amendments. The opinion noted that not all laws burdening the right to vote are subject to strict scrutiny, and determined that election laws that impose reasonable, nondiscriminatory restrictions on voters can be justified by the State’s regulatory interests.<sup>58</sup>

In one opinion, the panel (of which Judge Garland was a member) demonstrated a concern over the impact of First Amendment issues on the voting process. In *Initiative and Referendum Institute v. United States Postal Service*,<sup>59</sup> the plaintiffs challenged a U.S. Postal Service regulation banning “soliciting signatures on petitions, polls, or surveys” on “all real property under the charge and control of the Postal Service” on First Amendment grounds. The panel reversed the lower court’s judgment, which was in favor of the U.S. Postal Service, held that the regulation was unconstitutional on its face, and remanded for further proceedings.<sup>60</sup> In so doing the panel noted that the regulation hindered the plaintiffs’ attempt to place initiatives on state ballots by collecting signatures on petitions, which the panel described as the kind of speech that is at the core of the

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54 *Id.* at 301-03.

55 *Id.* at 364.

56 *Kingman Park*, 348 F.3d at 1036.

57 682 F.3d 72 (D.C. Cir. 2012).

58 *Id.* at 73.

59 417 F.3d 1299 (D.C. Cir. 2005).

60 *Id.* at 1302-03.

electoral process. More specifically, the panel determined that the regulation was not narrowly tailored and did not preserve sufficient alternative channels of communication.<sup>61</sup>

In contrast, in *Marijuana Policy Project v. United States*,<sup>62</sup> the panel (including Judge Garland) reversed a decision by the lower court finding legislation unconstitutional because it interfered with the citizens' First Amendment rights to District of Columbia's ballot initiative process. The complaint concerned a rider to the District's appropriations act that denied authority for the District to enact laws reducing penalties associated with the use, possession, or distribution of marijuana. The panel found that no First Amendment concerns were implicated, framing the legislation as limiting legislative authority rather than legislative advocacy and comparing the issue to Congress' ability to preempt state legislation in certain contexts.<sup>63</sup>

## **D. ENVIRONMENTAL LAW AND ENVIRONMENTAL JUSTICE**

The Lawyers' Committee reviewed Judge Garland's opinions dealing with environmental law because of its active involvement in environmental justice issues. The Lawyers' Committee believes that America's environmental laws and policies should protect all communities, regardless of race, color, national origin or income level. All too often, communities of color bear a disproportionate burden of the effects of environmental pollution, and citizen suits have been critical to the enforcement of environmental laws in minority and low-income communities. Prior to the Supreme Court's ruling in *Alexander v. Sandoval*,<sup>64</sup> Title VI of the Civil Rights Act of 1964 was an important tool for minority communities challenging the discriminatory impact of conduct by recipients of federal funding. Since the *Sandoval* case, however, individuals can no longer assert disparate impact claims under Title VI. As a result, fair and equitable environmental protection through the use of environmental laws has become increasingly vital to these highly vulnerable populations.

Judge Garland's treatment of environmental issues demonstrates no discernible bias toward plaintiffs, defendants, or agencies. This opinion is echoed by Richard Lazarus, an environmental law professor at Harvard who stated "No one would say Garland

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61 *Id.* at 1305.

62 304 F.3d 82 (D.C. Cir. 2002).

63 *Id.* at 83, 85.

64 532 U.S. 275 (2001).

is a hardened environmentalist, . . . [s]till we think we'll get a straight shot from him. He doesn't come with any inherent skepticism about the federal government overreaching on environmental regulation.”<sup>65</sup> Judge Garland's rulings indicate a balanced approach, with emphasis on agencies fulfilling their obligations under the Administrative Procedures Act and any related enabling legislation. He seems receptive to the right of plaintiffs to bring actions challenging agency decisions. The decisions indicate strong reliance on the rules of statutory interpretation and precedent in making his rulings, are thoroughly researched, and like his opinions in other areas, rely heavily on a thorough and detailed discussion of the facts.

Judge Garland's decisions, while employing *Chevron* deference to agency interpretations, do not indicate an automatic deference toward agencies, particularly where the agency has violated the guidelines of either the Administrative Procedures Act or other enabling legislation.<sup>66</sup> For example, in *U.S. Air Tour Ass'n v. Federal Aviation Admin.*,<sup>67</sup> Judge Garland upheld a regulation promulgated by the Federal Aviation Administration (“FAA”) pursuant to recommendations drafted by the Secretary of the Interior in accordance with the relevant statute regarding the regulation of noise from aircraft flying over Grand Canyon National Park in the face of a challenge by a trade association of flight tour operators. Judge Garland found that the FAA met the requirements of the underlying enabling statute, the Administrative Procedures Act (“APA”), and the Regulatory Flexibility Act (“RFA”) in the face of challenges by the trade association to the scientific tests used to establish the noise thresholds and the considerations made by the FAA in regards to small businesses and certain park tourists' accessibility to the

65 Lee Logan, *Obama Supreme Court Pick Garland Seen Backing Agency Deference*, CLEAN AIR REPORT, Mar. 24, 2016, 2016 WLNR 8922599 (internal punctuation omitted).

66 *Compare Appalachian Power Co. v. E.P.A.*, 135 F.3d 791, 821 (D.C. Cir. 1998) (holding that the EPA's promulgation of rules regulating the nitrous oxide emissions from various electric utility burners pursuant to the Clean Air Act was a valid exercise of its authority and done in compliance with the requirements of federal law for all but one challenge, where it was found that the EPA failed to adequately respond “to key questions about the reasonableness of the agency's position” requiring remand on that single challenge) with *Cement Kiln Recycling Coal. v. E.P.A.*, 493 F.3d 207 (D.C. Cir. 2007) (holding that the EPA complied with the requirements of the underlying enabling legislation and legal requirements in promulgating rules governing the requirement that hazardous waste combustors governed by both the Resource Conservation and Recovery Act and the Clean Air Act provide additional information allowing the EPA to evaluate the health and human safety impacts of their business) and *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (holding that the Fish and Wildlife Service violated the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedures Act by failing to make available to the public a map of a proposed mitigation site in the application for an incidental taking permit by a developer and by failing to independently consider an alternative to the developer's plan but instead relying only on the developer's assertion that the alternative was not reasonable).

67 298 F.3d 997 (D.C. Cir. 2002).

park.<sup>68</sup>

In the same decision, however, Judge Garland also determined that the FAA did exceed its statutory authority in relation to the same regulations in the face of a challenge by a coalition of environmental groups, known as the Grand Canyon Trust, finding that the FAA's reading of the Secretary of Interior's guidelines was inconsistent both with the Secretary's own interpretation of those guidelines as well as with the intent of the statute requiring such promulgation.<sup>69</sup> As shown by the case above, instead of deferring automatically to the agency, or viewing the agency's determinations with immediate skepticism, Judge Garland instead applied a reasoned approach to the challenge, where he examined the agency's decision making in context, and determined whether deference is properly accorded under the law.

Even where Judge Garland decided a plaintiffs' challenge was not ripe or where he did not grant the requested remedy due to extenuating circumstances surrounding the claim, he did preserve the plaintiffs' right to bring the action or proceed with the claim. For example, in *Devia v. Nuclear Regulatory Comm'n*,<sup>70</sup> members of a Native American tribe brought an action seeking to overturn the Nuclear Regulatory Commission's ("NRC") grant of a license for the construction and operation of a nuclear fuel storage facility on tribal land. Judge Garland ultimately determined that the plaintiffs' claim against the NRC was not ripe, in light of the fact that the entity seeking to operate the facility was denied a lease for the land by the Bureau of Indian Affairs, as well as denied its requested rights of way by the Bureau of Land Management. Judge Garland noted that, where the facility could not become operational without these approvals, and the entity had yet to file any appeal of these decisions, any potential harm that may befall the plaintiffs was not certain and an opinion on the NRC's decision would be unconstitutionally advisory. Rather than dismissing the case, however, Judge Garland made the determination to hold the case in abeyance so that the plaintiffs could renew the action pending the entity's "securing administrative approval (by judicial reversal of disapproval or otherwise) required for it to construct and operate the storage facility."<sup>71</sup>

Similarly, in *In re United Mine Workers of Am. Int'l Union*,<sup>72</sup> Judge Garland preserved the claims of a plaintiff by ensuring continued judicial oversight over agency actions.

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68 *Id.* at 1005-12 (finding that the FAA did not exceed its authority in the face of five distinct challenges by the U.S. Air Tour Association)

69 *Id.* at 1015-19.

70 492 F.3d 421 (D.C. Cir. 2007).

71 *Id.* at 422, 425-26.

72 190 F.3d 545 (D.C. Cir. 1999).

In this matter, the United Mine Workers of America (“UMWA”) brought an action for a writ of mandamus to force the Mine Health and Safety Administration (“MHSA”) to promulgate final regulations governing emissions in diesel exhaust resulting from use of diesel fueled equipment in underground mines. In 1989, the MHSA released draft regulations governing the permissible exposure limits (“PELs”) for the presence of harmful gases in mines, which served to update PELs established in 1972 that the MHSA conceded were outdated and “d[id] not fully protect today’s miners” in that form.<sup>73</sup> Despite the Mine Act requiring the “Secretary of Labor to promulgate final regulations, or to explain her decision not to promulgate them, within ninety days of the certification of the record of a hearing if one is held, or of the close of the comment period if a hearing is not held,” no such final regulations were promulgated by the time the case was filed in 1999. Judge Garland found that the MHSA was in clear violation of this required ninety day deadline.<sup>74</sup> Despite this finding, however, Judge Garland expressed concerns that a writ of mandamus may take the MHSA’s focus away from promulgating other regulations of equally high, if not higher priority than the regulation governing PELs. He noted that the court “must take care not to craft a remedy for MSHA’s statutory violation that could both interfere with the agency’s internal processes and damage the very interests the petitioner seeks to protect.”<sup>75</sup> Rather, however, than merely leaving the agency to set its own timeline with no oversight, Judge Garland required continued judicial oversight of the regulation with regular reports from the MSHA and left open the possibility that the “UMWA may petition this court to grant additional appropriate relief in the event that MHSA fails to adhere substantially to a schedule that would . . . constitute a good faith effort by the MHSA to come into compliance with the Mine Act.”<sup>76</sup> Both cases indicate Judge Garland’s inclination to provide plaintiffs with an opportunity to be heard, even where plaintiffs’ complaint against an agency is not ripe at the time of filing or the remedy requested is not practicable.

Finally, in *Rancho Viejo, LLC. v. Norton*, a real estate developer brought an action against the Secretary of the Interior claiming that the Secretary’s finding that a proposed development was an incidental taking under the Endangered Species Act (“ESA”) was an unconstitutional exercise of federal authority under the Commerce Clause.<sup>77</sup> The Secretary sought to protect an endangered species of toad. The developer argued that

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73 *Id.* at 547-48.

74 *Id.* at 550-51.

75 *Id.* at 553.

76 *Id.* at 556.

77 323 F.3d 1062, 1064 (D.C. Cir. 2003).

the Supreme Court's rulings in *United States v. Lopez*<sup>78</sup> and *United States v. Morrison*<sup>79</sup> required a finding that the activity regulated by the ESA was not economic in nature. Judge Garland disagreed, stating that the ESA "regulates takings not toads" and asserting that "nothing in the facts of *Morrison* or *Lopez* suggests that focusing on plaintiff's construction project [as the activity being regulated] is inappropriate or insufficient."<sup>80</sup>

Of particular interest to the Lawyers' Committee's, however, is Judge Garland's analysis of how *Lopez* and *Morrison* interact with seminal Commerce Clause decisions of the Court such as *Heart of Atlanta Motel v. United States*,<sup>81</sup> which upheld the constitutionality of Title II of the Civil Rights Act of 1964. In addressing whether a Congressional act under the Commerce Clause can be used to achieve noneconomic ends through the regulation of commercial activity (including commercial activity occurring only within a single state), Judge Garland noted of *Heart of Atlanta Motel* that "the fact that Congress passed the statute to attack the moral outrage of racial discrimination did not lead the Supreme Court to find it unconstitutional. To the contrary, citing several of the cases discussed above, the Court held that the fact that Congress was legislating against moral wrongs renders the enactments no less valid."<sup>82</sup> Later in the opinion, in a discussion regarding the federal government's authority to regulate the environment specifically, Judge Garland notes that the Supreme Court has held that Congress may "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment."<sup>83</sup>

While Judge Garland may not always side with the plaintiffs, agencies, or defendants in a case involving environmental issues, his decisions have shown no particular bias for or against plaintiffs or agencies. Further, his decisions in these cases indicate an implicit approval, in at least some instances, of both Congressional authority to regulate the environment nationally, agency authority to exercise its power to protect the environment, and citizen's ability to utilize the courts to enforce such legislation or regulations.

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78 514 U.S. 549 (1995).

79 529 U.S. 598 (2000).

80 323 F.3d at 1069-72.

81 379 U.S. 241 (1964).

82 323 F.3d at 1075 (internal citations omitted).

83 *Id.* at 1079.



## E. JURISPRUDENCE ON CRIMINAL JUSTICE

### 1. OVERVIEW

As to criminal justice issues which are central to Lawyers' Committee concerns – racial profiling by police, over-incarceration, discriminatory enforcement of criminal laws, clemency for non-violent offenders, rights of formerly incarcerated persons, etc. – Judge Garland has not authored opinions of direct relevance. The opinions providing possibly the most pertinent insights in this regard are his cases dealing with prisoner rights, noted in subsection 4 below. In those cases his approach is encouraging in terms of reflecting concerns about claims of the voiceless. On the range of other criminal justice related cases Judge Garland has authored, however, his perspective as a former federal prosecutor seems apparent. Judge Garland very rarely votes to reverse criminal convictions.<sup>84</sup> Perhaps most striking on this point, Judge Garland has, on at least 10 occasions, disagreed with more liberal colleagues, adopting the position more favorable to the government or declining to reach a question on which the majority had adopted a position more favorable to the defendant.<sup>85</sup> In his many opinions affirming criminal convictions and sentencings, Judge Garland frequently emphasizes the strength of the prosecution case against the defendant in finding alleged errors to be harmless.

### 2. GENERAL CRIMINAL APPEALS

#### A. INEFFECTIVE ASSISTANCE CLAIMS

In several decisions reviewing an appellant's request to vacate a guilty plea on grounds of ineffective assistance of counsel, Judge Garland authored opinions emphasizing the strength of the prosecution's case in the context of affirming the trial court's decision. For example, in *United States v. Berkeley*,<sup>86</sup> he noted that "any competent attorney would have advised Berkeley that he stood little chance of obtaining an acquittal if he went to trial on the indictment filed against him." The Court determined that even assuming that the appellant's attorney provided ineffective assistance, based on the strength of the prosecution's case it was unlikely that the appellant suffered any prejudice because even

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84 Tom Goldstein, *In The Potential Nomination of Merrick Garland*, SCOTUSblog (April 26, 2010, 4:30 pm), <http://www.scotusblog.com/2010/04/the-potential-nomination-of-merrick-garland/>. Goldstein identified only eight published rulings through 2010 in which Judge Garland joined the majority reversing a criminal conviction. Judge Garland did not write any of the opinions.

85 *See id.*

86 567 F.3d 703 (D.C. Cir. 2009).

effective counsel would have suggested the course taken.<sup>87</sup>

In *United States v. Hanson*, Judge Garland noted in his opinion for the Court on a similar case that “any competent attorney would also have advised Hanson that he stood little chance of obtaining an acquittal at trial.”<sup>88</sup> The appellant sought to vacate his guilty plea claiming that his counsel had miscalculated the appropriate sentencing range and that he had a viable defense of entrapment. In affirming the trial court’s decision, Judge Garland noted that the appellant’s “belated claim of entrapment was extremely weak.”<sup>89</sup> In another appeal, seeking reversal because of counsel’s failure properly to advise the appellant on the possible sentencing range, Judge Garland authored an opinion stressing the strength of the prosecution’s case and the substantial likelihood of the chances of conviction. Affirming the trial court’s decision not to allow the appellant to withdraw his guilty plea, the judge opined that given the choice again, the appellant would not have chosen to go to trial given the strength of the prosecution’s case.<sup>90</sup>

In *United States v. Eli*,<sup>91</sup> defendant challenged the sentence on his plea to the unlawful distribution of crack cocaine on the grounds that his original counsel was constitutionally ineffective by failing to advise defendant on the difference between “cocaine base” and “crack” or to raise this distinction at the sentencing hearing. Judge Garland’s opinion affirmed because the trial judge had concluded the substance distributed by the defendant was crack cocaine, based on testimony received from a government chemist and the description of the drug by the DEA and in the Presentencing report. Consequently, any error by defendant’s counsel was harmless.<sup>92</sup>

In contrast, in *United States v. Shabban*,<sup>93</sup> the court remanded for an evidentiary hearing defendant’s challenge to his conviction of international kidnapping on the grounds of ineffective assistance of counsel. Defendant alleged that his trial counsel had failed to investigate information he offered to undermine the charges against him, and the record reflected that trial counsel had not called any witnesses. Also, in *United States v. Jones*,<sup>94</sup> the court remanded for an evidentiary hearing defendant’s claim that following his guilty plea to conspiracy to distribute heroin, his sentencing counsel was ineffective by

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87 *Id.* at 710.

88 339 F.3d 983, 991 (D.C. Cir. 2003).

89 *Id.* at 988-89.

90 *In re Sealed Case*, 488 F.3d 1011, 1019 (D.C. Cir. 2007).

91 379 F.3d 1016 (D.C. Cir. 2004).

92 *Id.* at 1022.

93 612 F.3d 693 (D.C. Cir. 2010).

94 642 F.3d 1151 (D.C. Cir. 2011).

not asking the court to recommend that defendant be placed in the Bureau of Prison's Residential Drug Abuse Program. In both opinions, Judge Garland noted the court's general practice of remanding such claims for an evidentiary hearing unless the trial record conclusively established that the defendant either was or was not entitled to the relief.<sup>95</sup>

Other opinions by Judge Garland have likewise stopped short of reversing a conviction where there were gaps in the record, but instead remanded cases for further proceedings in the district court when the record did not contain sufficient information on which to decide a critical element of the appeal. For example, in *United States v. Goree*,<sup>96</sup> the court remanded the case for additional testimony to establish whether the circumstances surrounding the defendant's arrest posed sufficient danger to the arresting officers to establish an exigency that justified a warrantless search. Specifically, the opinion noted the absence from the record of information either confirming or disproving officers' statements about the layout of the apartment, the location of defendant's girlfriend in the apartment and whether the girlfriend was secured or moving freely about the apartment.

## B. OTHER ALLEGED SENTENCING ERRORS

Judge Garland has, with few exceptions, voted to affirm decisions on sentences, often finding that any alleged error at the trial court was harmless. In several cases deciding an appellant's claim that questions wrongfully decided by the judge should have been submitted to the jury, Judge Garland found that the judge's rulings were not controverted by evidence or would have otherwise not resulted in a different sentence.<sup>97</sup> In four other cases, Judge Garland wrote opinions similarly finding that errors at sentencing failed to rise to the level of error that would merit a reversal.<sup>98</sup> These opinions demonstrate a mastery of the factual record, deference to the trial court and confidence in the prosecution's case.

In the relatively rare cases in which Judge Garland has written opinions reversing the trial court's sentencing decision, the error has been clear under established law.

<sup>95</sup> See *Shabban* 612 F.3d at 698; *Jones*, 642 F.3d at 1156, n.3.

<sup>96</sup> 365 F.3d 1086 (D.C. Cir. 2004).

<sup>97</sup> See *United States v. Lafayette*, 337 F.3d 1043 (D.C. Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003); *United States v. Johnson*, 331 F.3d 962 (D.C. Cir. 2003).

<sup>98</sup> *United States v. Law*, 806 F.3d 1103 (D.C. Cir. 2015); *United States v. Hall*, 326 F.3d 1295 (D.C. Cir. 2003); *United States v. Heard*, 359 F.3d 544 (D.C. Cir. 2004); *United States v. Branham*, 515 F.3d 1268 (D.C. Cir. 2008).

For example, in *United States v. Riley*,<sup>99</sup> the court set aside a sentence that reflected a downward departure from the sentencing guidelines on the grounds that the defendant was not eligible for the downward departure. The defendant, who had several felony convictions more than ten years before, was apprehended by an FBI Special Agent as he entered his work place in the D.C. field office of the FBI. The defendant had a fully loaded firearm (for which he had a Maryland but no D.C. permit) and was charged with unlawful possession of a firearm by a convicted felon. The defendant, who identified himself as a MPD Chaplain and produced a Police Department ID, asserted that on the evening before his arrest he had delivered an invocation at an annual law enforcement memorial service, participated in a “ridealong” with a MPD officer and accompanied that officer to a shooting range in Maryland. Based on the nature of the offense, the guidelines rendered the defendant ineligible for probation. The sentencing judge, on the grounds that defendant was gainfully employed, supported his children and had not been charged with any crime for more than thirteen years, granted defendant’s request for a downward departure in order to impose a sentence of three years’ probation. On the government’s appeal of the sentence, Judge Garland on the basis of a de novo review rejected each justification for the downward departure proffered by the defendant and remanded the case for further sentencing hearings.<sup>100</sup> In a separate opinion, concurring in part and dissenting in part, Judge Rogers agreed that the downward departure was unwarranted based on the facts stated in the record, but argued for remanding the case to the district court for further factual findings that might support the lighter sentence.<sup>101</sup>

In *United States v. Thomas*,<sup>102</sup> reviewing the trial judge’s denial of a downward departure, Judge Garland concluded that an earlier D.C. Circuit case, which found that denying a downward departure on the basis of the defendant’s arrest record was plain error, compelled remanding a sentence that had resulted from the denial of a downward departure based in part on an arrest record with exactly the same parameters (number of arrests within number of years) as the prior case. The opinion noted that on remand, however, the district court could reject the departure again as long as it did so without reference to the defendant’s arrest record.<sup>103</sup>

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99 376 F.3d 1160 (D.C. Cir. 2004).

100 *Id.* at 1172-73.

101 *Id.* at 1173-78.

102 361 F.3d 653 (D.C. Cir. 2004).

103 *Id.* at 661-63.

## C. OTHER HARMLESS ERROR AND PROCEDURAL AFFIRMANCES

In other instances where there was arguably plain error in a trial resulting in a conviction, Judge Garland's opinions do not remand for further proceedings when the record contains sufficient information to conclude that the error was harmless. For example, *United States v. Stubblefield*,<sup>104</sup> does not resolve the question whether permitting the government to introduce evidence of an uncharged bank robbery was erroneous because the government had sufficient evidence to establish that the defendant had committed the six charged bank robberies and, therefore, any error with respect to the uncharged robbery was harmless.<sup>105</sup>

Judge Garland authored the opinion in *United States v. Pettiford*,<sup>106</sup> reviewing a defendant's contention that introduction of evidence of a guilty plea in another matter, which was submitted to the jury in the instant case but later vacated as involuntary, should warrant a new trial. Judge Garland noted that the plea was not a significant part of the prosecution's case and that "[t]he only reason the government used the plea transcript in the first place was that Pettiford's counsel preferred a dry transcript to the live testimony of police officers who would testify that they watched him transact a drug deal and then found crack in the same location in which it was found in this case."<sup>107</sup> In affirming the trial court's decision, Judge Garland's opinion suggests that his experience as a prosecutor can guide his understanding both of the importance of particular evidence in a case and of tactical decisions at trial.

In *United States v. Andrews*,<sup>108</sup> Judge Garland authored a majority opinion affirming a conviction despite errors made by the trial court because the court determined that the errors would not have impacted the outcome of the trial. In *Andrews*, an investigator's hand-written notes were not disclosed prior to trial and only provided to the appellant when mentioned during the investigator's testimony. The appellant argued that the failure to produce the investigator's notes constituted a *Brady* violation and reversible error. Ruling for the appellees, Judge Garland's opinion for the majority noted that "[t]he notes, however, were hardly voluminous . . . Moreover, defense counsel had two opportunities to request a continuance to examine them."<sup>109</sup> While concurring with

104 643 F.3d 291 (D.C. Cir. 2011).

105 *Id.* at 296-97.

106 *Id.* at 661-63.

107 *Id.* at 591-92.

108 532 F.3d 900 (D.C. Cir. 2008).

109 *Id.* at 906-07.

the result, Judge Rogers, a Clinton appointee, argued that the failure to provide the investigator's notes put the defense in a position where the use of such notes would have been to its disadvantage. More sympathetic to the appellant's claims of prejudice through the tardy disclosure, Judge Rogers argued that "the defense case was compromised," but found that the appellant's failure to object at trial raised the standard of review to "plain error," and that the appellant's case for a new trial failed to meet that standard.<sup>110</sup>

There are limited instances in which Judge Garland has authored an opinion reversing a trial court decision in a criminal case. In *United States v. Shmuckler*,<sup>111</sup> for example, the court overturned one count of a multiple count conviction because the indictment alleged counterfeiting a check while the evidence only spoke to forgery of a check. The prosecution had failed to present evidence on the crime as described in the indictment, and the court found that to be reversible error.<sup>112</sup>

### 3. GUANTANAMO CASES

Judge Garland has been criticized by some lawyers representing detainees at Guantanamo as having been overly pro-Government in those cases.<sup>113</sup> He was a member of the panel that heard the first appeal by a Guantanamo detainee, in *Al Odah v. United States*.<sup>114</sup> He joined the unanimous panel opinion affirming the district court's ruling that it lacked jurisdiction to issue writs of habeas corpus to aliens detained outside the sovereign territory of the United States, a position later reversed by the U.S. Supreme Court. The *al Odah* panel based its decision on the Supreme Court's holding in *Johnson v. Eisentrager*,<sup>115</sup> that German prisoners of war confined by the U.S. military in Germany did not have a Fifth Amendment right to petition for habeas corpus.

In most other Guantanamo cases for which Judge Garland wrote the majority opinion (or was on the panel), the court also ruled in favor of the government.<sup>116</sup> Notably, in

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110 *Id.* at 910-11.

111 792 F.3d 158 (D.C. Cir. 2015).

112 *See id.* at 162-63.

113 *See* Charlie Savage, *Garland's Guantanamo Rulings Have liberals Torn Over Nomination*, N.Y. Times, Mar. 19, 2016, at A14.

114 321 F.3d 1134 (D.C. Cir.), rehearing en banc denied (2003), rev'd sub nom. *Rasul v. Bush*, 540 U.S. 466 (2004).

115 339 U.S. 763 (1950).

116 *See, e.g., Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011) and *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012).

*Khan v. Obama*,<sup>117</sup> Judge Garland wrote the majority opinion rejecting a detainee's claim that confidential reports on which the district court had found that he was lawfully detained were unreliable. The D.C. Circuit concluded that the district court did not commit error by basing its factual findings on information included in the confidential reports because it had corroborated the information by reference to declarations by Army intelligence collectors who described why they assessed the sources of the information to be reliable, by assessing the detail and internal coherence of the information and with physical evidence recovered from the detainee's home. Furthermore, the government had submitted unredacted versions of the reports in camera both to the district court and the D.C. Circuit.

One case stands as an exception to that apparent pro-Government trend. Judge Garland wrote the majority opinion in *Parhat v. Gates*,<sup>118</sup> ruling against the government on an appeal under the Detainees Treatment Act of 2005 of a decision by a Combatant Status Review Tribunal ("CSRT") that the detainee (a Chinese Uighur) was an enemy combatant. The court held that the intelligence reports on which the CSRT based its factual findings were not sufficient because they did not identify the source of their information and, therefore, neither the CSRT nor the appellate court could assess their reliability. The government argued that the evidence must be reliable because it appeared in three different classified documents. Judge Garland responded: "We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true," referencing Lewis Carroll, *The Hunting of the Snark* 3 (1876).<sup>119</sup> In finding the government evidence insufficient, the *Parhat* opinion, like many Judge Garland opinions, takes a very impressively deep dive into the factual record.

#### **4. PRISONERS' RIGHTS/PRISON CONDITION CASES**

In *Malik v. District of Columbia*,<sup>120</sup> the court reversed a summary judgment based on procedural failures in favor of the District against a District prisoner who filed a complaint pro se claiming that the District and a correctional service hired by the District had violated his Eighth Amendment rights. The complaint alleged the violations occurred when the plaintiff was transported between Ohio and Arizona in

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117 655 F.3d 20 (D.C. Cir. 2011).

118 532 F.3d 834 (D.C. Cir. 2008).

119 *Id.* at 848-49.

120 574 F.3d 781 (D.C. Cir. 2009).

a forty-hour bus ride during which he was deprived of water and restrained in a way that made it impossible to use the restroom or his asthma inhaler. The district court had dismissed the complaint on the grounds that the plaintiff had not exhausted his administrative remedies and had missed a deadline for filing his response to a motion for summary judgment. The D.C. Circuit, in an opinion authored by Judge Garland, reversed the grant of summary judgment because the District had not established that the plaintiff had any administrative remedies to exhaust and because, given the confusing sequence of motions filed by the District and the private correctional service, the trial court had abused its discretion in granting the summary judgment against an incarcerated *pro se* plaintiff without providing him fair notice of his obligation to respond.

In *Daniel v. Fulwood*,<sup>121</sup> Judge Garland authored the opinion of the court reversing the decisions of the Chairman of the United States Parole Commission to apply current parole regulations to prisoners sentenced under prior parole regulations. In contrast to his numerous opinions favoring the government, Judge Garland's opinion in *Daniel* recognizes that prisoners that are sentenced under a specific regulatory regime should not be subject to additional prison time as a result of changes to the parole regulations. Judge Garland's opinion notes the strength of the several aspects of the plaintiff's arguments and chides the Commission for misconstruing the plaintiff's arguments.<sup>122</sup>

In *Daskalea v. District of Columbia*,<sup>123</sup> the panel reviewed the District's appeal of a jury award of \$350,000 in compensatory damages and \$5,000,000 in punitive damages. Sunday Daskalea had been an inmate in the District of Columbia jail, where she was subjected to repeated sexual harassment, culminating in her being forced to perform a strip-tease for a crowd of inmates, guards (including males) and maintenance workers. She had sued under 42 U.S.C. § 1983, and added common law claims of negligent supervision and intentional infliction of emotional distress. Judge Garland, writing for a unanimous panel, concluded that the jury had sufficient evidence to support its verdict for Daskalea (and the \$350,000 in compensatory damages). The District's sexual harassment policy did not insulate it from liability, given the substantial evidence of deliberate indifference to violations. Judge Garland also rejected the District's argument that the abuse was undertaken by "a small group of rogue employees" – he found the repeated harassment at the jail to be "open and notorious."<sup>124</sup> In confirming the sufficiency of the evidence to support the jury verdict, Judge Garland shows his

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121 766 F.3d 57 (D.C. Cir. 2014).

122 *Id.* at 61-62.

123 227 F.3d 433 (D.C. Cir. 2000).

124 *Id.* at 441-43.



typical mastery of the factual record. The panel did strike the \$5,000,000 punitive damage award. Judge Garland found that D.C. law did not permit punitive damages for the common law claims, and that the District, as a municipality, had immunity from punitive damages in the § 1983 action.<sup>125</sup> Further, Judge Garland again closely reviewed the trial record to confirm that Daskalea had sued the director of the D.C. Department of Corrections in her official, not individual, capacity, so that punitive damages were not appropriate against her either.<sup>126</sup>

In *Saleh v. Titan Corp.*,<sup>127</sup> Judge Garland dissented from the majority opinion (written by Judge Silberman, joined by Judge Kavanaugh) which dismissed claims by Iraqis against contractors at the infamous Abu Ghraib prison.

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125 *Id.* at 446-47.

126 *Id.* at 448-49 & n.13.

127 580 F.3d 1 (D.C. Cir. 2009) (Garland, J., dissenting).

## VI. OTHER SOURCES OF INFORMATION

Although the Lawyers' Committee believes that judicial opinions should be the primary source of information about a nominee such as Judge Garland, who has served as an appellate judge over a period of over eighteen years, it is appropriate for the Senate and the public to take into account considerations and information beyond judicial opinions in determining whether Judge Garland should be confirmed. Traditionally, for example, the Senate has considered speeches, articles and other writings of nominees in order to understand their judicial philosophies, legal abilities, and more intangible qualities, such as integrity and temperament. Here, however, we found no articles or speeches targeted to issues of concern to the Lawyers' Committee.

The Committee closely analyzed Judge Garland's record from his years in college and law school to help form a better impression of the judge's temperament and values. Our review reveals Judge Garland's deep commitment to public service. We observe that Judge Garland is a regular speaker at the annual 40@50 Judicial Pro Bono Breakfast, a cooperative effort by the D.C. Circuit Judicial Conference Committee on Pro Bono Legal Services and the D.C. Bar Pro Bono Center to encourage greater pro bono work in the legal community. Forty percent of lawyers are encouraged to perform a minimum of 50 hours of pro bono service. During one of his speeches, Judge Garland observed that: "With government service agencies facing budget cuts, law firms like yours will be needed to fill the gaps. We are not powerless against [high rates of poverty and unemployment]. I ask you to continue your partnerships with area legal service providers."<sup>128</sup>

On April 21, 2016, Judge Garland appeared at another such annual breakfast event and offered remarks that further illustrated his affinity for public service and appreciation for pro bono work. He said that by "helping to provide access to justice for the underprivileged all of you are helping to shore up the rule of the law that is the foundation of a just society." He continued: "Without legal assistance poor individuals and families have no real access to justice. Without access to justice, the promise of equal justice rings hollow. Without equal justice under law, faith in the rule of law the foundation of our civil society is at risk."<sup>129</sup> The concept of "equal justice under law" is at the core of the Lawyers' Committee's mission.

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128 See BLT: The Blog of Legal Times, *D.C. Federal Judges Honor Law Firm Pro Bono Work*, April 9, 2013, [legaltimes.typepad.com/blt/2013/04/dc-federal-judges-honor-law-firm-pro-bono-work.html](http://legaltimes.typepad.com/blt/2013/04/dc-federal-judges-honor-law-firm-pro-bono-work.html).

129 Josh Gerstein, *Garland speech may signal new phase in confirmation effort*, Politico (April 21, 2016), <http://www.politico.com/story/2016/04/merrick-garland-speech-lawyers-222250>.

Judge Garland also helped to create the first federal agency pro bono policy at the Department of Justice. Providing a behind-the-scenes account of how the Executive Order and the DOJ Pro Bono Policy came to be, Judge Garland has highlighted the tremendous growth of the Federal Government Pro Bono Program since its inception, noting that “[i]n early 1996, there was only one federal agency, the Justice Department, that had a [policy] to encourage pro bono participation. Now there are 28, with six more in the drafting stage.”<sup>130</sup>

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130 See D.C. Bar Legal Beat: February 2014, *Department of Homeland Security Receives Pro Bono Award*, <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/february-2014-leagl-beat.cfm>.

## VII. JUDICIAL DIVERSITY

The Lawyers' Committee is committed to promoting judicial diversity at every level of our local, state and federal judiciary. Diversity, particularly with respect to race and gender, should always be a positive factor in both the selection and review of a nominee. Given our particular mission, and the current makeup of the Court, we believe increasing the racial and ethnic diversity of the Court is of particular importance to ensure that the Court reflects the diversity of our society and appropriately weighs a wide range of viewpoints in its evaluation of cases. While Judge Garland does not advance diversity on the Supreme Court, we recognize that this is not the dispositive factor for the President, nor is it for the Lawyers' Committee in determining the qualifications of a nominee to the Court.

Judge Garland's own commitment to diversity would seem to be an appropriate line of inquiry at his nomination hearing. The Lawyers' Committee researched and interviewed a number of former clerks of Judge Garland, and identified at least five African American clerks who served for the Judge during his tenure, four of whom went on to secure Supreme Court clerkships. In general, Judge Garland's clerks, both minority and non-minority, consistently highlight his commitment to providing mentorship and support to all clerks, particularly with respect to their future professional endeavors. In at least one instance, we learned that Judge Garland identified a need for more African American clerks and was very deliberate and intentional in working to identify diverse candidates to consider for a clerkship position in his chambers. Ultimately, Judge Garland's effort bore fruit and resulted in the selection of an African American clerk, who subsequently went on to secure a U.S. Supreme Court clerkship.





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