

**THE NOMINATION OF
CHIEF JUDGE MERRICK B. GARLAND
TO THE SUPREME COURT
OF THE UNITED STATES**



**A REPORT BY THE
NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.**

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INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law firm. Founded by Thurgood Marshall, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for over 75 years. To this end, LDF is committed to ensuring that the federal judiciary fairly reflects the diversity of this nation and to protecting the central role played by the courts in the enforcement of civil rights laws and the Constitution's guarantee of equal protection. LDF therefore plays an active role in recommending and evaluating nominations to the Supreme Court and other courts across the nation.

Because the addition of an individual justice to the Supreme Court changes its balance and dynamic in both subtle and dramatic ways, each nomination is extraordinarily important to the future of our country. For this reason, it is LDF's practice to review the record of Supreme Court nominees to understand their views and positions on civil rights issues. LDF seeks to determine whether the prospective members of the Court demonstrate a strong commitment to preserving and furthering civil rights and to advancing the progress our nation has made toward fair and equal justice. LDF's purpose is not necessarily to endorse or oppose a nominee. In fact, LDF does not take a position on every Supreme Court nominee. Instead, LDF shares its conclusions about a nominee's record in order to contribute to a full understanding of a nominee's civil rights record,¹ support the Senate's constitutional obligation to "advise and consent" on such nominations, and ensure that the Supreme Court's role in vindicating the civil rights of those who are most marginalized is fully recognized in the confirmation process.

The circumstances surrounding the current nomination are anything but ordinary. Within 56 minutes of the official announcement of Justice Antonin Scalia's sudden death on February 13, 2016, leaders in the United States Senate announced that the "vacancy should not be filled until we have a new President."²

* We acknowledge the significant contributions made to this report by Orrick, Herrington & Sutcliffe LLP; Steven Barr; Professor Rena Steinzor; and John Vail.

¹ For example, we note that in the recently released report on Judge Garland's record by the Congressional Research Service, only one page is devoted to his record in civil rights cases. See Andrew Nolan et al., *Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court* (Congressional Research Service, Apr. 27, 2016), available at <http://www.fas.org/sgp/crs/misc/R44479.pdf>.

² Compare Press Release, Remarks by the President on the Passing of the U.S. Supreme Court Justice Antonin Scalia (Feb. 13, 2016, 5:45 PM), available at <https://www.whitehouse.gov/the-press-office/2016/02/13/remarks-president-passing-us-supreme-court-justice-antonin-scalia>, with Press Release, Statement by Leader Mitch McConnell on the Passing of Judge Scalia (Feb. 13, 2016, 6:41 PM), available at <https://twitter.com/SenateMajLdr/status/698653325718257664?lang=en>.

The rationale offered to support this preemptive and categorical refusal to consider a nominee is that it is the President's second Term and an election year. But the historical reality is that since 1875, every nominee to the Supreme Court has received either a hearing or a vote, and the Senate has never taken more than 125 days to act on a Supreme Court nomination.³ Moreover, nearly a quarter of all U.S. Presidents (10) have appointed a total of fourteen (14) Supreme Court justices who were confirmed during election years. Indeed, President Ronald Reagan nominated then-Judge Anthony Kennedy to the Supreme Court during his second term, in an election year. The Senate's refusal to consider a nominee not only represents an unprecedented departure from the Senate's historical practice and constitutional obligation, but also has fundamentally influenced the way in which his nomination has unfolded and the context in which this report is now being released.

On March 16, 2016, President Barack Obama nominated Chief Judge Merrick Brian Garland of the United States Court of Appeals for the District of Columbia Circuit to serve as the 113th justice of the Supreme Court of the United States. Since that announcement, the Chairman of the Senate Judiciary Committee has insisted that the Committee will not hold a confirmation hearing.⁴ Given Judge Garland's nineteen years on the federal bench, significant government service, time in private practice, and educational background, no one seriously disputes that he has an exceptional and extensive record of accomplishment. Instead, the fact that he has amassed such a lengthy record, including hundreds of appellate decisions, underscores the importance of a hearing. That body of work must be fully reviewed and explored by the United States Senate on behalf of the American people. In the absence of the customary Senate hearing, external vetting such as this report is even more important.

In preparing this report, LDF reviewed Judge Garland's judicial record, with a particular focus on the civil rights and constitutional issues that are of greatest relevance to the clients LDF represents. This process entailed analyzing all of his written opinions and dissents that bear on issues of employment and housing discrimination, criminal justice, voting rights, and access to the courts – as well as his votes in cases in which other judges authored the decision. LDF also examined Judge Garland's legal record from his work in private practice, as an Assistant U.S. Attorney (AUSA), and in his other positions at the U.S. Department of Justice (DOJ). Additionally, LDF conducted research into Judge Garland's publications and speeches, personal background, and work outside of the law.

³ As of the writing of this report, the Senate has refused to grant a hearing for the President's nominee for over fifty days.

⁴ See, e.g., Ted Barrett & Manu Raju, *First on CNN: Grassley on Garland meeting: 'Nothing has changed'*, CNN, Apr. 23, 2016, available at <http://www.cnn.com/2016/04/12/politics/merrick-garland-grassley-meeting-hill-supreme-court/>.

LDF found that Judge Garland is, without doubt, highly qualified to serve as a justice of the Supreme Court. He possesses exceptional credentials and an unquestionable and laudable commitment to government service. We note, however, that Judge Garland’s professional path follows an increasingly familiar trajectory for Supreme Court nominees, including his educational background and clerkships, work for the DOJ and U.S. Attorney’s Office, and service as a federal appellate judge. LDF continues to believe that the Supreme Court, like all courts, would benefit from greater diversity. In addition to racial and gender diversity, this should include nominees with a broader range of legal experience, such as a background in criminal defense and/or civil rights law. In this regard, we are mindful of the contributions to the Court made by our founder, Thurgood Marshall, who, as Justice Byron White explained, “brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match.”⁵

Nevertheless, our review of Judge Garland’s record reveals that he is well-prepared to serve on our nation’s highest court. He maintains a steadfast respect for the doctrinal and technical contours of the law, forges narrow, carefully reasoned opinions, and builds consensus. In cases involving racial discrimination, Judge Garland seems to appreciate the importance of letting plaintiffs have their day in court and try to prove their case.

At the same time, LDF has concerns about Judge Garland’s record in criminal justice cases, which may be influenced by his lengthy professional background and perspective as a former federal prosecutor and senior DOJ official. Those concerns are detailed in this report. Thus, LDF finds the need to grant Judge Garland a Senate hearing particularly compelling so that he can share his approach to cases and decision-making in this area.

There are certain constitutional and legal topics on which Judge Garland has had little opportunity to rule or comment, including affirmative action, school desegregation, and a range of voting rights issues. Some of this is a function of the unique nature of the D.C. Circuit docket—and some of it may stem from his tendency to write tightly focused decisions that narrowly construe the issues before the court. These are also matters that should be explored in the course of a confirmation hearing in which the Senate can further examine the nominee’s views.

Given his exceptional record of public service, his unblemished record as a practicing lawyer, his fine reputation as a jurist, and the exigencies of the current moment—including the unprecedented obstructionism in the Senate and the series of Supreme Court cases that have already deadlocked in a 4-4 vote—LDF supports

⁵ Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 Stan. L. Rev. 1215, 1216 (1992).

and indeed urges a prompt hearing, and thereafter a vote on the confirmation of Judge Garland as soon as is practicable. There is no sound reason for delay, particularly with a candidate of this stature. Judge Garland deserves the opportunity to present his views, his philosophy, and his approach to judicial decision-making to the Senate and to receive a timely up-or-down vote on confirmation.

BACKGROUND

Early Life, Education, and Clerkships

Merrick Brian Garland was born in Chicago, Illinois in 1952 and grew up in the city's northern suburbs. The descendant of Eastern European immigrants who fled anti-Semitism in Russia, Mr. Garland attended school in the town of Skokie, Illinois, a town that was then home to several thousand Holocaust survivors.⁶ Mr. Garland was the valedictorian of Skokie's Niles West High School in 1970 and then graduated Phi Beta Kappa from Harvard College in 1974. During college, Mr. Garland wrote for *The Harvard Crimson*,⁷ worked on a campus-wide student housing committee, and interned for then-Congressman and eventual federal judge Abner Mikva. (He would later fill Mikva's seat on the D.C. Circuit.) Mr. Garland received his J.D. from Harvard Law School and served as articles editor for the *Harvard Law Review*. After graduating from law school in 1977, Mr. Garland clerked for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and subsequently for Justice William Brennan of the Supreme Court of the United States.⁸

Private Practice and Initial Government Service

After his clerkships, Mr. Garland joined the staff of the DOJ, where he served as a special assistant to the Attorney General for the final two years of the Administration of President Jimmy Carter, working on an immigration case involving the Iranian hostage crisis and on False Claims Act matters.⁹ In 1981, Mr. Garland moved into the private sector as an associate at Arnold & Porter, where he made partner in 1985. In 1983 and 1984, he volunteered for Vice President Walter

⁶ *Nazis Thwarted in Rally Bid*, Jewish Telegraphic Agency, May 4, 1977, available at <http://www.jta.org/1977/05/04/archive/nazis-thwarted-in-rally-bid>.

⁷ See generally The Harvard Crimson, Merrick Garland | Writer Profile http://www.thecrimson.com/writer/5773/Merrick_Garland/.

⁸ Responses by Merrick Garland to Senate Judiciary Committee Questionnaire at 1-3 (1995), (hereinafter "1995 Senate Questionnaire").

⁹ See *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980) (raising challenges under the Due Process Clause, Administrative Procedure Act, and Freedom of Information Act); U.S. Senate Committee on the Judiciary, False Claims Act of 1979, S. 1981, 96th Cong. (Nov. 19, 1979), available at <https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/31/hear-96-33-1979.pdf> (Senate hearing where Mr. Garland served on panel about the False Claims Act, but offered no individual testimony).

Mondale's presidential campaign.¹⁰ In 1987, Mr. Garland married Lynn Rosenman.¹¹ In 1988, while still a partner at Arnold & Porter, Mr. Garland volunteered on the Presidential campaign of Governor Michael Dukakis, assisting in the candidate's debate preparation.¹²

As part of his private practice, Mr. Garland is publicly listed as counsel on a variety of commercial cases, most involving administrative or antitrust law.¹³ Notably, Mr. Garland also served as counsel of record on a *pro bono* petition for *certiorari* to the U.S. Supreme Court on behalf of the first African-American employee hired by the House of Representatives as an official reporter.¹⁴ The employee alleged she had been dismissed because of her race and that her employer's subsequent justification for her dismissal was pretextual. The question presented focused on whether the Speech and Debate Clause of the Constitution barred certain lawsuits for racially discriminatory firings of congressional employees. The Supreme Court declined to take the case in a 6-2 vote: Justices White and Brennan indicated that they would have granted *certiorari*; Justice Scalia took no part in the consideration or decision of the petition.¹⁵

During this period, Mr. Garland published several articles in law reviews and elsewhere, chiefly about antitrust issues,¹⁶ which were the focus of his private practice and of a class he taught at Harvard Law School as a lecturer. His

¹⁰ 1995 Senate Questionnaire at 17.

¹¹ In the course of our research for this report, we learned that Ms. Rosenman's grandmother, Dorothy Rosenman, served on LDF's Board of Directors from the late 1950s through the 1980s and actively supported LDF. Her grandfather, Samuel Rosenman, served on LDF's National Legal Committee in the 1940s and 1950s and on LDF's Lawyer of the Year Committee in the 1960s. We know of no other connections between Mr. Garland's family and LDF.

¹² 1995 Senate Questionnaire at 17.

¹³ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Posa, Inc. v. Miller Brewing Co.*, 642 F. Supp. 1198 (E.D.N.Y. 1986); *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206 (D.C. Cir. 1982); *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986); *Billman v. Maryland Deposit Ins. Fund Corp.*, 312 Md. 128 (Ct. App. Md. 1988); *U.S. v. Fischbach and Moore, Inc.*, 750 F.2d 1183 (3rd Cir. 1984).

¹⁴ Pet. for a Writ of Certiorari, *Browning v. Clerk, U.S. House of Representatives*, 1988 WL 1093974 (Oct. 3, 1988). Also on the brief were attorneys affiliated with American Civil Liberties Union in New York and D.C. See also 1995 Senate Questionnaire at 18 (indicating that the *Browning* representation was pro bono).

¹⁵ *Browning v. Clerk, U.S. House of Representatives, cert. denied*, 479 U.S. 996 (1986).

¹⁶ See e.g., James F. Fitzpatrick & Merrick Garland, *The Court, 'Veto' and Airbags*, N.Y. Times, Aug. 20, 1983, at L21; Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505 (1985); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486 (1987); Merrick B. Garland, *Antitrust and Federalism: A Response to Professor Wiley*, 96 Yale L.J. 1291 (1987). See also Notes, *The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act*, 89 Harv. L. Rev. 715 (1976) (collaborative student note); Commercial Speech, in *The Supreme Court 1975 Term*, 90 Harv. L. Rev. 56 (1976) (collaborative student note).

publications also touched upon questions of federalism and the balance-of-power in the context of federal agency regulation. Mr. Garland's writings featured little, if any, discussion of policy or commentary on the Reagan-era changes to regulatory bodies that were taking place at approximately the same time. Mr. Garland sometimes looked at Congressional intent in establishing a given regulatory framework, but did so without any normative predisposition on how the agency should function.

After the 1988 election, Mr. Garland left his law firm to become an Assistant U.S. Attorney in Washington, D.C. from 1989 to 1992, where he tried federal criminal cases. His work included the prosecution of large-scale narcotics activity and white collar crimes, including, most notably, the prosecution of former Washington, D.C. Mayor Marion Barry.¹⁷ For instance, Mr. Garland prosecuted a drug distribution enterprise in *United States v. Harris, et al.*,¹⁸ which, according to Mr. Garland's Senate questionnaire, was "the first mandatory life [sentence] Continuing Criminal Enterprise case tried in the District."¹⁹ The defendants in that case received a mandatory sentence of life in prison without the possibility of parole after conviction.

Mr. Garland continued to work as a prosecutor until 1992, at which time he returned to private practice at Arnold & Porter, when he also helped then-Governor Bill Clinton prepare for presidential debates.²⁰ After the 1992 election, Mr. Garland joined the DOJ in the new administration, serving initially as Deputy Assistant Attorney General for the Criminal Division. A year later, Deputy Attorney General Jamie Gorelick appointed Mr. Garland to serve as the Principal Associate Deputy Attorney General, her top aide.

Clinton Justice Department

In his position as Principal Associate Deputy Attorney General, Mr. Garland worked on some of the DOJ's biggest investigations in the 1990s. After the 1995 Oklahoma City bombing, Mr. Garland volunteered to head a DOJ task force that led to the eventual prosecution of Timothy McVeigh and Terry Nichols.²¹ DOJ sought

¹⁷ See *U.S. v. Kelley*, 36 F.2d 1118 (D.C. Cir. 1994); *U.S. v. Whitehead*, 1992 WL 20639 (D.C. Cir. Feb. 5, 1992) (per curiam, unpublished); *U.S. v. Richardson*, 1992 WL 71404 (D.D.C. 1992) (unreported); *U.S. v. Rogers*, 918 F.2d 207 (D.C. Cir. 1990); *U.S. v. Butler*, 924 F.2d 1124 (D.C. Cir. 1991).

¹⁸ 959 F.2d 246, 249 (D.C. Cir. 1992) abrogated by *U.S. v. Stewart*, 246 F.3d 728 (D.C. Cir. 2001).

¹⁹ 1995 Senate Questionnaire at 11.

²⁰ 1995 Senate Questionnaire at 2, 17.

²¹ *Id.* at 9. In May 1995, DOJ announced that the U.S. Attorney for the Western District of Oklahoma would head the Oklahoma City investigation and prosecution and that Mr. Garland would "return to his post as senior advisor and chief of staff to the Deputy Attorney General, where he [would] continue to oversee the Department's national response to the bombing." Press Release, U.S. Department of Justice, Joseph Hartzler to Head Oklahoma City Probe and Prosecution Team (May 22, 1995), available at https://www.justice.gov/archive/opa/pr/Pre_96/May95/288.txt.html.

and received a death sentence for Mr. McVeigh, who was executed in 2001. It also sought a death sentence for Mr. Nichols, but the jury deadlocked at the sentencing phase, and Mr. Nichols was ultimately sentenced to life imprisonment.²² Mr. Garland was listed as counsel for the DOJ in an appeal to the Tenth Circuit relating to Mr. McVeigh's case, but Mr. McVeigh later chose to waive his appeal of his death sentence and volunteer for his own execution.²³ Behind the scenes, Mr. Garland was regarded as taking special measures to run the process by the book²⁴ and ensure that the media attention did not impact the trial.²⁵

Mr. Garland was also deeply involved in DOJ's investigation into the UNABOMBER case,²⁶ including supervising the Department's interactions with Ted Kaczynski's family, who led law enforcement to Mr. Kaczynski after recognizing his writing style when his manifesto was published.²⁷ In a third terrorism-related case, Mr. Garland worked on the 1996 investigation of the Atlanta Olympics bombing and proactively advised FBI agents to give then-suspect Richard Jewell a *Miranda* warning. Mr. Jewell was subsequently cleared of wrongdoing.²⁸

In terms of policy work, we know, for example, that Mr. Garland helped create DOJ's policy allowing and promoting certain types of *pro bono* and volunteer work.²⁹ Somewhat less is known, however, about Mr. Garland's direct role in

²² Lois Romano & Tom Kenworthy, *Nichols Spared Death Penalty*, Wash. Post, Jan. 8, 1998, available at <http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/nichols0107.htm>.

²³ *U.S. v. McVeigh*, 896 F. Supp. 1549 (W.D. Ok. 1995), 106 F.3d 325 (10th Cir. 1997); Jo Thomas, *McVeigh Ends Appeal of His Death Sentence*, N.Y. Times, Dec. 13, 2000, available at <http://www.nytimes.com/2000/12/13/us/mcveigh-ends-appeal-of-his-death-sentence.html>.

²⁴ Selwyn Crawford & David Jackson, *McVeigh gets new attorney: FBI denies finding suspect's license plate*, Dallas Morning News, 1995 WLNR 5298913, May 9, 1995, (Mr. Garland was "making sure subpoenas and search warrants comply with the law.").

²⁵ Paul Queary, *A Quiet Man's Biggest Case[:] Prosecutors Sought Lead in Bombing Trial*, Charlotte Observer, 1997 WLNR 2026894, Apr. 24, 1997.

²⁶ Pierre Thomas & Thomas Heath, *Agents Dissecting a Cabin; Pieces of Bomb Suspect's Shed Shipped to Lab*, Wash. Post, 1996 WLNR 6562234, Apr. 12, 1996.

²⁷ Michael J. Sniffen, *Inquiry by Suspect's Brother in UNABOMBER Case Detailed*, Fort Worth Star-Telegram, 1996 WLNR 1171139, Apr. 9, 1996 (via Associated Press).

²⁸ See U.S. Department of Justice Office Professional Responsibility, Summary of the Investigation by the Office of Professional Responsibility Into the Circumstances Surrounding the Interview of Richard A. Jewell in the CENTBOM Case; David Johnston, *Report on F.B.I. Interview With Olympics Suspect Criticizes Agents in Atlanta*, N.Y. Times, July 26, 1997, available at <http://www.nytimes.com/1997/07/26/us/report-on-fbi-interview-with-olympics-suspect-criticizes-agents-in-atlanta.html>.

²⁹ See Memorandum to All Department Employees from the Attorney General, Department of Justice Pro Bono and Volunteer Policy (Mar. 8, 1996), available at https://www.justice.gov/sites/default/files/ust/legacy/2011/10/11/ProBono_Legal_Volunteer_Services_Policy.pdf; District of Columbia Circuit Judicial Conference Standing Committee on Pro Bono Legal Services, Report of the Standing Committee on Pro Bono Legal Services 14, available at <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20->

supporting or shaping several pieces of criminal justice legislation that were passed during this period. For example, the Department publicly supported the passage of the Violent Crime Control and Law Enforcement Act of 1994,³⁰ which is now recognized as exacerbating the problem of mass incarceration and producing a variety of harmful consequences for the African-American community.³¹ The Clinton administration also signed into law the Antiterrorism and Effective Death Penalty Act of 1996, which was produced “[a]fter the tragedy in Oklahoma City, [when President Clinton] asked Federal law enforcement agencies to reassess their needs and determine which tools would help them meet the new challenge of domestic terrorism.”³² On the other hand, during Mr. Garland’s tenure, DOJ improved its guidance for federal prosecutors to give them more leeway on charging and plea decisions.³³ Specifically, the policy set forth that federal prosecutors should consider whether the U.S. Sentencing Guidelines penalty for a given offense is “proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.”³⁴

Nomination to the D.C. Circuit

In late 1995, Mr. Garland was nominated for a seat on the D.C. Circuit Court, but he was not confirmed for nearly two years. The Senate initially refused to move on Mr. Garland’s nomination because Republican leaders—including Chairman of the Senate Judiciary Committee, Chuck Grassley—contended that the D.C. Circuit did not need more judges to effectively handle its caseload.³⁵

[%202014%20Pro%20Bono%20Committee%20Report/\\$FILE/DC%20Circuit%20Standing%20Committee%20Judicial%20Conference%20Report.PDF](#) (describing Mr. Garland’s creation of the policy).

³⁰ 1994 Annual Report of the Attorney General of the United States, *available at* <https://www.justice.gov/archive/ag/annualreports/ar94/finalag.txt> (listing “Support[] [of the] the passage of the Violent Crime Control and Law Enforcement Act of 1994” as one of the “Highlights of 1994 Accomplishments”); *see also* U.S. Department of Justice Fact Sheet, *available at* <https://www.ncjrs.gov/txtfiles/billfs.txt> (hailing the passage of the Act as the “product of six years of hard work”).

³¹ Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NPR (Sept. 12, 2014), *available at* <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

³² Press Statement, William J. Clinton Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *available at* <http://www.presidency.ucsb.edu/ws/?pid=52713>.

³³ Reno Bluesheet on Charging and Plea Decisions, 1994 WL 440706 (May/June 1994).

³⁴ *Id.* *See also* Sara Sun Beele, *The New Reno Bluesheet, A Little More Candor Regarding Prosecutorial Discretion*, 6 Fed. Sent’g Rep. 310 (1994); James K. Bredar & Jeffrey E. Risberg, *The Reno Retreat: New Department of Justice “Bluesheet” DOA*, 6 Fed. Sent’g Rep. 313 (1994).

³⁵ Neil A. Lewis, *Partisan Gridlock Blocks Senate Confirmations of Federal Judges*, N.Y. Times, November 30, 1995, *available at* <http://www.nytimes.com/1995/11/30/us/partisan-gridlock-blocks-senate-confirmations-of-federal-judges.html>.

After the 1996 election, President Clinton re-nominated Mr. Garland, who was ultimately confirmed by a vote of 76-23 on March 19, 1997.³⁶ There was little discussion in Mr. Garland's confirmation proceedings about issues directly implicating civil rights or racial justice, with the exception of the death penalty. In response to a question by Senator Arlen Specter, Mr. Garland declined to indicate whether, as a personal matter, he was in favor of capital punishment, instead noting that the Supreme Court had upheld the constitutionality of the death penalty and that this was "a matter of settled law."³⁷ Mr. Garland also indicated that he was "prepared to apply the law" insofar as it permits capital punishment, citing his experience recommending that the federal government seek the death penalty when he worked as a federal prosecutor.³⁸

Service as a Judge

During his nineteen years on the D.C. Circuit, Judge Garland has authored more than 300 opinions and participated in scores more cases.³⁹ Much of his work has been shaped by the unique jurisdiction and docket of the D.C. Circuit. As the federal appeals court for the nation's capital, the D.C. Circuit oversees many of the legal disputes surrounding the actions and rules of federal agencies. Because federal agencies make policy that impacts the entire country, the D.C. Circuit often hears cases of national applicability and significance.⁴⁰ For this reason, the D.C. Circuit is widely considered the second most powerful federal court in the country, after the Supreme Court. Additionally, the D.C. Circuit addresses a somewhat unique criminal docket because the U.S. Attorney's office in D.C. handles all criminal cases—including those that would normally be considered state or local matters.⁴¹ As a result of these D.C. Circuit-related idiosyncrasies, Judge Garland has a robust record on certain issues, but not others, as discussed in greater depth below.

Judge Garland has built a reputation as a widely-respected, even-handed jurist. Outside of the courtroom, he has moderated panel discussions sponsored

³⁶ See Senate Roll Call Vote #00034, Mar. 19, 1997, available at <https://democrats.senate.gov/1997/03/19/senate-roll-call-vote-00034-32/#.Vyd0kfrJhE>.

³⁷ See *Confirmation Hearings on Federal Appointments: Hearing Before the Comm. On the Judiciary*, 104th Cong. 1062 (1996).

³⁸ *Id.*

³⁹ These include majority, dissenting, and concurring opinions.

⁴⁰ See John G. Roberts, *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. Law Rev. 3 (2006), available at http://www.virginialawreview.org/sites/virginialawreview.org/files/375_0.pdf.

⁴¹ See, e.g., U.S. Department of Justice, The United States Attorney's Office, District of Columbia, available at <https://www.justice.gov/usao-dc>.

both by the Federalist Society⁴² and the American Constitution Society,⁴³ addressing issues of civil procedure and prosecutorial independence.⁴⁴ Judge Garland has occasionally spoken at *pro bono* awards ceremonies and law schools.⁴⁵ In these public appearances, Judge Garland's role is often to moderate the discussion or pose questions, as opposed to commenting substantively on the law.

Judge Garland's civic and volunteer activities since he has joined the bench have been focused and longstanding. Shortly after joining the D.C. Circuit, Judge Garland began tutoring at an elementary school in Northeast Washington, D.C., a commitment he has maintained for the better part of two decades. Judge Garland is a member of the alumni association of both Harvard College and Harvard Law School. In 2003, Judge Garland was elected to the Harvard Board of Overseers. The 30 Overseers are elected by Harvard alumni, serve six-year terms, and influence the University's direction by advising the President and Fellows of Harvard College.⁴⁶ Judge Garland served on the Board of Overseers until 2010, including as President during his final year.⁴⁷

He presently serves on the board of the Historical Society of the D.C. Circuit, but holds no other positions with non-profit entities or companies and has reported no outside income or gifts.⁴⁸ In addition to making regular financial disclosures as part of his judicial service, Judge Garland's personal and professional backgrounds have been subject to additional scrutiny since he was reportedly named a finalist to

⁴² See generally *Experts: The Honorable Merrick B. Garland* under the heading *Publications and Multimedia*, The Federalist Society, available at <http://www.fed-soc.org/experts/detail/merrick-b-garland>.

⁴³ See *(In)Effective Assistance of Counsel for Criminal Defendants*, 2008 National Convention Breakout Session, American Constitution Society, June 30, 2008, available at <http://www.acslaw.org/news/video/ineffective-assistance-of-counsel-for-criminal-defendants-2008-national-convention-breako>.

⁴⁴ See *Changing the Federal Rules of Civil Procedure: Has the Time Come?*, The Federalist Society, Dec. 9, 2010, available at <http://www.fed-soc.org/multimedia/detail/changing-the-federal-rules-of-civil-procedure-has-the-time-come-event-audiovideo>; *Independence of Federal Prosecutors: A Panel Discussion at the Federalist Society 2007 National Lawyers Convention*, 7 Ave Maria L. Rev. 207 (2008) (moderator).

⁴⁵ See, e.g., Zoe Tillman, *D.C. Federal Judges Praise Local Firms' Pro Bono Work*, Blog of Legal Times, Apr. 7, 2011, available at <http://legaltimes.typepad.com/blt/2011/04/dc-federal-judges-praise-local-firms-pro-bono-work.html>.

⁴⁶ See *The Charter of the President and Fellows of Harvard College*, May 31, 1650, Harvard University Archives at Harvard Library, available at <http://library.harvard.edu/university-archives/using-the-collections/online-resources/charter-of-1650>.

⁴⁷ See Mariella A. Gayla and Claire E. Parker, *Harvard Yard to the Rose Garden: Merrick Garland's College Days*, The Harvard Crimson, Apr. 17, 2016, available at <http://www.thecrimson.com/article/2016/4/17/merrick-garland-harvard/>.

⁴⁸ See Zoe Tillman, *Inside Merrick Garland's Financial Disclosure Reports*, The National Law Journal, Mar. 17, 2016, available at <http://www.nationallawjournal.com/id=1202752451515/Inside-Merrick-Garlands-Financial-Disclosure-Reports>; see also 2015 Financial Disclosure Report, <http://pdfserver.amlaw.com/nlj/Merrick%20Garland%202015.pdf>.

replace retiring Justice David Souter in 2009 and later retiring Justice John Paul Stevens in 2010.⁴⁹

EMPLOYMENT AND HOUSING DISCRIMINATION

Most of Judge Garland’s economic justice-related decisions pertain to employment discrimination. This issue comprises the largest share of civil rights cases before the Supreme Court, through both Equal Opportunity Employment Commission (EEOC) enforcement and suits between private parties.⁵⁰ As a justice on the Supreme Court, Garland would play a significant role in determining the extent of workplace protections for employees.

Overall, in his nineteen years on the bench, Judge Garland has taken a balanced, fact-sensitive approach in his review of employment discrimination claims—and he has often ruled in favor of plaintiffs. However, Judge Garland has not hesitated to rule in favor of defendant employers or issue mixed rulings, particularly when he found the facts at hand required such a conclusion. Judge Garland also dissented or joined dissenting opinions in instances where he believed that the majority misconstrued the applicable law. Below, we analyze Judge Garland’s notable decisions, primarily involving Title VII race or sex discrimination claims and employees or agencies of the federal government. We also analyze one noteworthy case about housing discrimination.

Employment Discrimination

Judge Garland has often ruled in favor of plaintiffs in employment discrimination matters. Five examples below evince his general view that these claims are significant and that plausible allegations should not be hastily dismissed. In at least three other instances, he also ruled against plaintiffs.

Notable Cases

In *Anderson v. Zubieta*,⁵¹ American citizens of Panamanian and Hispanic descent filed suit against the Panama Canal Commission and its predecessor (hereinafter “Commission”), a wholly-owned United States government corporation, for whom they had worked for many years, alleging that the Commission compensated the plaintiffs substantially less than other American citizens working

⁴⁹ See Adam Liptak, *Rare Breed Now: A Justice Who Wasn’t a Judge*, N.Y. Times, Apr. 30, 2010, at A1, available at <http://www.nytimes.com/2010/05/01/us/politics/01kagan.html>.

⁵⁰ In fiscal year 2015 alone, the Equal Employment Opportunity Commission received nearly 90,000 charges of discrimination; of those charges, 31,027 (or 34.7%) involved allegations of racial discrimination. See U.S. Equal Emp’t Opportunity Comm’n, *Charge Statistics FY 1997 through FY 2015* (2016), available at <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

⁵¹ 180 F.3d 329 (D.C. Cir. 1999).

in the same jobs and that this policy constituted race and national origin discrimination in violation of Title VII.

Plaintiffs offered statistical evidence as well as evidence of the Commission's longstanding history of discriminating against employees from the West Indies. Although the Commission's Office of Equal Opportunity originally found the plaintiffs' claims to be untimely, plaintiffs proceeded to federal court. The district court found that plaintiffs were denied benefits because of their citizenship, which it did not view to be a Title VII protected class. Further, the district court rejected the disparate impact claim on the ground that, although disparate impact "may be true as a matter of fact," there was "no evidence that the defendant acted with any unlawful discriminatory purpose."⁵² The district court granted summary judgment in favor of the Commission.

Judge Garland authored a thorough and heavily fact-based opinion reversing the grant of summary judgment. First, citing the Supreme Court's holding in *Bazemore v. Friday*,⁵³ Judge Garland determined that plaintiffs' complaint was timely because it alleged continuing violations of Title VII, which were actionable upon receipt of each paycheck. Turning to the merits of plaintiffs' claims, Judge Garland found that plaintiffs had established a *prima facie* case of wage discrimination under both a disparate treatment and disparate impact theory.⁵⁴ To support his holding, Judge Garland noted that plaintiffs received a salary that was fifteen percent lower than that received by their white, non-Panamanian counterparts and plaintiffs were not given the same equity package and vacation benefits; the statistics offered by plaintiffs were statistically significant, as the disparities exceeded 1.96 standard deviations; and "citizenship" can and did serve as a pretext for national origin discrimination.⁵⁵ Further, he held that the district court erred in finding that plaintiffs' disparate impact claim required proof of discriminatory intent and declared that a reasonable fact finder could determine that the Commission's pay policies were not justified by business necessity.⁵⁶ Finally, with respect to plaintiffs' disparate treatment claim, Judge Garland found that a reasonable fact finder could also find intentional discrimination.⁵⁷

⁵² *Id.* at 334.

⁵³ 478 U.S. 385 (1986) (holding that certain claims are not time-barred where continuing violations occur within a statute of limitations period).

⁵⁴ 180 F.3d at 339.

⁵⁵ Further, Judge Garland noted that district court's reliance in *Espinoza v. Farah*, 414 U.S. 86 (1973), in which the Supreme Court held that citizenship is not a facially unlawful criterion for employment decisions, was misplaced, as plaintiffs here were all American citizens. The Commission's eligibility requirements maintained an unlawful system of preferences based on whether employees were citizens at an earlier time. 180 F.3d at 341.

⁵⁶ 180 F.3d at 347.

⁵⁷ *Id.* at 347-48.

Accordingly, Judge Garland reversed and remanded the case back to the district court.⁵⁸

In *Sparrow v. United Air Lines, Inc.*,⁵⁹ Judge Garland enforced the longstanding principle that a plaintiff need not set forth the elements of a *prima facie* case of discrimination at the initial pleading stage. The lawsuit involved an African-American former employee of United Airlines who, proceeding *pro se*, sued the company for race discrimination under 42 U.S.C. § 1981. The district court granted the airline's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), holding that the plaintiff could not make out a *prima facie* case of discrimination because the plaintiff had not identified any similarly-situated employees that received preferential treatment over him.⁶⁰

Judge Garland reversed the lower court's dismissal of plaintiff's claims and remanded the case for further proceedings, finding that the Federal Rules of Civil Procedure and the Supreme Court's holding in *Conley v. Gibson*⁶¹ do not require a plaintiff to make out a *prima facie* case of discrimination in the complaint itself. Judge Garland found that plaintiff's complaint gave United Airlines fair notice of each claim and its basis and readily met the requirements of *Conley* by fleshing out specific claims of the airline's discriminatory failure to promote him and discriminatory termination.⁶²

In *Payne v. Salazar*,⁶³ Judge Garland found that the EEOC erred in interpreting Title VII to require a federal employee who wins one Title VII claim but loses another in an administrative proceeding to risk the first in order to seek relief on the second in federal court. The plaintiff, an employee of the Department of the Interior, was denied a religious accommodation to attend church on weekends and filed an administrative complaint with the agency, as is required for federal employees. The plaintiff alleged that after filing her complaint, the agency retaliated against her through micromanagement and denials of leave. The EEOC found in her favor on the religious discrimination claim and awarded monetary damages, but denied relief on the retaliation claim. The plaintiff then filed a federal lawsuit on the retaliation claim. The district court dismissed her complaint, determining that, under 42 U.S.C. § 2000e-16(c), a federal employee must reopen both the claim on which she prevailed in addition to the claim on which she did not to proceed.⁶⁴

⁵⁸ *Id.* at 348.

⁵⁹ 216 F.3d 1111 (D.C. Cir. 2000).

⁶⁰ *Id.* at 1114.

⁶¹ 355 U.S. 41 (1957).

⁶² *Id.*

⁶³ 619 F.3d 56, 58 (D.C. Cir. 2010).

⁶⁴ *Id.* at 59.

Judge Garland reversed the district court’s decision, holding that Title VII permits federal employees to sue solely on the EEOC claim on which they did not prevail.⁶⁵ Relying on statutory language and practical considerations, he noted a plaintiff could not be considered “aggrieved” with respect to a claim on which she was successful before her agency, nor would she have standing on that claim.⁶⁶ Judge Garland made clear that an employee’s right to a trial *de novo* following an administrative disposition—whether her employer is the federal government or a private company—entitles her to a plenary trial of whatever claims she brings to court.⁶⁷

In *Steele v. Schafer*,⁶⁸ an African-American female employee of the Department of Agriculture filed a Title VII action against the agency, alleging a hostile work environment based on race and unlawful retaliation. Plaintiff detailed numerous ways in which her supervisor discriminated against her based on her race, including falsely accusing her of misusing government credit cards, unjustifiably denying her a promotion, and unreasonably denying her several cash awards.⁶⁹ She further alleged that the agency retaliated against her in multiple ways, including by giving her the lowest performance rating of her career. Plaintiff further contended that the agency’s harassment forced her to resign and that the agency continued to retaliate against her by falsely contesting her employment benefits at the local office of unemployment compensation.⁷⁰ The district court granted summary judgment in favor of the government on four grounds: untimeliness; failure to establish a *prima facie* case of discrimination or retaliation; failure to demonstrate several alleged incidents constituted “adverse employment actions”; and failure to show conditions were so intolerable that any reasonable person would have felt compelled to quit.⁷¹

Judge Garland reversed the district court’s ruling and remanded the case for further proceedings. First, on the issue of timeliness, Judge Garland found that a genuine issue of material fact existed as to the date of plaintiff’s contact with an EEOC counselor. While a federal government employee alleging discrimination must initiate contact with an EEOC counselor in her agency within 45 days of the date of the discriminatory action, the record revealed a discrepancy regarding the date plaintiff first contacted the counselor.⁷² Further, Judge Garland agreed with

⁶⁵ *Id.* at 64.

⁶⁶ *Id.* at 60-61. The D.C. Circuit did affirm the district court’s grant of summary judgment on a second retaliation claim for failure to exhaust, which plaintiff admitted at oral argument.

⁶⁷ *Id.* at 63.

⁶⁸ 535 F.3d 689 (D.C. Cir. 2008).

⁶⁹ *Id.* at 690.

⁷⁰ *Id.*

⁷¹ *Id.* at 692.

⁷² *Id.* at 693.

plaintiff that, even if some of her individual claims were time-barred, she could still rely on their underlying events to support her claims that she was subjected to a hostile work environment. Judge Garland made clear that the district court's ruling conflicted with the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*,⁷³ in which the Court held that the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. Judge Garland further found that the plaintiff sufficiently raised a constructive discharge claim premised on a hostile work environment.⁷⁴ Finally, he explained that the standard for retaliation applied by the district court was inconsistent with the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*,⁷⁵ which held that a plaintiff must only show that a reasonable employee would have found the challenged action materially adverse, and that this inquiry does not involve consideration of either the severity of the underlying act of discrimination to which the employee objected or (as the agency insisted here) of the courage of the particular employee demonstrated by reporting it.⁷⁶

In *Czekalski v. Peters*,⁷⁷ a female plaintiff alleged that her reassignment at work, from a position of leadership at the Federal Aviation Administration to a new position with different responsibilities, was motivated by gender discrimination in violation of Title VII. The district court granted summary judgment for the agency, finding that the employment action was not adverse because it was a lateral transfer and that there was insufficient evidence of discriminatory intent.⁷⁸

Judge Garland reversed the district court's grant of summary judgment, finding that the employer's implied premise that a lateral transfer could not constitute an adverse action under Title VII was erroneous.⁷⁹ Judge Garland held that the plaintiff raised a genuine issue as to whether the reassignment left her with significantly different—and diminished—supervisory responsibilities and proffered sufficient evidence demonstrating that her reassignment moved her down the agency hierarchy. Accordingly, a reasonable jury could find plaintiff's transfer to be adverse because it led to significantly diminished responsibilities.⁸⁰ Further, he determined that the plaintiff had set forth sufficient evidence of discriminatory intent, by offering evidence showing that all four reasons originally given for her transfer were inaccurate, as well as testimony about her supervisor's discriminatory

⁷³ 536 U.S. 101, 115 (2002).

⁷⁴ 535 F.3d at 694.

⁷⁵ 548 U.S. 53 (2006).

⁷⁶ 535 F.3d at 696 (citing *Burlington*, 548 U.S. at 68).

⁷⁷ 475 F.3d 360 (D.C. Cir. 2007).

⁷⁸ *Id.* at 361.

⁷⁹ *Id.* at 364 (citing *Stewart v. Ashcroft*, 352 F.3d 422, 426 (D.C. Cir. 2003); *Burke v. Gould*, 286 F.3d 513, 522 (D.C. Cir. 2002)).

⁸⁰ *Id.* at 364.

attitudes toward women and the supervisor's preferential treatment toward men.⁸¹ Because a reasonable jury could render a verdict in favor of the plaintiff, Judge Garland reversed the district court's grant of summary judgment in the government's favor.⁸²

Mixed Rulings

Judge Garland's fact-sensitive approach has not only resulted in fair rulings in favor of employment discrimination claims, but also it has produced significant rulings against such challenges:

In *Lathram v. Snow*,⁸³ a former employee of the U.S. Customs Service asserted three claims of discrimination and retaliation pursuant to Title VII. The district court granted summary judgment in favor of defendant on all three claims. Judge Garland agreed with the district court that summary judgment was warranted on plaintiff's first discrimination claim because she could not prove discriminatory non-promotion given that she did not apply for the position at issue.⁸⁴ But Judge Garland reversed the district court's grant of summary judgment to the employer on the second and third claims. In her second claim, plaintiff challenged the agency's decision to hire an outside candidate for the position of public affairs specialist and transfer many of her responsibilities to that new hire.⁸⁵ Judge Garland found that there was evidence that plaintiff was qualified and that the new hire had less experience, and that a reasonable jury could conclude that the employer's failure to promote plaintiff to the public affairs specialist position was pretext for discrimination.⁸⁶ On the third claim, plaintiff challenged the employer's selection of another candidate for the position of director of press operations. Using a scoring system, the other candidate scored higher than plaintiff only after getting points for veteran's preference.⁸⁷ Plaintiff challenged the application of the veteran's preference as discriminatory because the government had not applied that preference in two similar positions created at the same time.⁸⁸ Judge Garland noted that the government had offered no explanation as to why it structured the application process such that the preference would apply to the press operations director position and not to other positions. As a result, he found a

⁸¹ *Id.* at 365-68.

⁸² *Id.* at 368.

⁸³ 336 F.3d 1085 (D.C. Cir. 2003).

⁸⁴ *Id.* at 1089.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1091.

⁸⁷ *Id.* at 1093.

⁸⁸ *Id.*

reasonable jury could find the government's explanation for hiring another candidate for the position pretextual, and summary judgment was improper.⁸⁹

In *Calhoun v. Johnson*,⁹⁰ an African-American employee filed a Title VII action against the U.S. General Services Administration (GSA), claiming discrimination for failure to promote and retaliation. The district court granted summary judgment in favor of the government, finding that plaintiff had not presented sufficient evidence to refute the supervisor's nondiscriminatory reason for hiring another candidate and that plaintiff failed to submit evidence that would reasonably support a conclusion that the decision to hire other individuals was pretextual.⁹¹ Judge Garland authored a mixed ruling, reversing the grant of summary judgment on plaintiff's first claim and affirming the lower court's denial of plaintiff's remaining claims. Citing longstanding D.C. Circuit precedent, including *Lathram*,⁹² Judge Garland found that the evidence submitted by plaintiff—that another hiring official thought she was more qualified than the individual who got the promotion—was sufficient circumstantial evidence of race discrimination for the claim to go before a jury.⁹³ On the second claim, in which plaintiff alleged that the GSA discriminated and retaliated against her by selecting three other candidates as program experts in the Office of Real Property, Judge Garland found that the gap in qualifications between plaintiff and the other candidates (who had thirteen to twenty-six more years of experience than plaintiff) constituted a legitimate business reason, and thus her claim could not survive.⁹⁴

Reversals

In cases where Judge Garland found that a plaintiff should *not* prevail in favor, he has not shied away from reversing or affirming the district court accordingly.

In *Borgo v. Goldin*,⁹⁵ a white female former employee of the National Aeronautics and Space Administration (NASA) filed a Title VII action alleging retaliatory firing and reverse discrimination by her African-American supervisor. The district court granted summary judgment on liability and, later, judgment as a matter of law on the question of remedy for plaintiff. The district court found that retaliation was part of the reason plaintiff was terminated.⁹⁶

⁸⁹ *Id.* at 1094.

⁹⁰ 632 F.3d 1259 (D.C. Cir. 2011).

⁹¹ *Id.* at 1260.

⁹² *Id.* at 1263 (citing *Lathram*, 336 F.3d 1091-92; *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006)).

⁹³ *Id.*

⁹⁴ *Id.* at 1264.

⁹⁵ 204 F.3d 251 (D.C. Cir. 2000).

⁹⁶ *Id.* at 252.

Judge Garland reversed the district court’s grant of summary judgment and judgment as a matter of law, citing extensively to the record to demonstrate that the supervisor’s testimony regarding plaintiff’s work performance and the termination letter he sent her (detailing the “serious deficiencies” in plaintiff’s conduct) raised a question as to whether she was terminated for non-discriminatory reasons (e.g., missed deadlines, unexplained absences).⁹⁷ Because a genuine issue of material fact existed, Judge Garland found that summary judgment was improper, as the court could not reach a conclusion that the supervisor had a retaliatory motive without both construing ambiguity against NASA and discounting the supervisor’s credibility.⁹⁸ Judge Garland also determined that the grant of judgment as a matter of law must be reversed, as it cannot be considered until the jury finds for plaintiff on the issue of liability.⁹⁹

Similarly, in *Waterhouse v. District of Columbia*,¹⁰⁰ Judge Garland affirmed a grant of summary judgment to the defendant employer in a Title VII race case. In *Waterhouse*, a white plaintiff filed suit against the District of Columbia, her former employer, and her former supervisor, alleging that she was terminated because of her race in violation of Title VII. The district court concluded that a reasonable jury could not find that plaintiff’s termination was motivated by race in light of the record evidence.¹⁰¹

Judge Garland found that there was no genuine issue regarding plaintiff’s failure to fulfill her basic job responsibilities, including meeting deadlines for the budget formulation process and paying vendors on time.¹⁰² Because plaintiff did not rebut—and actually admitted—many of the deficiencies in her job performance cited by defendants, Judge Garland concluded that she failed to establish that her employer’s proffered explanation was “unworthy of credence.”¹⁰³ Further, plaintiff did not meet her burden to establish discriminatory intent by relying in part on a statement from the District of Columbia’s then-mayor that “one of the legacies” he wanted to leave was ensuring that the city was run by an African-American team. Judge Garland agreed with the district court that this statement did not satisfy plaintiff’s burden of showing that a reasonable jury could conclude that she was terminated on account of her race, as it was made in the context of a general

⁹⁷ *Id.* at 253, 256-58.

⁹⁸ *Id.* at 257.

⁹⁹ *Id.* at 257-58.

¹⁰⁰ 298 F.3d 989 (D.C. Cir. 2002).

¹⁰¹ *Id.* at 991.

¹⁰² *Id.* at 994-95.

¹⁰³ *Id.* at 995 (citing the standard set forth in *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000)).

discussion of the mayor's commitment to challenging racial stereotypes and was made two years after plaintiff was terminated.¹⁰⁴

In a case involving the Americans with Disabilities Act (ADA) and the Rehabilitation Act, Judge Garland affirmed the grant of summary judgment for the government employer, the District of Columbia. In *Minter v. District of Columbia*,¹⁰⁵ an employee alleged that the District failed to provide a reasonable accommodation for her disability and retaliated against her for requesting an accommodation. The facts presented to the district court demonstrated that the employee had failed to communicate with her employer about her disability and failed to appear for work, which resulted in a termination after she faxed the District a "certificate of disability" stating that she would be "totally disabled" for an indefinite period of time. For her retaliation claim, plaintiff relied on the temporal proximity between her request for accommodation and her termination.

On plaintiff's reasonable accommodation claim, Judge Garland found that the district court properly granted summary judgment because plaintiff's ADA Coordinator had been engaged in an "interactive" process to determine a reasonable accommodation. On the retaliation claim, Judge Garland noted that to establish such a claim, plaintiff must show that there existed a causal link between her termination and her request for an accommodation. He found that the District's explanation for terminating plaintiff—because she effectively abandoned her job—was legitimate, and no reasonable jury could conclude otherwise.¹⁰⁶ Where an employer asserts a legitimate, nondiscriminatory reason for an adverse employment action, the remaining question is whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer's asserted nondiscriminatory reason was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis. Further, the plaintiff would need to prove that the actual reason for her termination was retaliatory. Positive evidence beyond mere proximity is required to create a genuine issue of material fact concerning whether the motive for an adverse employment action was retaliatory.¹⁰⁷ Here, Judge Garland found plaintiff's request for accommodation came during the same period in which she was entirely unable to perform the functions of her position even with an accommodation.¹⁰⁸ Because the plaintiff could not proffer the requisite "positive evidence," he concluded that summary judgment was appropriate.¹⁰⁹

¹⁰⁴ *Id.* at 996.

¹⁰⁵ 809 F.3d 66 (D.C. Cir. 2015).

¹⁰⁶ *Id.* at 71.

¹⁰⁷ *Id.* at 71-72.

¹⁰⁸ *Id.* at 72.

¹⁰⁹ *Id.*

Dissents

In several Title VII cases involving remedies, Judge Garland joined a dissent (in whole or in part) in instances where he agreed that the majority opinion misconstrued the applicable law.

In *Kolstad v. American Dental Ass'n*,¹¹⁰ an employee sued her employer, the American Dental Association (ADA), for sex discrimination, alleging that the ADA pre-selected a male candidate for a promotion. Plaintiff also alleged that her supervisor told sexually offensive jokes and used derogatory terms to refer to professional women. At trial, the jury found that the ADA had unlawfully discriminated against plaintiff, but the question of punitive damages was withheld from the jury. A panel of the D.C. Circuit reversed the district court's dismissal of the punitive damages claim and remanded for a trial on punitive damages. The court subsequently granted *en banc* review on the question of the legal standard for the imposition of punitive damages under Title VII. In a 6-5 vote, the *en banc* majority held that, under 42 U.S.C § 1981a, punitive damages in a Title VII case may be imposed only upon a showing of egregious conduct.¹¹¹ Punitive damages could be recovered where, for example, the evidence showed that the defendant engaged in a pervasive pattern of discriminatory acts, manifested genuine spite and malevolence, or otherwise evinced a criminal indifference to civil obligations.¹¹² A finding of intentional discrimination is not enough, as it would conflict with the remedial structure of the statute, legislative history, and Supreme Court precedent.¹¹³ Because no evidence of such behavior was shown at trial, plaintiff could not recover punitive damages.

Judge Garland joined the dissent in the case, authored by Judge David Tatel and also joined by then-Chief Judge Harry Edwards, and Judges Wald and Rogers, which stated that the majority's opinion nullified the reckless indifference standard set forth in 42 U.S.C § 1981a and conflicted with Supreme Court precedent.¹¹⁴ According to the dissent, the statute allows a jury to consider punitive damages if the employer acts not only with malice, but also with reckless indifference.¹¹⁵ Accordingly, the dissent would have remanded the case for a trial on punitive damages.

In a 5-4 decision, the Supreme Court vacated and remanded the D.C. Circuit's (majority) opinion, adopting a view that was somewhat closer to what the

¹¹⁰ 139 F.3d 958 (D.C. Cir. 1998).

¹¹¹ *Id.* at 960.

¹¹² *Id.* at 965.

¹¹³ *Id.* at 961-62.

¹¹⁴ *Id.* at 971.

¹¹⁵ *Id.*

dissenters (including Judge Garland) proposed. Subsequently, the D.C. Circuit remanded the case to the district court for further proceedings.¹¹⁶

Judge Garland dissented in *Berger v. Iron Workers Reinforced Rodmen, Local 201*,¹¹⁷ which involved defendant unions that had previously been found liable for racial discrimination in a class action suit. Both parties appealed the district court’s order fashioning a remedy. The D.C. Circuit issued an order regarding several methodology errors made by the Special Master, including holding that he should have included all employees working zero hours in the back pay calculations, because it is a “false assumption” that all members of the plaintiff class would have remained full-time in the industry, given the dangers and disincentives inherent in the work.¹¹⁸ Judge Garland dissented as to the issue of the inclusion of zero hour workers because the unions had not demonstrated that the Special Master’s calculation was clearly erroneous. He noted that there are a variety of ways to calculate remedies, and the proper test on appeal is not whether the appellate judges hearing the case would have made a different calculation.¹¹⁹ Further, he would have found that the Special Master “not unreasonably” took the most direct approach on this issue.¹²⁰

Housing Discrimination

Judge Garland has had few opportunities to rule on cases involving fair housing laws. In one notable case addressing source-of-income discrimination, Judge Garland carefully and thoughtfully applied the law to the facts at hand. In *Feemster v. BSA Ltd. P’ship*,¹²¹ he ruled in favor of Section 8 tenants, who brought an action against their landlord, alleging that the landlord unlawfully refused to accept federal vouchers as payment for rent in violation of federal housing statutes and the District of Columbia Human Rights Act.

The defendant landlord, BSA, managed a number of residential properties throughout the District and participated in the Section 8 rental assistance program¹²² administered by the Department of Housing and Urban Development (HUD) for many years (1982 to 2004). During that time, BSA limited tenants’ rent to a percentage of the family’s income and accepted the remainder from HUD in the form of a project-based subsidy. BSA opted out of the Section 8 program in 2002 and allowed its contract with HUD to expire in 2004. All nine plaintiffs in the case received rental assistance through the Section 8 program, and many had lived in

¹¹⁶ 527 U.S. 526 (1999); 1999 WL 825555 (D.C. Cir. Sept. 8, 1999) (per curiam, unreported).

¹¹⁷ 170 F.3d 1111 (D.C. Cir. 1999).

¹¹⁸ *Id.* at 1122.

¹¹⁹ *Id.* at 1140.

¹²⁰ *Id.*

¹²¹ 548 F.3d 1063 (D.C. Cir. 2008).

¹²² “Section 8” refers to Section 8 of the Housing Act of 1937, codified as 42 U.S.C. § 1437f.

BSA's properties for over twenty years. Under federal law, when an owner opts out of a project-based Section 8 contract, assisted families in that project may elect to remain in their units and receive an enhanced voucher, through which the tenant's rent subsidy may be increased to cover the difference between the previous rent and the new market price.¹²³ The District of Columbia Housing Authority determined that plaintiffs were eligible for enhanced vouchers, but BSA refused to accept them or to execute the necessary lease agreements.

The tenants filed suit in federal court, arguing that BSA was required to accept their enhanced vouchers until their tenancies were validly terminated under District of Columbia law, and that its refusal to do so violated both federal and District law. The district court granted summary judgment for the tenants on their federal claims, finding that the tenants clearly had the right to remain in their units using enhanced vouchers for as long as the tenants remain eligible or until they are evicted.¹²⁴ However, the district court granted summary judgment in favor of BSA on plaintiffs' District law claim, finding that plaintiffs failed to show that an impermissible factor played a motivating or substantial role in BSA's refusal to accept the enhanced vouchers.¹²⁵

On appeal, BSA only disputed the issue of whether the units at issue were being "offered for rental housing" at the time it refused the tenants' enhanced vouchers.¹²⁶ In his opinion, Judge Garland noted that BSA's caveat—upon which its entire appeal rested—was not a requirement of the U.S. Housing Act of 1937 and only appeared in a sentence in a HUD Policy Guide describing the right-to-remain provision.¹²⁷ He concluded that the degree of deference that the court owes to such a policy guide is uncertain, and even if given the full measure of deference,¹²⁸ it would not help BSA's case. Other language in the guide supported the view that HUD considered a property to be "offered for rental housing" until it is withdrawn from rental use—an objective inquiry tied to the legal status of the property, not the owner's intentions.¹²⁹

Judge Garland then examined the Human Rights Act claim. First, he noted that although the District of Columbia Court of Appeals had not yet outlined the boundaries of source-of-income discrimination under the Human Rights Act, it has generally looked to cases from the federal courts involving Title VII claims for

¹²³ 42 U.S.C. § 1437f(t).

¹²⁴ 548 F.3d at 1066.

¹²⁵ *Id.* at 1067.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1067-68.

¹²⁸ *Id.* at 1068 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

¹²⁹ *Id.* at 1069.

guidance.¹³⁰ Under Title VII, when a policy is discriminatory on its face, motive is irrelevant.¹³¹ Judge Garland reasoned that just as it would constitute a facial violation of Title VII to discriminate in leasing on the basis of a renter's race, it is a facial violation of the District law to discriminate on the basis of a renter's source of income.¹³² Further, BSA's rationale that the Section 8 program requirements are burdensome was insufficient—to accept such an argument would vitiate the definition of “source of income” within the Act and the legal safeguard it was intended to provide.¹³³

Accordingly, Judge Garland held that Section 8 tenants' right to stay in their homes and pay with vouchers was secure unless and until their tenancies were validly terminated under local law. Further, Judge Garland found that it was a facial violation of the District's Human Rights Act for BSA, which refused to accept vouchers, to discriminate on the basis of the Section 8 renters' source of income.¹³⁴ For these reasons, Judge Garland reversed the grant of summary judgment in favor of BSA on the Human Rights Act claim (and affirmed the grant of summary judgment to the tenants on their federal claim), concluding that tenants were entitled to judgment as a matter of law on both their federal and District claims.¹³⁵

CRIMINAL JUSTICE

As a justice, Garland would likely encounter a broad range of criminal justice matters, including issues of first impression and questions of law he has not yet had the opportunity to address. This is especially probable in light of the increasing national awareness about the role of race in the administration of criminal justice and the pressing need for criminal justice reform, as well as the Supreme Court's recent grant of *certiorari* in several cases addressing racial bias in the criminal justice system.

Overall, in approaching criminal cases, Judge Garland's professional experience and perspective as a longtime former federal prosecutor are apparent. Specifically, Judge Garland regularly sides with the government's position in criminal law matters: he rules most often in favor of the prosecution and consistently credits the position of law enforcement in several areas, including cases pertaining to Fourth Amendment issues. This apparent leaning also plays out in subtle ways that are not necessarily discernible in the affirmance rate of convictions alone—particularly since D.C. Circuit opinions are often unanimous.

¹³⁰ *Id.* at 1070.

¹³¹ *Id.* (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)).

¹³² *Id.* at 1070.

¹³³ *Id.* at 1070-71.

¹³⁴ *Id.* at 1071.

¹³⁵ *Id.*

Judge Garland's opinions are often fact-bound, well-reasoned, and generally devoid of fervent commentary about prosecutors, law enforcement, or the criminal justice system. He has occasionally overturned convictions on narrow, factual grounds that there was insufficient evidence.¹³⁶ Other times, he has vindicated the constitutional rights of defendants, and he has been willing to criticize particularly troublesome instances of prosecutorial misconduct. On several occasions, however, he has broken with colleagues to dissent and explain why he would have ruled in favor of prosecutors.¹³⁷

Below, we analyze a sampling of his key decisions about prosecutorial misconduct, *Miranda* rights, the Fourth Amendment, sentencing, prisoners' rights, and *habeas corpus*. It is also worth noting that Judge Garland does not appear to have had the opportunity to materially weigh in on other types of criminal law issues that have significant ramifications for civil rights, such as *Batson*¹³⁸ challenges, certain Sixth or Eight Amendment claims, or the constitutionality of the death penalty.

Prosecutorial Misconduct

Judge Garland's opinions regarding prosecutorial misconduct and the government's failure to disclose exculpatory evidence reveal a tendency to support and affirm the actions of prosecutors against charges of constitutional violation. Nevertheless, on some occasions Judge Garland has proven willing to rein in prosecutors who plainly violated their ethical and constitutional obligations.

In *Watson v. United States*,¹³⁹ the panel reversed appellant's conviction in a decision by Judge Rogers, where the prosecutor twice misstated the testimony of a witness on an issue of central importance to the prosecution. Judge Garland dissented, characterizing the prosecutor's actions as a modest overstatement of the witness's testimony. Judge Garland then excused the prosecutor's behavior as unintentional, even though that conclusion lacked obvious support in the opinion. His view of defense counsel was less charitable. In excusing the prosecutor who misstated the witness testimony, Judge Garland instead blamed defense counsel for not taking sufficient action to correct the prosecutor's error.

¹³⁶ See *U.S. v. Gaskins*, 690 F.3d 569 (D.C. Cir. 2012) (reversing a defendant's conspiracy conviction where the government had failed to introduce enough evidence to justify it); *U.S. v. Shmuckler*, 792 F.3d 158 (D.C. Cir. 2015) (reversing a defendant's counterfeiting conviction where the government failed to introduce sufficient evidence to support it).

¹³⁷ See e.g., *Valdes v. U.S.*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc) (Garland, J., dissenting); *U.S. v. Watson*, 171 F.3d 695 (D.C. Cir. 1999) (Garland, J., dissenting); *U.S. v. Spinner*, 152 F.3d 950 (D.C. Cir. 1998) (Garland, J., dissenting).

¹³⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹³⁹ 171 F.3d 695 (D.C. Cir. 1999).

Judge Garland approached his majority opinion in *United States v. Andrews*¹⁴⁰ in a similar vein. In *Andrews*, defense counsel requested all *Brady*¹⁴¹ material prior to trial, but the prosecutor failed to disclose a set of exculpatory notes until the fourth day of trial. The prosecutor knew about the notes before trial, but had failed to review them. In this decision, Judge Garland affirmed the trial court’s ruling and held, in part, that the notes were timely produced. This view was premised on the idea that defense counsel could have effectively reworked his defense strategy four days into trial and at the conclusion of the government’s case but had simply failed to do so. A concurring opinion described this view as “highly implausible” and noted that *Brady* requires the prosecution to disclose material at such a time that a defendant can make meaningful use of the material—that is, before the trial’s midpoint.

Notwithstanding Judge Garland’s seeming deference to the prosecution, he has found prosecutorial error in some cases. For instance, in *In re Sealed Case No. 99-3096*,¹⁴² Judge Garland wrote the majority opinion finding that the government violated its *Brady* obligations. The government conceded that the evidence in question was *Brady* material but defended its failure to disclose on specious grounds that Judge Garland dismissed as “somewhat surprising” and “unpersuasive.” Similarly, in *United States v. Maddox*,¹⁴³ Judge Garland joined a unanimous decision finding that a prosecutor had erred by relying, in closing argument, on evidence that was not admitted at trial and by informing the jury that various police officers who were not called as witnesses could have testified favorably for the government—a misstep that the government conceded as error on appeal.

Miranda Rights

Judge Garland has written at least one noteworthy opinion that addresses the Fifth Amendment privilege against self-incrimination and the Supreme Court’s decision in *Miranda v. Arizona*.¹⁴⁴ In *United States v. Jones*,¹⁴⁵ the defendant, Duane Jones, argued that the district court should have suppressed a statement that he made to a law enforcement officer before he was given *Miranda* warnings.¹⁴⁶ Mr. Jones was the subject of an arrest warrant in connection with a homicide that had taken place six weeks earlier.¹⁴⁷ Upon his arrest, but before administering

¹⁴⁰ 532 F.3d 900 (D.C. Cir. 2008).

¹⁴¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁴² 185 F.3d 887 (D.C. Cir. 1999).

¹⁴³ 156 F.3d 1280 (D.C. Cir. 1998).

¹⁴⁴ 384 U.S. 436 (1966).

¹⁴⁵ 567 F.3d 712 (D.C. Cir. 2009).

¹⁴⁶ *Id.* at 185-89.

¹⁴⁷ *Id.* at 185.

Miranda warnings, James Cyphers, a deputy U.S. Marshal, asked Mr. Jones whether he had “anything on” him.¹⁴⁸ In response, Mr. Jones stated that he had “a burner in [his] waistband.”¹⁴⁹ Another deputy marshal recovered a firearm from Mr. Jones’ waistband, and Mr. Jones was later convicted of several firearm-related charges.¹⁵⁰

Judge Garland held that the public safety exception to *Miranda* applied to the case.¹⁵¹ In his opinion, Judge Garland emphasized that the totality of the circumstances demonstrated that Officer Cyphers’ question was “reasonably prompted by a concern for the public safety”; these circumstances included Mr. Jones’ prior criminal record and “the dangerous nature of the neighborhood where [Mr. Jones] was arrested.”¹⁵² Judge Garland rejected Mr. Jones’ argument that Officer Cyphers intended to elicit testimonial evidence when questioning him.¹⁵³ Judge Garland noted that the Supreme Court had already held that the subjective motivation of the officer is irrelevant in determining the applicability of the public safety exception.¹⁵⁴ In closing, Judge Garland acknowledged that “the [public safety] exception [should] not be applied so routinely as to swallow the rule,” and emphasized the limited, fact-specific nature of the holding in the case.¹⁵⁵

Fourth Amendment

Judge Garland regularly rules in favor of the government in Fourth Amendment cases. He generally finds the actions of law enforcement officers to be reasonable under the circumstances, and his opinions reveal a reluctance to second-guess decisions made by officers. This is particularly true when an officer’s judgment during the course of duty is in question. Three cases in particular demonstrate Judge Garland’s deference to decisions made by police officers:

In *United States v. Wesley*,¹⁵⁶ Judge Garland rejected the defendant’s argument that an arrest made by an officer who admitted to making a special trip to a particular neighborhood with the expectation of finding the defendant was in bad faith and violated the Constitution. Judge Garland held that it is neither the defendant’s nor the court’s place “to dictate which among an array of lawful tactics a police officer must use when confronting a suspect on the street.”¹⁵⁷ The

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 186.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 187 (citing *New York v. Quarles*, 467 U.S. 649 (1984)).

¹⁵² *Id.* at 187-88.

¹⁵³ *Id.* at 188-89.

¹⁵⁴ *Id.* at 188 (citing *Quarles*, 467 U.S. at 656).

¹⁵⁵ *Id.* at 189.

¹⁵⁶ 293 F.3d 541 (D.C. Cir. 2002).

¹⁵⁷ *Id.* at 546.

defendant also argued that, even if his arrest was lawful, the officer's search of the passenger compartment of his car exceeded the permissible scope of a search incident to arrest. Judge Garland also rejected this argument.¹⁵⁸

In *United States v. Bookhardt*,¹⁵⁹ a defendant was arrested for driving with an expired license and subsequently charged with unlawful possession of a firearm after two guns were found in his car. On appeal, Judge Garland agreed with the defendant's claim that he was arrested without probable cause. Nonetheless, Judge Garland upheld the constitutionality of the arrest and the trial court's denial of the motion to suppress the weapons because he believed the officer had probable cause to arrest the defendant on other grounds (reckless driving). In support of his ruling, Judge Garland explained that "were we to hold otherwise, we would do no more than create an incentive for the police 'to routinely charge every citizen taken into custody with every offense they can think of, in order to increase the chances that at least one charge would survive.'"¹⁶⁰

In *United States v. Christian*,¹⁶¹ police searched a car after seeing an individual standing next to it throw two objects into the vehicle and later noticing a knife between the driver's seat and the front passenger's seat. Police then found a gun in a bag inside the car. Judge Garland accepted the government's argument that the seizure of the gun was lawful as search under the Supreme Court's decision in *Terry v. Ohio* (a limited search for weapons conducted when an officer has a reasonable fear for his own and others' safety based on an articulable suspicion that the suspect is armed and dangerous).¹⁶² Judge Garland reached this conclusion notwithstanding the fact that the officers failed to frisk the defendant prior to searching the car. Rejecting the defendant's contention that the officer's failure to frisk him before they searched the car belied a claim of reasonable fear, Judge Garland stated "as appellate judges we do not second-guess a street officer's assessment about the order in which he should secure potential threats," and that courts "must defer to [an officer's] 'quick decision as to how to protect himself and others from possible danger.'"¹⁶³ Notably, Judge Garland rejected the government's argument that the search in question was justified as a search incident to arrest, because simple possession of the knife was not a crime under the cited statute.¹⁶⁴

¹⁵⁸ *Id.* at 547 (quoting *New York v. Belton* 453 U.S. 454, 459 (1981)).

¹⁵⁹ 277 F.3d 558 (D.C. 2002).

¹⁶⁰ 277 F.3d 558, 566 (quoting *U.S. v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971)).

¹⁶¹ 187 F.3d 663 (D.C. Cir. 1999).

¹⁶² 392 U.S. 1, 21 (1968).

¹⁶³ 187 F.3d at 669.

¹⁶⁴ *Id.* at 667.

Even when Judge Garland acknowledges that an officer’s actions are troubling, as he did in *United States v. Webb*,¹⁶⁵ he shows deference to their decisions. In *Webb*, Judge Garland found the issuance of a warrant more than 100 days after the last known drug transaction between the informant and the defendant “troubling.” He nonetheless held that suppression was inappropriate under the Supreme Court’s exception in *United States v. Leon* (when police officers obtain evidence through a search incident to a warrant, “suppression is appropriate only if the officers . . . could not have harbored an objectively reasonable belief in the existence of probable cause”).¹⁶⁶ Specifically, Judge Garland reasoned that the officers had an “objectively reasonable belief in the existence of probable cause,”¹⁶⁷ because “it would not necessarily have been unreasonable for an officer to conclude that a longtime drug dealer, whose most recent known deal had occurred three months earlier, would still retain papers permitting him to get back in touch with his customers or—as turned out to be the case—his supplier.”¹⁶⁸

Sentencing

In the sentencing context, Judge Garland tends to strictly follow the U.S. Sentencing Guidelines and defer to district court findings, finding harmless error or no plain error in nearly every instance. Indeed, Judge Garland affirmed all but a handful of the district court sentencing decisions that were presented to him on appeal. Judge Garland remanded for re-sentencing in favor of defendants in only a few cases, which often involved new legal precedent, changes in sentencing guidelines, or other narrow technical grounds.¹⁶⁹

Judge Garland announced or joined opinions finding plain error in sentencing decisions outside of the *Booker*¹⁷⁰ context on three occasions: First, in *United States v. Thomas*,¹⁷¹ Judge Garland upheld two defendants’ sentences and remanded for the third defendant’s resentencing, finding that the third defendant’s sentence met the final two prongs of the plain error standard because there was a reasonable likelihood that the district court would have reached a different decision regarding the seriousness of his record absent consideration of his arrests (his record contained eleven arrests without convictions over fifteen years). Second, in *In re*

¹⁶⁵ 255 F.3d 890 (D.C. Cir. 2001).

¹⁶⁶ 468 U.S. 897, 926 (1984).

¹⁶⁷ 255 F.3d 890 (D.C. Cir. 2001) (quoting *U.S. v. Leon*, 468 U.S. 897 (1984)).

¹⁶⁸ *Id.*

¹⁶⁹ See *In re Sealed Case*, 722 F.3d 361 (D.C. Cir. 2013) (remanding resentencing after change in crack guidelines); *U.S. v. Branham*, 515 F.3d 1268 (D.C. Cir. 2007) (remand for resentencing post-*Booker*); *U.S. v. Henry*, 472 F.3d 910 (D.C. Cir. 2007) (post-*Booker* remand for resentencing); *U.S. v. McCoy*, 722 F.3d 361 (D.C. Cir. 2002) (technical decision holding defendants not always barred from raising new arguments on re-sentencing).

¹⁷⁰ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁷¹ 361 F.3d 653 (D.C. Cir. 2004).

Sealed Case,¹⁷² Judge Garland joined Judge David Tatel’s opinion finding plain error where the district court gave a defendant convicted of unlawful distribution of heroin an enhanced sentence in order to “rehabilitate” the defendant through longer exposure to prison’s rehabilitation programs. The Court found that this was not only contrary to the Sentencing Guidelines, but also inconsistent with statutory language explicitly stating that imprisonment is not an appropriate means of promoting rehabilitation. Third, in *United States v. Bigley*,¹⁷³ Judge Garland joined a *per curiam* opinion with a divided court, finding plain error for the trial court’s silence and failure to address the defendant’s non-frivolous argument for a downward departure.

Additionally, a few sentencing cases stand out as favoring the prosecution or treating defendants harshly. In *United States v. Brooke*,¹⁷⁴ Judge Garland affirmed the denial of a downward departure based on age and physical condition for an 82-year-old defendant who dealt in cocaine base, determining the district court correctly understood the law, and that its exercise of discretion was not reviewable. In *United States v. Riley*,¹⁷⁵ Judge Garland set aside a sentence and remanded for further sentencing proceedings, finding that the district court erred in granting Mr. Riley a downward departure in a case involving the possession of a firearm and ammunition by a person convicted of a felony. The district court had previously granted a downward departure because Mr. Riley possessed the gun for a sporting purpose. Judge Garland held that the departure was improper, finding the fact that Mr. Riley’s possession of a weapon was for lawful purpose was irrelevant. Judge Garland vacated the lesser sentence and remanded for re-sentencing.

In *United States v. Adewani*,¹⁷⁶ a defendant was convicted of constructively possessing a handgun, and Judge Garland upheld the district court finding that his previous conviction for felony “escape” constituted a crime of violence under the Sentencing Guidelines, thereby justifying higher sentencing for the later possession charges. In that earlier case, Adewani had “escaped” by “walking away from halfway houses” twice. Previously the D.C. Circuit held that “escape” in the Sentencing Guidelines was categorically a crime of violence, and most circuits agreed—but since the last time the D.C. Circuit had ruled on the issue, the Ninth Circuit held that it was not necessarily a crime of violence. Nonetheless, Judge Garland reasoned that the “escape” still qualified for the sentencing enhancement under the Sentencing Guidelines’ catch-all category defining “crimes of violence” to

¹⁷² 573 F.3d 844 (D.C. Cir. 2009).

¹⁷³ 786 F.3d 11 (D.C. Cir. 2015).

¹⁷⁴ 308 F.3d 17 (D.C. Cir. 2002).

¹⁷⁵ 376 F.3d 1160 (D.C. Cir. 2004).

¹⁷⁶ 467 F.3d 1340 (D.C. Cir. 2006).

include offenses that “*otherwise involve[] conduct that presents a serious potential risk of physical injury to another.*”¹⁷⁷

Prisoners’ Rights

Judge Garland has not authored many opinions regarding prisoners’ rights, but his limited record on this subject suggests that he values procedural fairness and the humane treatment of prisoners. His opinions also reveal an understanding of the challenges faced by *pro se* litigants and a limited patience for government efforts to deny *pro se* litigants their day in court through procedural ploys.

Judge Garland’s approach to *pro se* litigants was on display in *Schnitzler v. United States*,¹⁷⁸ a case in which a *pro se* state prisoner sought to renounce his U.S. citizenship. The district court dismissed the case on mootness and jurisdictional grounds, adopting the government’s procedural arguments and its construction of Mr. Schnitzler’s claims. Although Judge Garland disclaimed an ability to understand Mr. Schnitzler’s motivations, he treated Mr. Schnitzler’s legal claims seriously and avoided the sort of rigidly formal analysis often used to dismiss *pro se* litigants’ claims on procedural grounds. At one point, he rejected the district court’s view of Mr. Schnitzler’s claim as “far too narrow a construction of what Schnitzler sought.” Later, Judge Garland rejected the government’s efforts to portray Mr. Schnitzler’s claim as a petition for mandamus—a characterization that Mr. Schnitzler denied, noting that he was not an attorney and did not even understand the legal concept—and conducted a holistic review of Mr. Schnitzler’s filings in an effort to accurately classify his legal claims. Judge Garland also rejected the district court’s claim that Schnitzler lacked standing because he had not suffered an injury by virtue of being an American citizen. Judge Garland explained that the appropriate perspective was not the court’s or the government’s, but the petitioner’s: “[T]he fact that we, or the government’s attorneys, would not ourselves feel ‘prejudiced’ by being required to remain in citizenship status does not mean that Schnitzler has not suffered an injury in fact. Nor is there any dispute that Schnitzler genuinely believes he has.”¹⁷⁹ In the end, Judge Garland reversed the district court decision, thereby reinstating Mr. Schnitzler’s complaint.

Judge Garland adopted a similar approach in *Malik v. District of Columbia*,¹⁸⁰ a *pro se* case where a prisoner sued over being shackled for a 40-hour bus ride in which prisoners were denied access to a bathroom and forced to defecate and urinate on themselves. The district court dismissed Mr. Malik’s complaint on procedural grounds, holding that Mr. Malik had failed to exhaust the requisite

¹⁷⁷ *Id.* at 1341 n.2 (citation omitted, emphasis in original).

¹⁷⁸ 761 F.3d 33 (D.C. Cir. 2014).

¹⁷⁹ *Id.* at 40.

¹⁸⁰ 574 F.3d 781 (D.C. Cir. 2009).

administrative remedies and had conceded a second summary judgment motion filed by one of the defendants by failing to respond. With regard to administrative exhaustion, Judge Garland’s opinion carefully reviewed the correctional facility’s grievance policy and determined that Mr. Malik had not, in fact, failed to comply with the policy. With regard to the summary judgment motion, Judge Garland noted that the complex procedural history was “objectively confusing” and that Mr. Malik had “plainly manifested” “subjective confusion,” which the trial court made no efforts to dispel.¹⁸¹ Based on the district court’s failure to provide clear guidance and Mr. Malik’s obvious and understandable confusion as a *pro se* litigant, Judge Garland found that Mr. Malik had not received the necessary fair notice and reversed the district court.

Two other cases demonstrate Judge Garland’s concern for the fair treatment of incarcerated individuals. In *Daskalea v. District of Columbia*,¹⁸² the District of Columbia appealed after a jury awarded damages to a former female prisoner, who had been abused by correctional officers and forced “to dance naked on a table before more than a hundred chanting, jeering guards and inmates.” Judge Garland affirmed the compensatory damages award and reversed the award of punitive damages—an award that was precluded under local law. At the end of the opinion, Judge Garland added a section for the sole apparent purpose of expressing his disgust with the conditions created by the District of Columbia and its mistreatment of prisoners: “Sexual assault, forced naked dancing, and the other indignities borne by [appellee] at the District of Columbia Jail are ‘simply not part of the penalty that criminal offenders pay for their offenses against society.’ To the contrary, ‘when the State takes a person into custody and holds [her] there against [her] will, the Constitution imposes upon it a corresponding duty to assume some responsibility for [her] safety and general well-being.’”¹⁸³

Judge Garland also evinced an interest in the fair treatment of prisoners in *Daniel v. Fulwood*,¹⁸⁴ a class action in which a group of D.C. prisoners sued the United States Parole Commission. Plaintiffs claimed that the Parole Commission had violated the Ex Post Facto Clause by applying parole guidelines that were created in 2000, rather than the guidelines in place at the time of their offenses. The district court dismissed their complaint for failure to state a claim, but the D.C. Circuit reversed in a decision written by Judge Garland. The Commissioners disputed the claim that the guideline switch increased the plaintiffs’ sentences, arguing that the guidelines were impossible to compare to each other because they used fundamentally different methodologies and both permitted the exercise of

¹⁸¹ 574 F.3d at 787-88.

¹⁸² 227 F.3d 433 (D.C. Cir. 2000).

¹⁸³ *Id.* (citations omitted).

¹⁸⁴ 766 F.3d 57 (D.C. Cir. 2014)

broad discretion. Judge Garland rejected the Commissioner’s arguments, noting that the new system created an effective presumption that prisoners receive additional prison time despite the methodological differences between the guidelines and the room for discretion.

Habeas Corpus and Post-Conviction Relief

Judge Garland has authored a number of opinions addressing prisoners’ claims of unlawful detention. In the context of motions pursuant to 28 U.S.C. § 2255, he has overwhelmingly ruled in favor of the government. Out of approximately seventeen opinions written by Judge Garland in this area, only a few have reversed the trial court and granted post-conviction relief.¹⁸⁵ Judge Garland has not reversed any trial court decision that was favorable to the prisoner.

Judge Garland has rarely granted relief to defendants who have presented a claim of ineffective assistance of counsel. In *United States v. Weathers*,¹⁸⁶ Judge Garland granted a joint request by the government and the defendant for a remand to the district court for an evidentiary hearing on the claim. In other cases challenging the constitutional effectiveness of counsel, Judge Garland has concluded that trial counsel’s error was not prejudicial to the defendant. For example, in *In re Sealed Case*,¹⁸⁷ the defendant pled guilty to drug possession after his counsel failed to inform him that he could be treated as a career offender under the Sentencing Guidelines, which could nearly double his sentence. The defendant moved to set aside his sentence. Judge Garland affirmed the denial of the defendant’s motion, concluding that since the defendant likely would have received a life-sentence at trial, there was no reasonable probability that his trial counsel’s error affected his decision to plead guilty.

The D.C. Circuit reviews a considerable number of *habeas* petitions from Guantanamo detainees. Judge Garland’s record in this area has been mixed. Judge Garland has occasionally offered relief to petitioners on narrow grounds.¹⁸⁸ For instance, in *Parhat v. Gates*,¹⁸⁹ Judge Garland wrote an opinion invalidating a determination by a Combat Status Review Tribunal that the detainee was an “enemy combatant.” Judge Garland held that the evidence was insufficient to establish that the detainee in question was an “enemy combatant” as defined by the Department of Defense. In so holding, Judge Garland declined to reach the broader question of whether that definition was consistent with Congress’s Authorization for Use of Military Force.

¹⁸⁵ See *U.S. v. Caso*, 723 F.3d 215 (D.C. Cir. 2013); *U.S. v. Johnson*, 254 F.3d 279 (D.C. Cir. 2001).

¹⁸⁶ 186 F.3d 948 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 1272 (2000).

¹⁸⁷ 488 F.3d 1011 (D.C. Cir. 2007), *cert. denied*, 121 S. Ct. 495 (2000).

¹⁸⁸ See e.g., *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008).

¹⁸⁹ 532 F.3d 834 (D.C. Cir. 2008).

In most other cases, Judge Garland has ruled in favor of the government. In a case that received a considerable amount of media attention, detainees filed an emergency motion challenging a policy requiring genital searches both before and after their meetings with their lawyers. The district court granted the motion. The D.C. Circuit, in an opinion joined by Judge Garland, reversed, holding that the policy was reasonably related to the government’s interests in ensuring security.¹⁹⁰

POLITICAL PARTICIPATION

The Supreme Court continues to play a critical role in protecting voting rights and all forms of political participation. Yet in 2013, the Court effectuated a major setback for voting rights in *Shelby County, Alabama v. Holder*,¹⁹¹ a 5-4 decision which effectively gutted Section 5 of the Voting Rights Act (VRA). As a result, in 2016, the United States will hold its first Presidential election in more than 50 years without the benefit of a law that blocked countless voter suppression efforts since the civil rights movement.

Since *Shelby County*, a number of states and counties have passed dozens of discriminatory voting measures that have been challenged by the DOJ, civil rights groups including LDF, and voters. The Supreme Court has heard several voting law cases this Term,¹⁹² and it will likely continue to address and decide voting rights issues—including discriminatory voter ID laws, gerrymandering, and redistricting¹⁹³—that will dictate the scope and extent to which communities of color have access to the political process.

Judge Garland has only ruled on a handful of voting rights cases. He joined a *per curiam* opinion that partially rejected Florida’s attempt to cutback early voting. That decision evinced a pragmatic approach to the VRA, offered a fairly robust defense of the Act’s Section 5 preclearance provisions, and demonstrated an appreciation for legislative history in context. Judge Garland also joined a split decision rejecting an attempt to seek voting representation for District of Columbia residents and joined a unanimous opinion holding that limits on independent campaign contributions were unconstitutional as applied to a particular plaintiff.

¹⁹⁰ See *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014).

¹⁹¹ 133 S. Ct. 2612 (2013).

¹⁹² See e.g., *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2014); *Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301 (2016); *Wittman v. Personhuballah*, No. 14-1504 (argued Mar. 21, 2016); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

¹⁹³ For example, it is likely that the Supreme Court will adjudicate one or more challenges to photo ID laws and other restrictive voting laws from Texas, North Carolina, Wisconsin, and/or Alabama.

Voting Rights Act

Judge Garland served on a three-judge district court in *Florida v. United States*,¹⁹⁴ a case involving Section 5 of the VRA. At issue was Florida’s request for Section 5 preclearance of three proposed methods of election changes: (1) restrictions on groups that collect voter registration forms (“third-party voter registration organizations”); (2) new rules for voters who moved to new counties before an election and wished to vote in their new county of residence (“inter-county movers”); and (3) a severe cutback to early voting hours and days. LDF intervened in this case on behalf of the Florida State Conference of the NAACP, the Volusia County unit of the NAACP, and a number of individual voters (hereinafter “Intervenors”).

In a *per curiam* opinion joined by Judge Garland, the court rejected Florida’s contention that Section 5 did not apply to the proposed changes because they involved “ballot access” rather than “ability to elect.”¹⁹⁵ The court relied heavily upon the legislative history of the 2006 reauthorization of Section 5, concluding that “nothing in the 2006 legislative record indicates” that ballot access cases are exempt from Section 5 requirements.¹⁹⁶ The court reasoned that Florida’s “novel arguments . . . [would have been] inconsistent with the central goal of the Voting Rights Act: to provide robust and meaningful protections for minority voting rights.”¹⁹⁷ The court went on to explain that, contrary to Florida’s arguments, “no amount of voter disenfranchisement can be regarded as ‘*de minimis*.’”¹⁹⁸

Although precedent “has not specifically addressed how the retrogression test applies to ‘ballot access’ laws (e.g. laws governing the procedures for voting and voter registration),” the court stressed that the VRA’s “central concern” is “with prohibiting practices and procedures that impede minority voters from casting a ballot.”¹⁹⁹ The court then created a two-part analysis and held that “the retrogression test in ballot access cases is not solely one of ‘disparate impact’ . . . a ballot access change must be sufficiently burdensome that it will likely cause some reasonable minority voters not to register to vote, not to go to polls, or not to be able to cast an effective ballot once they get to the polls.”²⁰⁰

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

¹⁹⁵ *Id.* at 312-13.

¹⁹⁶ *Id.* at 314.

¹⁹⁷ *Id.* at 317.

¹⁹⁸ *Id.* at 318.

¹⁹⁹ *Id.* at 311-12.

²⁰⁰ *Id.* at 312.

On the merits, the court rejected some of Florida’s proposed changes and approved of others:

First, the court did not squarely rule upon Florida’s proposed restrictions to “third-party voter registration organizations”—which were LDF’s primary focus in the case—because Florida amended those provisions shortly before trial and thereby removed them from consideration in this case.

Second, the court granted preclearance to Florida regarding its proposed change to “inter-county movers.” The court accepted that the change would “disproportionately affect minority voters,”²⁰¹ but reasoned that the new paperwork requirements would not take more time and that the ballots of “inter-county movers” would have to be counted just like regular ballots.²⁰² Additionally, the court was persuaded to grant preclearance because it concluded that the new law would make it easier for voters to change their registration information before elections.²⁰³ Indeed, the court described this aspect of the proposed law as “ameliorative.”²⁰⁴ The court also reasoned that “the lack of retrogressive effects constitutes evidence that the inter[-]county mover amendments were *not* passed for a discriminatory reason,”²⁰⁵ and concluded that the one statement from a legislator cited by DOJ and private defendants as evidence of intent could not be imputed to the entire legislature.²⁰⁶

Third, the court straightforwardly rejected Florida’s proposal to eliminate half of early voting hours and one third of early voting days. The court explained that “Florida is left with nothing to rebut either the testimony of the defendants’ witnesses or the common-sense judgment that a dramatic reduction in the form of voting that is disproportionately used by African-Americans would make it materially more difficult for some minority voters to cast a ballot than under the benchmark law.”²⁰⁷

The court recognized that when a judge “cannot preclear one iteration of a submitted plan, but may be able to preclear a modified version, the Supreme Court has expressed approval for issuing a kind of ‘conditional order’ indicating the circumstances under which approval may be obtained.”²⁰⁸ The *Florida* court did just that, determining that “if the covered counties offer the maximum available

²⁰¹ *Id.* at 338.

²⁰² *Id.* at 310.

²⁰³ *Id.* at 340.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 353.

²⁰⁶ *Id.* at 354.

²⁰⁷ *Id.* at 333. The court did not consider the purpose prong with respect to early voting, as preclearance was denied under the effects prong.

²⁰⁸ *Id.* at 333.

early voting hours each day [12 hours] . . . the negative effect of reducing the number of days from 12 to 8 would likely be offset by the ameliorative effects of adding additional non-working weekday hours, a Sunday, and additional weekend hours.”

Ultimately, this detailed decision offered a fairly rigorous defense of Section 5 and made several legal determinations which may offer some insight into Judge Garland’s view of the VRA. Notably, the court took a favorable view of Intervenor’s interest in the case and recognized the significance of a detailed factual record.²⁰⁹ However, the court’s reasoning also indicated a kind of judicial pragmatism that could cut both ways in future cases.

Representational Equality

In the consolidated cases of *Adams v. Clinton*²¹⁰ and *Alexander v. Daley*,²¹¹ the District of Columbia and D.C. residents sought voting representation in Congress under various Constitutional provisions. Then, as now, D.C. residents had one non-voting delegate in the U.S. House of Representatives. The plaintiffs brought claims under Article I (election of House members by “People of the several states”); Article IV (republican guarantee for “every state in this Union”); the Seventeenth Amendment (election of Senators by the people “from each State”); the Fourteenth Amendment (equal protection; privileges or immunities); and the Fifth Amendment (due process).

Serving on a three-judge district court, Judge Garland joined Judge Colleen Kollar-Kotelly in a *per curiam* opinion, holding that D.C. residents are not constitutionally entitled to vote in Congressional elections because D.C. is not a state,²¹² and that strict scrutiny did not apply.²¹³ In reaching this decision, the court noted it was “not blind to the inequity of the situation,” and acknowledged that “[m]any courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction.”²¹⁴ The Supreme Court summarily affirmed.²¹⁵

²⁰⁹ *Id.* at 303; *id.* at 303 n. 1.

²¹⁰ 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge court) (*per curiam*), *aff’d mem.*, 531 U.S. 941 (2000).

²¹¹ 90 F. Supp. 2d 27 (D.D.C. 2000) (three-judge court), *aff’d mem.*, 531 U.S. 940 (2000).

²¹² *Id.* at 40, 45. The court also determined that, procedurally, plaintiffs had standing to bring their claims and that certain of those were justiciable.

²¹³ *Id.* at 66.

²¹⁴ *Id.* at 72.

²¹⁵ 531 U.S. 941 (2000); 531 U.S. 940 (2000).

Campaign Finance

Following the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*,²¹⁶ the amount of money spent on political campaigns has risen substantially, raising serious questions about whether significant disparities in wealth lead to corresponding disparities in political participation. Undoubtedly, the Supreme Court will continue to hear disputes over the constitutionality of campaign finance regulation, and any future justice will be required to make tough decisions about the role of money in politics.

In *SpeechNow.org v. Federal Election Commission*,²¹⁷ plaintiff—a political organization engaged in express advocacy for candidates—sought a declaratory judgment regarding the constitutionality of the Federal Election Campaign Act (FECA). The Federal Election Commission (FEC) had concluded that under FECA, SpeechNow.org was a “political committee” as defined by 2 U.S.C. § 431(4), and was thus subject to a number of restrictions in its operations. These restrictions included limits on independent (as opposed to direct) campaign contributions. The district court, as required by 2 U.S.C. § 437h, directly certified the constitutional question for an *en banc* determination by the D.C. Circuit.²¹⁸

Judge Garland joined in a unanimous opinion determining that limits on independent campaign contributions were unconstitutional as applied to plaintiff. The opinion, authored by then-Chief Judge David Sentelle, primarily relied on the recent precedent of the Supreme Court’s *Citizens United* decision, which was issued in the time between the FEC’s initial conclusion and the *en banc* ruling. Citing *Citizens United*, the D.C. Circuit held that the government lacked an anti-corruption interest in limiting contributions to independent expenditure groups (colloquially known as “Super PACs”) like SpeechNow.org.²¹⁹ The court simultaneously upheld reporting requirements for SpeechNow.org, ruling that such regulations were not a hindrance to free speech.²²⁰

ACCESS TO JUSTICE

A crucial, if sometimes underappreciated, area of the Supreme Court’s work involves access to justice, both directly through adjudication of procedural cases about whether a given plaintiff will have his or her day in court and indirectly through the Chief Justice’s and the Court’s role in the Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure.

²¹⁶ 558 U.S. 310 (2010).

²¹⁷ 599 F.3d 686 (D.C. Cir. 2010).

²¹⁸ *Id.* at 689.

²¹⁹ *Id.* at 695.

²²⁰ *Id.* at 699.

Overall, Judge Garland's opinions about access to justice and the Federal Rules of Civil Procedure demonstrate a pragmatic approach to procedural analysis, with a focus on allowing colorable claims to be heard and decided on their merits by a finder of fact. Judge Garland's opinions are respectful of district court judges and, where trial court discretion remained, take care not to direct particular results on remand.²²¹

Specifically, Judge Garland's procedural rulings in discrimination cases evince a desire to ensure that persons are able to have claims heard and adjudicated when practicable. In a few cases after the Supreme Court's decisions in *Iqbal*²²² and *Twombly*,²²³ Judge Garland's rulings suggest a preference for decisions on the merits. On issues of Article III and intervenor standing, he generally takes a pragmatic approach. Additionally, on questions of justiciability in challenges to federal agency action, he carefully scrutinizes the plaintiffs' ability to bring suit and, in several instances, has ruled against the plaintiffs.

All told, Judge Garland's record does not suggest broad leniency toward granting standing or toward overcoming summary judgment. His opinions do reflect a willingness to look carefully at the record in order to determine whether standing has been established or whether a claim has been sufficiently pled. He has not had much of an opportunity to weigh in on issues involving class action certification standards or discovery.

Discrimination Cases

As outlined earlier in this report, Judge Garland's employment discrimination opinions generally display a commitment to ensuring plaintiffs have their day in court. The same trend holds true with regard to a range of procedural issues that he has faced in this context. Often writing for three-judge panels without dissent, Judge Garland has reversed and remanded lower court dismissals of employment claims sounding in racial discrimination where the factual record was sufficiently developed or factual disputes lingered.

²²¹ *E.g.*, *Peterson v. Archstone Cmtys. LLC*, 637 F.3d 416 (D.C. Cir. 2011) (reversing dismissal for failure to prosecute because district court did not find that *pro se* plaintiff's conduct was so severe as to be unfair to defendant and did not consider less drastic alternatives, but refused to remand to different district and magistrate judges because "we have found absolutely no evidence of prejudice, or even the appearance of prejudice . . ."); *Ciralsky v. Central Intelligence Agency*, 355 F.3d 661 (D.C. Cir. 2004) (remanding case for reconsideration because, while the district court did not abuse its discretion in granting motion to dismiss without prejudice on the basis that the complaint contained superfluous information, plaintiff did not fully explain until its appellate briefing that some of its claims would be barred by the statute of limitations if plaintiff had to refile the case).

²²² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

²²³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Judge Garland's opinion in *Sparrow v. United Air Lines, Inc.*,²²⁴ is a prime example. Writing for a three-judge panel, Judge Garland reversed and remanded, holding that "I was turned down for a job because of my race' is all a complaint has to say to survive a motion to dismiss under Rule 12(b)(6)."

In *Steele v. Shafer*,²²⁵ Judge Garland held that incidents contributing to a hostile work environment that were time-barred could serve as underlying evidence of a hostile work environment, so long as at least one incident of relevant conduct fell within the applicable period. Judge Garland based his decision more on the district court's legal errors than on the presence of a material factual dispute; thus, the decision demonstrates the importance that Judge Garland accords to legal standards in dispositive motions.

The timeliness holding in *Steele* echoed Judge Garland's earlier decision in *Anderson v. Zubieta*,²²⁶ where he carefully discussed precedent and distinguished between initial acts of discrimination that did not persist within the system and the kind of pattern and practice discrimination that was being alleged by plaintiffs in this case. By recognizing the importance of the difference between these two types of experiences, Judge Garland's opinion not only gave plaintiffs the opportunity to have their claims heard, but also the potential recovery of damages for historical conduct that falls outside the statute of limitations.

Iqbal and Twombly

In addition to Judge Garland's *Sparrow* opinion, which was decided before the Supreme Court's ruling in *Iqbal*, he has participated in two cases discussing pleading issues post-*Iqbal*. In *Daniel v. Fulwood*,²²⁷ Judge Garland reversed the dismissal of prisoners' constitutional claims, finding that the *Iqbal* plausibility standard had been met. Most notably, he agreed with the prisoners that an inference should be made in their favor from the pleaded facts.

Additionally, Judge Garland participated in *Harris v. D.C. Water & Sewer Authority*,²²⁸ an employment claim involving retaliation. The district court dismissed for want of sufficient factual allegations regarding causation. Judge Garland wrote for the unanimous panel reversing the district court's judgment, concluding that, while there was a five-month lag between plaintiff's complaints about racial discrimination and his termination, plaintiff alleged additional facts that could support a finding that he was not terminated for performance issues or because his position was eliminated. Judge Garland found that because the

²²⁴ 216 F.3d 1111 (D.C. Cir. 2000).

²²⁵ 535 F.3d 689 (D.C. Cir. 2008).

²²⁶ 180 F.3d 329 (D.C. Cir. 1999).

²²⁷ 766 F.3d 57, 63 (D.C. Cir. 2014).

²²⁸ 791 F.3d 65 (D.C. Cir. 2015).

complaint “alleged facts that, if shown, would be at least sufficient to state a prime facie case of retaliation—and perhaps enough to survive summary judgment—it necessarily alleged facts sufficient to render his claim plausible at the motion to dismiss stage.”²²⁹ Judge Garland also reasoned that allegations that the employee had received commendations for his work and that his job functions continued to be performed after his position was eliminated plausibly supported the inference that non-performance was not the real reason for dismissal. Again, Judge Garland was careful to look at facts alleged.

Article III Standing

Judge Garland has a pragmatic approach to issues of standing under Article III of the constitution. Language from Judge Garland’s unanimous opinion in *Muir v. Navy Federal Credit Union*²³⁰ highlights as much: Parsing through the arguments from each side, Judge Garland recognized that the dispute about standing boiled down to whether or not the statute at issue had been violated. He concluded that this was a merits question and, at the pleading stage, plaintiff did not need to prove the action was a violation of the statute in order to establish standing.²³¹ In addressing the district court’s holding that the plaintiff also lacked prudential standing, Judge Garland highlighted earlier D.C. Circuit precedent that explained that the “zone-of-interest” test only excludes parties whose interests are so marginally related to, or are inconsistent with, the purposes of the suit that Congress could not have reasonably intended such a suit. The opinion then went on to explain that the district court had read the purpose of the statute in this case too narrowly.

Intervenor Standing

Judge Garland has taken a similarly practical approach with regard to intervenor standing. In *Fund for Animals, Inc. v. Norton*,²³² Judge Garland wrote for the court when it decided the question of whether Mongolia should be allowed to intervene, as of right, as a defendant in an action relating to the application of the Endangered Species Act to argali sheep in Mongolia. Judge Garland found that Mongolia had established Article III standing and reversed the district court’s denial of its motion to intervene. He concluded that the loss of tourism fees that could result from barring American hunters from bringing home argali sheep trophies from Mongolia presented a “concrete and imminent injury” that was fairly

²²⁹ *Id.* at 70.

²³⁰ 529 F.3d 1100 (D.C. Cir. 2008).

²³¹ Judge Garland also discussed this standing issue in *Info. Handling Serv., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024 (D.C. Cir. 2003) and set forth the standard explicitly: “[A]t the motion to dismiss stage, a plaintiff’s non-frivolous contention regarding the meaning of a statute must be taken as correct for purposes of standing.”

²³² 322 F.3d 728 (D.C. Cir. 2003).

traceable to the petition. Judge Garland went on to explain that previous D.C. Circuit authority did not require a party seeking to intervene to submit evidence demonstrating standing in all cases. Here, while Mongolia itself was not the object of the proposed administrative action (which would make standing self-evident), Mongolia considered the sheep at issue to be national property and natural resources; thus, Judge Garland concluded, “we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party’s property.” On the issue of intervention, Judge Garland found the first three factors of Federal Rule of Civil Procedure 24(a)(2) were easily satisfied and then considered whether Mongolia’s interest would be adequately represented by the existing parties. He explained that it was not hard to imagine how the interests of the federal defendants and Mongolia might diverge in litigation; and the fact that Mongolia was represented by the same counsel as another intervening party did not demonstrate that Mongolia’s interests would be adequately represented. Ultimately, Judge Garland instructed the district court to grant Mongolia’s motion to intervene, rather than leaving the issue for the district court on remand. This may have resulted from the district court’s failure to include any findings of facts or legal analysis in its order denying the motion to intervene, an omission raised multiple times by Judge Garland.

Justiciability and Agency Challenges

In the context of challenges to agency action, Judge Garland has frequently engaged in detailed examination and analysis of justiciability, regardless of whether or not the issue is raised by the defendant agency. These sorts of issues often arise due to the uniqueness of the D.C. Circuit’s docket, which regularly includes reviews of agency actions. Judge Garland’s opinions are detailed, careful, and non-ideological.

In *United States Telecom Association v. Federal Communications Commission*,²³³ Judge Garland wrote for a unanimous three-judge panel. He affirmed the Federal Communications Commission’s (FCC) ruling that the Iowa Communications Network (ICN), a state-owned telecommunications network in Iowa, was a “telecommunications carrier” that was eligible for subsidies under a Telecommunications Act provision, which gave discounts to schools and rural health care providers. In order to satisfy its independent obligation to assure constitutional standing, the court directed the parties to submit supplemental briefs on this subject. Judge Garland first considered whether the United States Telecom Association (USTA) had associational standing to bring the suit on behalf of its members. Because some USTA members had lost business to ICN, he concluded that they demonstrated the constitutional minimum requirement of an “injury in

²³³ 295 F.3d 1326 (D.C. Cir. 2002).

fact,” and that USTA had standing to sue. With respect to the merits, Judge Garland first found that even though ICN serves only a subset of the public, it is a “common carrier” because it “holds itself out indiscriminately to serve all within that class.” In deciding whether ICN’s rules overly restricted users’ communications in violation of the second prong of the “common carrier” test, Judge Garland found that the FCC properly accepted ICN’s assurances that it does not police content, and, instead, places the burden of discerning appropriateness on the user. The Supreme Court denied the USTA’s petition for *certiorari*.

In *Ranger Cellular v. Federal Communications Commission*,²³⁴ the FCC challenged plaintiffs’ standing to challenge the issuance of certain licenses. Judge Garland, writing for a unanimous three-judge panel, found that plaintiffs lacked standing and affirmed the FCC’s denial of their petition for a refund of filing fees. Ranger Cellular contended that if the licenses were rescinded, it would have a reasonable chance of winning them in a re-lottery involving original applicants. But Judge Garland found that any re-lottery would include a large number of large companies with whom Ranger Cellular would not be able to compete, as it admitted at oral argument. Because Ranger Cellular’s injuries would not be redressed by the relief sought in the action, it lacked standing. Further, its bid for a refund of filing fees failed because the FCC reasonably concluded that the applicant got what it paid for: the opportunity to participate in a lottery for licenses.

In *Chamber of Commerce v. Environmental Protection Agency*,²³⁵ Judge Garland, again writing for a unanimous three-judge panel, dismissed the petition for review. The heart of the decision concerned the Chamber’s and National Automobile Dealers Association’s (NADA) purported failure to establish standing, which was disputed by the parties. Petitioners challenged the EPA’s grant to California of a waiver from federal preemption under the Clean Air Act. The basis for the challenge was their contention that California’s distinct standards would have no effect on increased global temperatures, and the effects of climate change in California were not sufficient to justify distinct standards. In evaluating the Chamber’s claim, Judge Garland found that it did not meet the requirements for associational standing because it failed to identify an injured member. The Chamber’s co-petitioner, NADA, presented a closer case. Nevertheless, Judge Garland held that NADA’s is not harmed by California’s emissions standards, which regulate manufacturers, not dealers. While NADA could still have shown standing had it demonstrated a “substantial probability” of injury, it failed to do so. Further, even if NADA initially had standing, the case became moot when the federal government announced that it would establish “stringent” greenhouse gas and fuel economy standards for coming model years.

²³⁴ 348 F.3d 1044 (D.C. Cir. 2003).

²³⁵ 642 F.3d 192 (D.C. Cir. 2011).

Finally, in *Conservation Force, Inc. v. Jewell*,²³⁶ Judge Garland wrote a unanimous opinion dismissing a challenge to agency action on mootness grounds. There, appellants challenged two actions of the Fish and Wildlife Service: (1) a failure to act on a petition to downgrade a particular animal, the straight-horned markhor, from endangered to threatened; and (2) an unreasonable delay in processing applications for the importation of straight-horned markhor trophies. After finding both of these claims were mooted by agency action taken while the case was pending, Judge Garland turned to appellants' argument that the delay claim should survive in light of a pattern of unreasonable delay by the Service. He found that the claim was not ripe. Any future delay was a speculative possibility, and, without evidence that any appellant intended to submit a new permit in the future, there was no hardship. Furthermore, appellants lacked standing as there was no evidence that any appellant had suffered injury in fact from the alleged ongoing policy of delay. Judge Garland specifically discussed the evidence presented by the individual appellants, none of whom indicated that they intended to hunt for markhor in the future, as well as evidence from the organizational appellants who had not named any members who had such future plans. The opinion emphasized that general allegations of injury are insufficient, not because "we are misguided nitpickers, but rather because we must respect the limits of our own jurisdiction."²³⁷

OTHER ISSUES

Education

We have carefully examined Judge Garland's record for cases involving racial bias in education, racial diversity, or affirmative action, but found few. Part of this is likely due to the fact that the D.C. Circuit's only territorial jurisdiction is Washington, D.C. Recently, however, Judge Garland participated in a *per curiam* opinion dismissing a challenge to Department of Education regulations about for-profit colleges.²³⁸ LDF participated in the case, co-authoring an amicus brief that argued that, when students accrue large student loans at for-profit colleges and are unable to obtain gainful employment and repay those debts, it does particular harm to African-American communities.²³⁹ The *per curiam* opinion vindicated LDF's position in support of the Department and its promulgation of the regulations.

²³⁶ 733 F.3d 1200 (D.C. Cir. 2013).

²³⁷ *Id.* at 1207.

²³⁸ See *Assoc. of Private Sector Colls. & Univs. v. Duncan*, --- F. App'x ---, 2016 WL 1257759 (D.C. Cir. Mar. 8, 2016) (petition for rehearing or rehearing en banc pending)

²³⁹ See also Amicus Br. of Air Force Sergeants Assoc. et al., 2015 WL 7567698 (D.C. Cir., Nov. 24, 2015).

LGBTQ Issues

Judge Garland has not ruled squarely on issues of LGBTQ anti-discrimination protections or marriage equality. In a 2003 appeal about a Navy officer’s discharge for sexual misconduct, Judge Garland participated in a unanimous decision that affirmed summary judgement in favor of the government and assumed, without deciding, that the Defense Department’s “Don’t Ask, Don’t Tell” regulations were enforceable.²⁴⁰ The handful of other decisions that involved parties who self-identified as or were associated with the LGBTQ community do not shed light on his broader views on anti-discrimination protections.²⁴¹

Administrative Law

In the realm of administrative law, Judge Garland has a strong record of favoring environmental protections, worker rights, and access to health care, and often defers to agency decisions where that is legally supported. This is true fairly broadly, and beyond the context of the justiciability issues that have arisen in the agency context and were discussed above. In the handful of cases where he did not find deference was warranted, his opinions and dissents were more supportive of the public interest than the agency’s original decision. His decisions are well-organized, factually grounded, and generally devoid of commentary on the policy implications of the issues at stake in the underlying rulemaking or adjudication. When he criticizes a given agency, he explains which specific aspects of the substantive decision trouble him and declines to engage in ideological attacks or questions about the agency’s competence. For example, Judge Garland was part of an *en banc* decision involving an attempt to resurrect the non-delegation doctrine in a case involving EPA’s efforts to reduce ozone (smog) and particulate matter in major American cities, *American Trucking Associations, Inc. v. EPA*.²⁴² Both pollutants exacerbate asthma and other respiratory diseases and have a major impact on the health of African Americans who live in so-called “non-attainment areas.” Judge Garland voted to support the EPA’s decision to establish tolerable levels of ozone and particulate matter in the ambient air without regard to cost.

Judicial Ethics

In his capacity as Chief Judge of the D.C. Circuit, Judge Garland oversees a variety of administrative matters, including judicial ethics complaints.²⁴³ In 2015, Judge Garland reviewed a notable ethics complaint involving Judge Edith Jones of

²⁴⁰ *Turner v. Dep’t of Navy*, 325 F.3d 310 (D.C. Cir. 2003).

²⁴¹ See *Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002); *Int’l Action Center v. U.S.*, 365 F.3d 20 (D.C. Cir. 2004); *Pinson v. Samuels*, 761 F.3d 1 (D.C. Cir. 2014).

²⁴² 195 F.3d 4 (D.C. Cir. 1999) (*en banc*).

²⁴³ See Rules for Judicial-Conduct and Judicial-Disability Proceedings, Art. III (review of complaint by chief judge) (amended Sept. 17, 2015).

the U.S. Court of Appeals for the Fifth Circuit. At issue was a public speech Judge Jones gave at the University of Pennsylvania Law School, where she was alleged to have made a number of racially charged and inflammatory comments including: that certain “racial groups like African Americans and Hispanics are predisposed to crime,” are “‘prone’ to commit acts of violence,” and get involved in more violent and “heinous” crimes than people of other ethnicities; and that challenges to the death penalty on the grounds that it is administered in a racially discriminatory manner are “red herrings.”²⁴⁴

Several public interest groups and individuals, including the Austin Chapter of the NAACP, filed a judicial misconduct complaint. A Special Committee of the Judicial Council of the D.C. Circuit, including Judge Garland, evaluated the complaint and found, in pertinent part, that it had “no doubt that suggesting certain racial or ethnic groups are ‘prone to commit’ acts of violence or are ‘predisposed to crime’ would . . . violate both the Code of Conduct and the Judicial-Conduct Rules.”²⁴⁵ However, the Special Committee concluded that “in light of the [inexact] recitation of the witnesses’ recollections, we are unable to find, by a preponderance of the evidence, that Judge Jones made those comments in her initial remarks” and that “whatever she said initially, it is clear that Judge Jones used the question-and-answer period to clarify that she did not adhere to such views.”²⁴⁶ The Special Committee recommended dismissal of the complaint, which was adopted by the Judicial Council of the D.C. Circuit. A petition for review of that order was denied.²⁴⁷

CONCLUSION

Judge Garland is highly qualified to serve as a justice of the Supreme Court of the United States. He deserves a prompt hearing in the United States Senate and a timely, up-or-down vote on his nomination.

²⁴⁴ *In re: Complaint of Judicial Misconduct*, No. 14-01, Memorandum of Decision at 3 (Feb. 19, 2015), available at www.uscourts.gov/file/3318/download (hereinafter “Memorandum of Decision”). The complaint also alleged other unethical conduct at the lecture and at unrelated *en banc* argument.

²⁴⁵ *In re: Complaint of Judicial Misconduct*, Report of the Special Committee to the Judicial Council of the District of Columbia Circuit 26 (July 7, 2015), available at www.uscourts.gov/file/3318/download. The Chief Judge of the Fifth Circuit requested the matter be transferred to the judicial council of another circuit, and Chief Justice John Roberts relayed the case to the D.C. Circuit, which also appointed a special counsel to investigate.

²⁴⁶ *Id.*

²⁴⁷ Memorandum of Decision at 15. See also Brandi Grissom, *Complaint: Judge’s Death Penalty Remarks Show Racial Bias*, The Texas Tribune, June 4, 2013 (quoting LDF’s Director of Litigation Christina Swarns about Judge Jones’ reported comments and their impact on the criminal justice system), available at <https://www.texastribune.org/2013/06/04/complaint-judges-comments-show-bias-death-penalty/>.