Report of the American Civil Liberties Union
On the Nomination of Judge Merrick B. Garland
To be Associate Justice of the
United States Supreme Court

TABLE OF CONTENTS

INTRODUCTION 1

FREEDOM OF SPEECH AND PRESS 4

CRIMINAL LAW 10

NATIONAL SECURITY 23

RELIGIOUS LIBERTY 29

LGBT RIGHTS 30

REPRODUCTIVE RIGHTS 31

GENDER DISCRIMINATION 31

RACE DISCRIMINATION 34

VOTING RIGHTS 35

IMMIGRATION 39

AGE DISCRIMINATION 41

DISABILITY RIGHTS 42

PRISONERS' RIGHTS 46

DEATH PENALTY 48

FREEDOM OF INFORMATION ACT 50

BIVENS 55

STANDING 56

SECOND AMENDMENT 58

INTRODUCTION

In accordance with ACLU Policy 519, this report summarizes the civil liberties and civil rights record of Judge Merrick B. Garland, who was nominated by President Barack Obama on March 16, 2016, to replace Justice Antonin Scalia as an Associate Justice of the United States Supreme Court. ACLU Policy 519 provides.

> Whenever a Supreme Court nominee is sent to the Senate, the ACLU will prepare a report for use by the Senate, the press and the public, in evaluating the nominee. The report will examine the nominee's record with regard to civil liberties, and the role of the courts in protecting civil liberties, including the nominee's judicial record (if any), writings, speeches, and activities.

Judge Garland has been a judge on the United States Court of Appeals for the District of Columbia Circuit since 1997 and has served as chief judge of that court since 2013. After graduating from Harvard College and Harvard Law School, Judge Garland received two prestigious clerkships, first to Judge Henry J. Friendly on the United States Court of Appeals for the Second Circuit and then to Justice William J. Brennan, Jr. on the United States Supreme Court. Following his clerkships, Judge Garland spent two years in the Department of Justice as a Special Assistant to the Attorney General, then eight years as partner at Arnold & Porter. He left the firm in 1989 to become an Assistant United States Attorney in the District of Columbia, went back briefly to Arnold & Porter in 1992 and then, in 1993, returned to the Justice Department as Deputy Assistant Attorney General in the Criminal Division. From 1994 until his appointment to the bench, Judge Garland was Principal Associate Deputy Attorney General where, among other things, he supervised the prosecution of Timothy McVeigh and Terry Nichols for the bombing of the federal building in Oklahoma City.

After nineteen years on the federal bench, Judge Garland's judicial record is extensive. Like past reports on prior nominees, therefore, this report focuses on Judge Garland's written opinions, including his concurrences and dissents. We have also included some significant cases in which Judge Garland joined opinions written by other judges but did not write separately. Beyond his judicial record, there is very little to rely on in assessing Judge Garland's nomination. Positions that he may have taken in litigation when in private practice or

government (and nothing particularly controversial has emerged so far) are always subject to the qualification that he was representing a client. His extrajudicial writings have primarily focused on antitrust issues that are not germane to this report. And his testimony before the Senate Judiciary Committee when he was nominated as a circuit judge likewise offers little insight into his judicial philosophy or his position on important issues involving civil liberties and civil rights. It is possible that other material will emerge if and when the confirmation process proceeds. If so, we will amend the report, as appropriate.

Several other caveats are worth noting at the outset. Despite his long tenure on the court of appeals, Judge Garland has not written any significant opinions on many of the hot-button issues that regularly come before the Supreme Court, including abortion, LGBT rights, religious rights, affirmative action, immigration, and the death penalty. Furthermore, as with all lower court judges, Judge Garland was bound by Supreme Court precedent in a way that would not apply if he were elevated to the Supreme Court.

That being said, Judge Garland's record on the court of appeals does support some general observations.

- The common description of Judge Garland as a judicial moderate seems like a reasonable one and is reflected in the bipartisan support he has received throughout his career. The current political impasse over his nomination has less to do with Judge Garland than the electoral calendar.
- Judge Garland is a careful judicial craftsman and his opinions tend to be narrowly written. He does not favor broad legal pronouncements nor does he use his opinions as an occasion to expound on theories of constitutional interpretation. The combination of these factors makes it difficult to characterize his judicial record in simple ideological terms.
- During his confirmation hearings for the D.C. Circuit, Judge Garland was asked which job had best prepared him for the role of judge and he responded that it was his time as a prosecutor. On the bench, Judge Garland has been willing to give the prosecution the benefit of the doubt in what he perceives as close criminal cases.
- Judge Garland's approach to criminal cases is consistent, more broadly, with a presumptive deference to administrative agencies and subject-matter experts.

- His most important free speech cases involve campaign finance. In one, he joined (but did not write) a decision relying on *Citizens United* to strike down limits on contributions to Political Action Committees (PACs); in the other, he upheld a ban on federal campaign contributions by federal contractors. His most important opinion involving freedom of the press was a dissent arguing in favor of strong constitutional protection for a reporter's confidential sources.
- Like all D.C. Circuit judges, Judge Garland has sat on a number of Guantánamo appeals. His record is a mixed one. Judge Garland joined in an opinion holding that Guantánamo detainees could not challenge their detention in federal court that was later overturned by the Supreme Court. But he rejected the government's designation of a Chinese Uighur at Guantánamo as an enemy combatant and he wrote a vigorous dissent from a decision dismissing torture claims brought against private contractors by Iraqi detainees held at Abu Ghraib prison.
- More often than not, Judge Garland has sided with civil rights plaintiffs in discrimination cases, although the decisions tend to be fact-specific.
- In FOIA cases, Judge Garland has shown an appreciation for the importance of transparency and accountability.
- Within the confines of existing law, he has taken a generally expansive view of standing rather than looking for ways to close the courthouse doors.

A more detailed summary of Judge Garland's civil liberties record follows. As stated in ACLU Policy 519, "the Supreme Court has a unique and special role under the Constitution in protecting civil liberties." As Policy 519 further states, "in fulfilling its constitutional role of advice and consent the Senate has an obligation to undertake a thorough examination of a nominee's views on civil liberties and on the function and role of the judiciary in protecting civil liberties." It is our hope that this report will assist in that effort.

FREEDOM OF SPEECH AND PRESS

Judge Garland has participated in a substantial number of cases involving free speech claims under the First Amendment. Here, as elsewhere, his opinions focus closely on the facts and stick closely to the precedents. He has not articulated a personal theory of the First Amendment, and it is difficult to infer one from his opinions. His opinions do reflect, however, an appreciation of the fact that stifling debate on matters of public concern or compelling the disclosure of confidential sources carries a significant First Amendment cost.

1. The Rights to Protest and Petition

In *Initiative & Referendum Institute v. U.S. Postal Serv.*, 417 F.3d 1299 (D.C. Cir. 2005), Judge Garland wrote for a unanimous panel to hold that a U.S. Postal Service regulation banning "soliciting signatures on petitions, polls, or surveys" on "all real property under the charge and control of the Postal Service" failed scrutiny as a time, place, or manner restriction on speech in a traditional public forum. *Id.* at 1302. The panel relied primarily on *United States v. Grace*, 461 U.S. 171 (1983)—a case invalidating speech restrictions on the sidewalk in front of the Supreme Court building—to conclude that, although the regulation served the substantial government interest of preventing disruption to Postal Service business, it was not narrowly tailored and did not leave open sufficient alternative channels of communication; instead, the restriction completely limited a form of core political speech, even though disruption was only occasional. *Id.* at 1306–12. *But see Marlin v. Dist. of Columbia Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir.) (Judge Garland joined an opinion holding that partisan activity could be banned from polling places because they are not public forums), *cert. denied*, 532 U.S. 1039 (2001).

In *American Bus Ass'n v. Rogoff*, 649 F.3d 734 (D.C. Cir. 2011), Judge Garland authored a unanimous opinion rejecting a First Amendment challenge by two trade organizations to an amendment to a federal statute that barred the Federal Transit Administration from spending funds to enforce a portion of the Federal Transit Act against a particular Seattle bus line. *Id.* at 735–37. The plaintiffs claimed that this violated their right to petition the agency for a remedy to the Seattle bus line's violation of the Act. *Id.* The panel disagreed, holding that the spending limitation affected only the availability of a remedy, not the right to petition for a remedy—and under D.C. Circuit precedent, the First Amendment protects only the latter. *Id.* at 740.

2. Employee Speech

Judge Garland has authored just one employee-speech opinion, and has joined a handful of others, building a mixed record in such cases.

In *Mpoy v. Rhee*, 758 F.3d 285 (D.C. Cir. 2014), Judge Garland wrote an opinion holding that qualified immunity barred a special education teacher's First Amendment claim of retaliation for being fired after sending an email complaining about administrative misconduct to the school chancellor. Judge Garland, applying the Supreme Court's test from *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held that the email was unprotected by the First Amendment because "the content and the context of the email, as construed in light of the complaint, indicate that Mpoy was speaking as an employee reporting conduct that interfered with his job responsibilities, rather than as a citizen." *Mpoy*, 758 F.3d at 291. Judge Garland acknowledged that the scope of a public employee's unprotected speech might have been narrowed by the Supreme Court's recent decision in *Lane v. Franks*, 134 S. Ct. 2369 (2014), which suggested that such speech is unprotected only if it relates to "ordinary" job responsibilities. Nonetheless, Judge Garland declined to reach that question on qualified-immunity grounds because the firing in *Mpoy* happened before the decision in *Lane*. *Mpoy*, 758 F.3d at 295.

Judge Garland has joined several opinions that took robust views of the First Amendment with respect to matters of public concern in the employment context. In *Thompson v. Dist. of Columbia*, 428 F.3d 283 (D.C. Cir. 2005), Judge Garland joined an opinion by Judge Tatel reversing the district court in holding that an employee of the D.C. Lottery Control Board had stated a First Amendment retaliation claim when he was fired shortly after alleging fraud and misconduct in Board activities to his superiors. (Notably, the Board had conceded that the employee's speech was on a matter of public concern, per *Garcetti*.) And in *LeFande v. Dist. of Columbia*, 613 F.3d 1155 (D.C. Cir. 2010), Judge Garland joined Judge Henderson's unanimous panel opinion reversing a district court finding that a D.C. police officer was not speaking on a matter of public concern. The *LeFande* panel held instead that the officer's speech on the shortcomings of the police administration was protected by the First Amendment.

In another notable case addressing the First Amendment in the employment context, *Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011), Judge Garland joined Judge Sentelle's unanimous panel opinion finding that a Voice of America employee who alleged she

was fired for participating in a music video critical of America had stated a First Amendment claim under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Despite the result, the *Glassman* opinion is notable for dicta that could be read to restrict beyond present doctrine public-employee speech rights in the context of agencies that must maintain the appearance of impartiality. *See Glassman*, 637 F.3d at 317 ("It is not likely that the Board would argue that, for example, a janitor or messenger could be discharged for making an anti-American video. In contrast, it might well be that an on-the-air editorialist for VOA or a top executive could be discharged for the same conduct.").

But Judge Garland has also joined opinions disposing of First Amendment claims in the employment context. In *Koszola v. F.D.I.C.*, 393 F.3d 1294 (D.C. Cir. 2005), he joined Judge (now Justice) Roberts' unanimous panel opinion rejecting a First Amendment claim by an FDIC employee who argued that he had been fired in retaliation for making disclosures of mismanagement and violations of the law by his employer. Deferring to fact-finding by the district court, the *Koszola* panel held that the district court did not clearly err in concluding the employee would have been discharged regardless of his protected disclosures. And Judge Garland also joined Judge Rogers' unanimous panel opinion in *Baumann v. Dist. of Columbia*, 795 F.3d 209 (D.C. Cir. 2015), rejecting a First Amendment challenge by a D.C. police officer who, claiming whistleblower status, had been sanctioned for disclosing police radio communications. The panel, applying the *Pickering* test, held that the discipline the officer received after his release of the communications struck the appropriate balance between the speech interest ("a strong interest in his speaking to the public about safety issues related to the [police department's] management of barricade situations," *id.* at 217) and governmental interests ("weighty interest in preserving confidential information that, if released publicly, could jeopardize the successful conclusion of a criminal investigation," *id.* at 216).

3. Commercial Speech

Judge Garland has participated in only a few cases involving commercial speech that do not reveal a clear ideological approach beyond applying existing precedent.

In *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir.), *reh'g denied*, 172 F.3d 72 (1999), Judge Garland joined Judge Silberman's unanimous panel opinion reversing the district court and reinstating a First Amendment claim against the FDA. The panel held that, under *Central*

Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980), FDA regulations requiring pre-approval before listing certain health claims on dietary supplements were invalid because the FDA could have used a less-restrictive alternative to requiring disclaimers.

In two other cases, Judge Garland upheld FTC regulations against First Amendment challenges by corporations. In *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015), Judge Garland joined Judge Srinivasan in a unanimous panel opinion finding no First Amendment problem with an FTC regulation requiring food advertisers to have one clinical trial supporting claims of disease prevention before claiming a causal relationship between their product and any health benefits. The opinion noted that the FTC's requirement of two clinical trials failed *Central Hudson*'s test because the additional clinical trial would not serve the government's interest in preventing deceptive advertising. And in *Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002), Judge Garland joined a unanimous panel opinion by Judge Henderson sustaining FTC regulations prohibiting the dissemination of information about individuals' credit in marketing lists against a First Amendment challenge.

Finally, in *American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc), Judge Garland joined an en banc majority that upheld a USDA regulation requiring the disclosure of country-of-origin information for certain meat products. *Id.* at 20. The central issue was whether the deferential standard of *Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985), applies to disclosure mandates that further a government interest other than correcting deception. 760 F.3d at 20. The majority held that it does, and that because a speaker's interest in opposing the forced disclosure of information is minimal, only limited scrutiny applied. *Id.* at 27. The USDA regulation passed muster under this deferential review because it was a well-tailored means of serving the government's interest in enabling consumers to buy American-made products and to avoid meat from countries where food-borne illnesses have arisen. *Id.* at 23. Judge Garland also sat on the three-judge panel that reached the same conclusion before en banc review was granted. *See* 746 F.3d 1065 (D.C. Cir. 2014).

4. Campaign Finance and Election Regulation

Judge Garland has written three opinions upholding electoral and/or campaign finance regulations.

In *Wagner v. Fed. Election Comm'n*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), Judge Garland wrote for the unanimous en banc court in rejecting a First Amendment challenge to a Federal Election Campaign Act provision barring individuals and firms who negotiate or perform a federal contract from making campaign contributions. Plaintiffs argued that the provision should be declared unconstitutional as applied to individuals who have personal services contracts with federal agencies. Judge Garland declined to apply strict scrutiny, holding that laws regulating campaign contributions, including bans on contributions, need only be "closely drawn" to the state interest, and the challenged provision satisfied that requirement. *Id*. at 6–8. Judge Garland also found that the provision was not fatally underinclusive for, among other things, not applying to federal employees, who are not generally banned from making campaign contributions. *Id*. at 31. Early this year, the Supreme Court declined review. *See Miller v. Fed. Election Comm'n*, 136 S. Ct. 895 (2016).

In *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009), Judge Garland authored a unanimous panel opinion upholding the lobbying-disclosure requirements of the Honest Leadership and Open Government Act of 2007 against a First Amendment challenge. Judge Garland hewed to the framework of the Supreme Court's decisions in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), *United States v. Harris*, 347 U.S. 612 (1954), and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), applying strict scrutiny but found that the requirements were not facially invalid because of the government's continuing vital interest in disclosure of lobbying activities. Judge Garland distinguished the case from *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), because there the record demonstrated that compelled disclosure would impact NAACP members in specific ways that would chill their associative activity.

And in *Fed. Election Comm'n v. Craig for U.S. Senate*, No. 14-5297, 2016 WL 850823 (D.C. Cir. Mar. 4, 2016)—his last published opinion prior to his nomination to the Supreme Court—Judge Garland held for a unanimous panel that the district court's order that Senator Larry Craig disgorge campaign funds wrongly converted to personal use in violation of the Federal Election Campaign Act did not violate the First Amendment because requiring the disgorgement of funds to the Treasury was not the same as a campaign finance restriction. *Id*., at *15.

However, in perhaps the most significant campaign finance case in which he participated, Judge Garland joined a unanimous en banc court in *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir.) (en banc), *cert. denied*, 562 U.S. 1003 (2010), striking down limits on contributions to PACs that make only independent expenditures. The court rested its decision on the holding in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), that independent expenditures, which cannot be coordinated with candidates, do not present a risk of corruption.

5. Freedom of Association

In *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), Judge Garland recognized First Amendment interests on both sides in dismissing presidential candidate Lyndon LaRouche's First Amendment claim challenging the application of the Democratic Party's internal rules to deprive him of delegates at the 1996 Democratic National Convention. LaRouche asserted a First Amendment right to associate with the political party of his choice and the concomitant right of his supporters to associate with the candidate of their choice. *Id.* at 975, 993 n.28. Assuming without deciding that the Democratic Party could be considered a state actor, Judge Garland declined to apply strict scrutiny to LaRouche's claim, reasoning that this standard was inappropriate because the Democratic Party's actions were also "clothed with strong First Amendment protections," and the First Amendment therefore "weighed on both sides of the balance." *Id.* at 992, 994. The appropriate question was whether the Party's actions "rationally advance[d] some legitimate interest of the party"—a standard that Judge Garland held was easily satisfied. *Id.* at 995–98.

6. Freedom of the Press

Judge Garland has had occasion to directly address the freedom of the press only once, dissenting from the D.C. Circuit's denial of en banc review in *Lee v. Dep't of Justice*, 428 F.3d 299 (D.C. Cir. 2005) (en banc) (per curium), and urging a broadening of the so-called "reporter's privilege." *See id.* at 302 (Garland, J., dissenting from denial of en banc review). After several news organizations reported on an investigation into a federal government scientist suspected of espionage, the scientist sued the government for violations of the Privacy Act and issued subpoenas to the journalists, including James Risen of the *New York Times*. The journalists refused to disclose the names of individuals within the FBI who may have provided them with information. The three-judge appellate panel upheld contempt citations for those journalists and

the en banc court declined to hear the appeal. Judge Garland's dissent noted that the appellate panel's focus on whether the identity of a source goes "to the heart of the matter." as well as whether alternative sources of information have been exhausted, would render the privilege meaningless in Privacy Act suits where a reporter received information from a whistleblower. *Id*. at 223–24. He also joined Judge Tatel's dissent from denial of rehearing en banc, who argued that there should be a weighing of "'the public interest in protecting the reporter's sources against the private interest in compelling disclosure'" in civil suits. *Id*. at 222.

In a second case touching on free-press concerns, Judge Garland joined Judge Sentelle's dissent in *Boehner v. McDermott*, 484 F.3d 573, 581 (D.C. Cir.) (Sentelle, J., dissenting), *cert. denied*, 552 U.S. 1072 (2007), concluding that a member of the House of Representatives had a valid First Amendment defense to civil Wiretap Act claims brought by the Speaker of the House for the dissemination of an unlawfully recorded conference call among Republican House members discussing ethical violations by Newt Gingrich. The en banc majority agreed with Judge Sentelle's dissent that *Bartnicki v. Vopper*, 532 U.S. 514 (2001), provided the relevant analytical framework, and that neither the government nor a state could "constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator." *Boehner*, 484 F.3d at 586 (Sentelle, J., dissenting). But while the majority concluded that the House member's dissemination lost First Amendment protection because it appeared to violate congressional rules, Judge Sentelle (joined by Judge Garland) found the distinction to be a "*non sequitur*," as those rules were unrelated to the Wiretap Act claims at issue in the case. *Id.* at 587.

CRIMINAL LAW

1. Fourth Amendment

Judge Garland very rarely ruled in favor of defendants in Fourth Amendment cases and has generally found law enforcement action to be reasonable under the circumstances. His opinions make clear that he is reluctant to second-guess the decisions made by law enforcement and is deferential to the lower court findings of fact. The following cases are illustrative.

In *In re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998), Judge Garland found that police officers had probable cause to believe that a burglary was in progress and thus to enter

defendant's home without a warrant, where they later found guns and drugs, after they observed him force open the door and, when they identified themselves as police officers, resist their effort to investigate. It was "irrelevant to the probable cause inquiry," Judge Garland wrote, "that the officers later learned the defendant had entered his own house, and that [the defendant] later offered evidence that the door had been broken for several years prior to this incident." 153 F.3d at 765. He further ruled that the exigent circumstances exception to the warrant requirement applied in light of "the officers' belief that the defendant was engaged in an ongoing burglary attempt that could have endangered the occupants of the house if the police had paused to obtain a warrant." *Id.*at 766. Finally, Judge Garland held that the search of the bedroom where the defendant was apprehended was justified as a search incident to arrest under *Chimel v. United States*, 394 U.S. 752 (1960) and its progeny, while the search of a second bedroom was justified as a lawful "protective sweep" under *Maryland v. Buie*, 494 U.S. 325 (1990).

In *United States v. Brown*, 334 F.3d 1161 (D.C. Cir. 2003), police officers approached a car with tinted windows and two occupants in the backseat while investigating a report of shots fired in a parking lot located in a "high crime" neighborhood. After the occupants failed to respond, the officer opened the car door to investigate further. Noting that the opening of the car door constituted both a stop and a search under *Terry v. Ohio*, 392 U.S. 1 (1968), Judge Garland found that, given the totality of the circumstances, the police had reasonable suspicion to believe criminal activity was afoot and a reasonable fear that the defendant was armed and dangerous.

In *United States v. Turner*, 119 F.3d 18 (D.C. Cir. 1997), Judge Garland rejected the defendant's argument that the evidence discovered in the passenger compartment of the car was indicative only of personal marijuana use, and therefore did not amount to probable cause that additional drugs would be found outside of the defendant's immediate vicinity or control, including the trunk of the car.

In *United States v. Goree*, 365 F.3d 1086 (D.C. Cir. 2004), the police engaged in the warrantless search of a home, which ultimately produced a firearm, in response to a report of domestic violence. Judge Garland determined that the record below was "inadequate to establish whether sufficient potential danger remained, even after [the defendant's] detention, to create an exigency justifying the warrantless search," 365 F.3d at 169, but noted that if the record had supported the government's recitation of the facts, exigent circumstances would have justified

the search given the presence of a gun even though the defendant had been handcuffed prior to the search.

In *United States v. Christian*, 187 F.3d 663 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct. 1444 (2000), Judge Garland rejected the government's argument that the search in question was justified as a search incident to arrest, because simple possession of a dagger (discovered in plain view inside the defendant's car) was not a crime under the cited statute. Judge Garland accepted the government's alternative argument that the seizure of the gun (found in a bag on the front passenger seat) was lawful as a valid protective search under *Terry v. Ohio* because there was reasonable suspicion the defendant was trying to hide contraband and might be armed and dangerous notwithstanding that possession of the dagger was not illegal. Judge Garland noted that though officers failed to search the defendant himself, raising questions as to whether they felt threatened, "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.'"

In *United States v. Williams*, 773 F.3d 98 (D.C. Cir. 2014), *cert. denied*, 135 S.Ct. 2336 (2015), the district court found credible both defendant's testimony that he was wearing a seatbelt when stopped and the officer's testimony that he "thought" the defendant was not wearing his seatbelt. Judge Garland found that because the officer's belief was reasonable, whether or not it was erroneous, he had the probable cause necessary to conduct the stop. The court further held that use of the defendant's key fob to locate his car following arrest was not a search, "let alone an unconstitutional one," and that the subsequent search of the car outside of the police station was justified under the automobile exception to the warrant requirement.

In *United States v. Hewlett*, 395 F.3d 458 (D.C. Cir. 2005), Judge Garland first held that the defendant had waived any argument that his arrest was unsupported by probable cause. Judge Garland then held that the officers did have probable cause to make the arrest in light of the existence of a valid arrest warrant. As to the possibility that the warrant could have been quashed or otherwise withdrawn during the eleven months between the police learning of the arrest warrant and the actual arrest, the court stated that it could not "conclude that the passage of eleven months so diminished that support as to reduce it below the level of probable cause." 395 F.3d at 462.

In *United States v. Wesley*, 293 F.3d 541 (D.C. Cir. 2002), Judge Garland found that it was reasonable for the arresting officer to believe that the location at which he found the defendant in November 2000 fell within the ambit of an earlier stay-away order prohibiting the defendant from being at or near that location. Judge Garland ruled that there was nothing improper about the officer's decision to travel to the intersection specifically to investigate whether the defendant was present. As for defendant's contention that it would have been more prudent for the officer to conduct an investigatory stop before making the arrest, Judge Garland noted that it is not 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." 293 F.3d at 546. Finally, the court found that the search was not overly broad in light of the bright line rule established in *New York v. Belton*, 453 U.S.454 (*rev'd by Davis v. United States.*, 564 U.S 229), permitting a search of the passenger compartment of an automobile incident to a lawful arrest.

In *United States v. Pindell*, 336 F.3d 1049 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 1461 (2004), Judge Garland rejected the defendant's argument that the search warrants in question violated the particularity requirement because they included a catch-all phrase allowing a search for "any other evidence in violation of Title 18 U.S.C. § 242." *Pindell*, 336 F.3d at 1051. In Judge Garland's view, the warrants would have been overly broad if they had *only* authorized police to seize "evidence in violation of Title 18 U.S.C. § 242," but the warrants at issue here included a very specific list of items to be seized. *Id*. Moreover, the catch-all phrase appeared at the end of that specific list, suggesting that it referred to evidence relating to those specific items. Further, since the warrants were valid, the officers seizure of items inside of the defendant's car and home was lawful.

In *United States v. Bookhardt*, 277 F.3d 558 (D.C. Cir. 2002), the defendant was arrested for driving with an expired language and then charged with unlawful possession of a firearm after two guns were found in his car. Judge Garland agreed with the defendant that the police lacked probable cause to arrest him on the basis they asserted. He nevertheless ruled that the arrest was constitutional, and the motion to suppress properly denied, because there was probable cause to arrest the defendant for reckless driving. In so holding, Judge Garland noted 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—yielding no additional protection of civil

liberties while adding considerably to the burden placed upon both defendants and police." 277 F.3d at 566 (quoting *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (internal quotations omitted)).

In *United States v. Dykes*, 406 F.3d 717 (D.C. Cir. 2005), Judge Garland relied on *Illinois v. Wardlow*, 528 U.S. 119 (2000), to hold that there was "no question" that the officers had reasonable suspicion to stop the defendant in the parking lot because he "fled without provocation upon seeing police enter an area 'known for heavy narcotics trafficking." 406 F.3d at 720. Further, the police were justified in using force to effectuate the arrest since the defendant was in full flight at the time, and it was reasonable to remove his hands from underneath him in order to place handcuffs on him.

In *United States v. West*, 458 F.3d 1 (D.C. Cir. 2006), the defendant argued that he was seized unlawfully when a drug interdiction officer began questioning him aboard a commercial bus, and that he did not consent to the subsequent search of his bag. Citing *United States v. Drayton*, 536 U.S. 194 (2002), Judge Garland ruled that the interaction between the police officer and the defendant did not constitute a seizure, and the subsequent consent was voluntary, since, i.) the officer was in plain clothes; ii.) spoke in a conversational tone; iii.) did not display a weapon; and iv.) returned the defendant's bus ticket after examining it. As such, a reasonable person would have felt free to decline the officer's requests. The fact that the encounter took place on a bus was immaterial to the inquiry.

In *United States v. Webb*, 255 F.3d 890 (D.C. Cir. 2001), the defendant argued that the search warrant affidavit was based on stale information since more than 100 days had passed since the last known drug transaction between the informant and the defendant. Though Judge Garland found "the issuance of this warrant troubling" in light of the timing, he found that suppression was inappropriate under the *Leon* exception because the officers had an "objectively reasonable belief in the existence of probable cause," 255 F.3d at 905 (quoting *United States v. Leon*, 468 U.S. 897, 926 (1984)), because earlier transactions verified the informant's statement that the defendant had been dealing drugs for an extended period of time and the warrant sought documents related to the defendant's drug trafficking activities, and "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." *Id.*

United States v. Bowman, 496 F.3d 685 (D.C. Cir. 2007), is notable because it is a rare criminal case in which Judge Garland did not defer to the district court's findings. Instead, he held that those findings were insufficient to determine whether a license-and-registration roadblock was lawful under circuit precedent since i.) inconsistent testimony of a single officer constituted the only evidence supporting the district court's finding that the primary purpose of the roadblock was to check for licenses and registrations; ii.) the district court failed to make a finding as to whether the roadblock was an effective means of furthering vehicular regulation; and iii.) there was no clear finding as to whether the roadblock was minimally intrusive. The court remanded the case for further fact-finding without reaching the question of whether the stop and frisk that followed the roadblock was lawful under *Terry v. Ohio*.

Finally, in in *United States v. Gbemisola*, 225 F.3d 753 (D.C. Cir. 2000), *cert. denied*, 531 U.S 1026, Judge Garland held that no warrant is required for law enforcement to install and use a tracking device to track the location of a suspect's package as it was carried by hand and in a vehicle, nor to determine when the package was opened. Judge Garland relied on Supreme Court cases from the 1980s that held that use of tracking "beepers" installed in containers to track the locations of those containers as they were carried by car on public roadways was not a Fourth Amendment search. Because the defendant's package was tracked only while being conveyed on public roadways, Judge Garland concluded that the defendant had no reasonable expectation of privacy in its location or movements, and thus no warrant was required.

A decade later, however, in *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010), Judge Garland joined a majority of the en banc D.C. Circuit in denying the government's petition for rehearing en banc of an opinion taking a far more expansive view of the Fourth Amendment. A three-judge panel of the court had held that use of a GPS device to surreptitiously track a suspect's car for twenty-eight days violates a reasonable expectation of privacy under the Fourth Amendment, creating a split with courts of appeals in several other circuits that had held prolonged GPS tracking not to constitute a search under the Fourth Amendment. *United States v. Maynard*, 615 F.3d 544, 555-556 (D.C. Cir. 2010), which likely contributed to the Court's decision to grant certiorari in a case involving Maynard's co-defendant. Four of the nine

members of the en banc court dissented from the denial of rehearing en banc. By joining the majority of judges in denying rehearing, Judge Garland maintained the D.C. Circuit's split with the other circuits, which likely contributed to the Supreme Court's decision to grant certiorari. The Supreme Court unanimously affirmed the D.C. Circuit's holding, with five Justices reaching that result on the basis that attachment of a GPS device to a car and its use to gather location information is a search because it constitutes a trespass, and five Justices agreeing with the D.C. Circuit's rationale that longer-term GPS monitoring violates reasonable expectations of privacy by revealing private information about their lives. *United States v. Jones*, 132 S. Ct. 945 (2012).

2. Sentencing

Section 3B1.1(a) of the Sentencing Guidelines allows for a four-level upward adjustment in the base offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In *United States v. Wilson*, 240 F.3d 39 (D.C. Cir. 2001), the defendant argued that the district court improperly had applied this enhancement where it questioned "'whether five or more participants were actually clearly established,' but found the criminal activity 'otherwise extensive.'" *Id.* at 47. The panel majority sided with the defendant and with the Second and Third circuits, concluding that to make a finding of "otherwise extensive" under 3B1.1(a), the district court "must look primarily or solely to the number of persons involved in the criminal activity." *Id.* In contrast, a number of other circuits read the guidelines "as imposing first an 'irreducible minimum' requirement that the defendant be involved in criminal activity with at least one other criminally responsible person, but, once this is met…the court looks to 'the totality of the circumstances including not only the number of participants but also the width, breadth, scope, complexity, and duration of the scheme." *Id.* The panel majority in *Wilson* offered a textual justification for its reading of the ambiguous guideline and expressed policy concerns with what it characterized as the "unconstrained inquiry" that the totality reading permits. *Id.* The majority worried that the "open-ended approach invited double counting" whereby a defendant's sentence could be enhanced multiple times based on the same characteristic under different parts of the guidelines. *Id* at 48-49. In addition, the totality reading of the "otherwise extensive" clause "would either allow this provision to eat up the 'five or more participant' prong or would produce the anomalous result that unknowing outsiders count more than criminally culpable participants." *Id.* at 49.

Judge Garland dissented. He argued that the court should adopt the totality reading of the clause, pointing out that eight circuits had adopted this view and the *Wilson* majority left the D.C. Circuit in the company of only two other circuits. Judge Garland offered his own textual justification for the totality test and also dismissed the majority's policy concerns as "overstated" and unwarranted. *Id* at 53. Responding to the majority's criticism that the totality reading leads to an "unconstrained inquiry," Judge Garland contended that while "it is true that the Sentencing Guidelines were intended to limit [district courts'] discretion, they were not intended to squeeze out every last drop." *Id* at 53. In addition, he asserted that the double counting concern was unconvincing because the Commission "expressly forbids it where it is not intended" and the Commission "has not forbidden double counting here, nor even indicated that it is disfavored." *Id* at 54. While Judge Garland's position is neither extreme nor obviously wrong, it is more prosecution-friendly than the majority's approach, allowing for more frequent and more flexible application of the 3B1.1(a) enhancement to increase sentences.

Judge Garland's other notable sentencing decisions similarly demonstrate a pro-prosecution perspective. In *United States v. Bridges*, 175 F.3d 1062 (D.C. Cir. 1999), the district court departed upward, placing the defendant in criminal history category V even though his history placed him in category II because the presentence report concluded that category II did not adequately represent his history or likelihood of committing additional crimes. *Id.* at 1064-65. Before settling on category V, the district court did not consider whether categories III or IV would suffice. The defendant appealed and Judge Garland affirmed, holding that the guideline at issue "does not require a step-by-step procedure for departing from one criminal history category to another." *Id.* at 1066. In coming to this conclusion, Judge Garland took a cabined view of two previous D.C. Circuit cases that arguably supported the defendant's position. *Id.* at 1067. He also acknowledged that other circuits took a different approach but argued that the difference was incremental and that "[i]n practice, this approach will seldom if ever yield results different from our own." *Id.* at 1068.

In *United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004), the district court had departed downward and the government appealed. Under the PROTECT Act of 2003, Congress required appellate courts to review guidelines departures de novo—rather than for abuse of discretion—to combat a perceived excess in district courts departing downward. *Id.* at 1164-65. The defendant argued that application of the new law would violate the presumption against retroactive

application of statutes and the ex post facto clause. Judge Garland disagreed, following the lead of other circuits that had considered similar arguments. *Id.* at 1165. Applying de novo review, Judge Garland then held that the downward departure was unwarranted and remanded for resentencing. Judge Rogers dissented, advocating for a narrower application of the PROTECT Act's de novo review of departures and asserting that Judge Garland's decision "distorts the appellate court's role beyond that contemplated by the PROTECT Act." *Id.* at 1176 (Rogers dissenting).

In *United States v. Webb*, 255 F.3d 890 (D.C. Cir. 2001), Judge Garland adopted a pro-prosecution approach to plain error review in the *Apprendi* context. The defendant was charged with multiple counts of drug violations and one of those counts triggered an increased sentence based on drug quantity. *Id.* at 892. Following pre-*Apprendi* precedent, the district court told the jury that it could convict without making any findings as to drug quantity, and it convicted on all counts. *Id.* at 893, 897. The defendant argued that his sentence violated *Apprendi,* which had been decided in the interim, and which held that facts supporting a sentencing enhancement must be found by the jury. Because *Apprendi* was not raised or considered below (it had not yet been decided), Judge Garland applied a plain error standard and concluded that the fairness of the judicial proceeding had not been affected because the evidence of drug quantity was both "overwhelming" and "essentially uncontroverted." *Id.* at 900–01. A year later, the Supreme Court adopted this approach in *United States v. Cotton*, 535 U.S. 625 (2002), which Judge Garland noted in a subsequent opinion raising related issues. *United States v. Johnson*, 331 F.3d 962, 968 (D.C. Cir. 2003) ("Presaging the analysis applied by the Supreme Court in *Cotton,* this court employed a similar approach in *Webb…).*

Similarly, in *United States v. Andrews*, 532 F.3d 900 (D.C. Cir. 2008), Judge Garland rejected the defendant's argument that use of the guidelines in effect at his sentencing violated the ex post facto clause because they resulted in a higher guidelines range than the guidelines in effect at the time he committed his offense. Acknowledging that circuit precedent from 2003 dictated that "courts must apply the Guidelines in effect on the date the offense was committed if using the Guidelines in effect at the time of sentencing would yield a longer sentence," *id.* at 908, Garland nonetheless agreed with the government that even if the district court erred in applying the guidelines in effect at the time of sentencing, the error was not plain. Judge Garland explained that "[t]his circuit has not yet determined whether, after *Booker* [in 2005], application

of a later (than the date-of-offense) Guidelines Manual that yields a higher sentence continues to raise an ex post facto problem. Nor has the Supreme Court." *Id.* at 909 (internal citations omitted). When Judge Garland wrote *Andrews*, there was a circuit split on the issue and he decided that the court "do[es] not need to decide which side of that circuit split we would join in order to resolve this case," because even if the district court erred, "there is no plain error unless [the] district court failed to follow [an] 'absolutely clear' legal norm...." *Id. See also United States v. Samuel*, 296 F.3d 1169 (D.C. Cir. 2002), *cert. denied*, 123 S.Ct. 680 (2002); *United States v. Lafayette,* 337 F.3d 1043 (D.C. Cir. 2003).

Overall, Judge Garland's sentencing decisions nearly always favor the government. *See e.g., United States v. Glover*, 153 F.3d 749 (D.C. Cir. 1998); *In re Sealed Case No. 97-3112*, 181 F.3d 128 (D.C. Cir. 1999) (en banc), *cert. denied*, 120 S.Ct. 453 (1999); *United States v. Brooke*, 308 F.3d 17 (D.C. Cir. 2002); *United States v. Thomas*, 361 F.3d 653 (D.C. Cir. 2004) *cert. granted, judgment vacated on other grounds,* 543 U.S. 1111 (2005) (vacated and remanded for consideration post-*Booker)*; *United States v. Heard*, 359 F.3d 544 (D.C. Cir. 2004); *United States v. Edwards*, 496 F.3d 677 (D.C. Cir. 2007); *United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007); *United States v. Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), *cert. denied*, 555 U.S 1155 (2009); *United States v. Motley*, 587 F.3d 1153 (D.C. Cir. 2009); *United States v. Salahmand*, 651 F.3d 21 (D.C. Cir. 2011); *United States v. Legg*, 713 F.3d 1129 (D.C. Cir. 2013); *United States v. Blackson*, 709 F.3d 36 (D.C. Cir. 2013), *cert. denied*, 134 S.Ct. 514 (2013); *United States v. Williams*, 773 F.3d 98 (D.C. Cir. 2014) *cert. denied,* 135 S. Ct. 2336 (2015).

3. Habeas Corpus

Judge Garland's federal habeas jurisprudence faithfully applies the rigid barriers to relief that the Anti-terrorism and Effective Death Penalty Act ("AEDPA") imposes on criminal defendants mounting collateral attacks on their convictions or sentences. Judge Garland has authored seventeen opinions under 28 U.S.C. § 2255, all of which were unanimous judgments. He has twice reversed the trial court in favor of the petitioner. *See United States v. Caso*, 723 F.3d 215 (D.C. Cir. 2013); *United States v. Johnson*, 254 F.3d 279 (D.C. Cir. 2001). By contrast, none of his opinions reversed a trial court's grant of relief to the petitioner.

Judge Garland frequently disposes of habeas cases on one dispositive ground that avoids thornier issues, such as denying relief under the most forgiving of potential standards or

assuming a constitutional violation in favor of a fatal harmless error analysis. *See, e.g., United States v. Lafayette*, 337 F.3d 1043 (D.C. Cir 2003) (finding harmless any error in under *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) because United States Sentencing Guidelines required same total amount of punishment for other offenses, and bypassing questions about *Apprendi*'s retroactivity, AEDPA's one year deadline, and procedural default). But, given the numerous procedural hurdles to AEDPA relief, this approach is not surprising.

Judge Garland's opinions established circuit precedent on three occasions. Of these, *Caso*, 723 F.3d 215, is the most significant. The case dealt with a former Congressional aide who sought to vacate his conviction of honest-services wire fraud. Because the conviction rested on Caso's admission to falsifying a financial disclosure statement, he was actually innocent under *United States v. Skilling*, 130 S.Ct. 2896 (2012), which held that the honest-services wire fraud statute only applied to bribes and kickbacks. Caso, however, had not raised this claim on direct appeal. To overcome this default, Caso had to demonstrate that he was actually innocent of any equally or more serious offense that the government abandoned during plea bargaining. *Bousley v. United States*, 523 U.S. 614 (1998). The Government asserted it had dropped a false statement charge – of which Caso would have been guilty – and that Caso therefore could not prevail because honest-services wire fraud and making a false statement had the same statutory maximum. Without clear direction from Supreme Court or prior circuit precedent, Judge Garland rejected the statutory maximum in favor of the United States Sentencing Guidelines. The false statement charge was less serious by this rubric, thus entitling Cato to relief.

The second case is *United States v. Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), *cert. denied*, 129 S.Ct. 1038 (2009). There, a defendant tried and convicted of possession of a firearm in furtherance of a drug trafficking offense alleged that his trial counsel was ineffective for failing to request a jury instruction that possession of a semiautomatic weapon was an element of a separate offense that the jury had to find beyond a reasonable doubt. Use of a semiautomatic weapon raised the mandatory minimum from five to ten years. Judge Garland ultimately found that Cassell could not demonstrate prejudice from counsel's error, since the trial evidence left no reasonable doubt that Cassell possessed an assault rifle. But, departing from his usual practice of limiting decisions to a single dispositive ground, Judge Garland also reached the question of whether possession of a semiautomatic assault weapon was indeed an element of a separate offense "because we think it important to have circuit precedent on the question" of whether. *Id.*

at 1010. After reviewing the statutory framework, Judge Garland decided it was not; thus, possession of a semiautomatic firearm was merely a sentencing factor that need not be submitted to the jury. The United States Supreme Court later reject this reasoning – and its own prior case law – in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), holding that facts that increase the mandatory minimum, just like facts that raise the mandatory maximum, must be found by a jury beyond a reasonable doubt.

In the third case, *United States v. Johnson*, 254 F.3d 279 (D.C. Cir. 2001), the district court had issued a twelve-page "Memorandum and Order" denying Johnson's ineffective assistance of counsel claim. Johnson did not receive notice of the order until 11 months later. However, the district court denied his motion to reopen the case so that Johnson might file a timely appeal. Judge Garland, deciding an issue of first impression for the Circuit, held that the "separate document rule" of Rule 58 of the Federal Rules of Civil Procedure, which requires the court set forth a judgment in a separate document, applies to 2255 habeas petitions. Judge Garland further found that the district court did not comply with the separate document rule and allowed Johnson to file his appeal.

As one might expect of cases on collateral review, many of Judge Garland's habeas decisions involved claims of ineffective assistance. The Court of Appeals granted relief just once in these cases – a remand for further fact-finding in the district court – and that by consent of the parties at oral argument. *United States v. Weathers*, 186 F.3d 948 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct. 1272 (2000). Otherwise, Judge Garland typically concluded that any deficient performance by counsel did not prejudice the defendant.

In re Sealed Case, 488 F.3d 1011 (D.C. Cir. 2007), *cert. denied*, 121 S.Ct. 495 (2000), is notable among these. The defendant pleaded guilty to cocaine possession with intent to distribute. Counsel failed to inform his client that he could be treated as a career offender under the Sentencing Guidelines, a fact that nearly doubled his Guidelines sentencing range from 151-188 months to 262-327 months. This discovery prompted an unsuccessful attempt by the defendant to withdraw his plea. Judge Garland concluded that the defendant could not demonstrate a reasonable probability thathe would have rejected a plea and gone to trial with proper advice from counsel. Rather than credit the defendant's efforts to go to trial, Judge Garland relied on the fact that competent counsel would have informed the defendant that the

Government could pursue other charges that would have carried a higher sentencing range, that he faced a life sentence on the charge he pled to, and that he would almost certainly be convicted.

4. Miranda

In *United States. v. Jones*, 567 F.3d 712 (D.C. Cir. 2009), Judge Garland held that the "public safety" exception to *Miranda* applied when an officer, while arresting a suspected murderer, asked the suspect whether he had "anything on" him. Judge Garland emphasized the fact that the suspect had not yet been handcuffed, was believed by the police to be armed, and had just led police on a chase through a crowded, high-crime area before being apprehended in a poorly-lit stairwell. The officer's motivation in asking the question was irrelevant, according to Judge Garland, as was the fact that his question was not narrowly crafted; precision could not be expected under the circumstances.

5. Exculpatory evidence

Judge Garland has decided a handful of cases involving the government's obligation to provide any exculpatory evidence to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). *cert. denied*, 135 S.Ct. 1477 (2015). Here, too, he has most often sided with the prosecution. *United States v. Andrews*, 532 F.3d 900 (D.C. Cir. 2008) (government's failure to disclose a police officer's rough interview notes did not constitute a *Brady* violation because the material contained in the notes was similar to material contained in the officer's report and testimony, and regardless even late disclosure at trial left defense adequate time to prepare); *United States v. Johnson*, 519 F.3d 478 (D.C. Cir. 2008) (government's failure to disclose evidence favorable to the defendant did not constitute a *Brady* violation when the evidence would have been inadmissible at trial); *Baxter v. United States*, 761 F.3d 17 (D.C. Cir. 2014) (holding that failure to turn over evidence that a key witness suffered from bipolar disorder would not have changed the outcome of the trial that featured overwhelming evidence of defendant's guilt). *But see In re SEALED CASE NO. 99-3096 (BRADY OBLIGATIONS)*, 185 F.3d 887 (D.C. Cir. 1999) (in remanding the case, Judge Garland held that under these facts the prosecution had a *Brady* obligation to disclose any cooperation agreements between the hostile defense witness and the government where the agreement served not only to impeach but also to affirmatively demonstrate innocence).

NATIONAL SECURITY

1. Guantánamo

Judge Garland's record on Guantánamo-related questions is mixed. Although he authored *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), an opinion invalidating a Combat Status Review Tribunal's designation of a detainee as an "enemy combatant," he has never ruled in favor of a detainee on the merits in a Guantánamo habeas case. Moreover, Judge Garland has joined panel opinions foreclosing habeas jurisdiction over Guantánamo, *see Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), and endorsing evidentiary standards that are overly deferential to the government, *see Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 917 (2011).

Early in Guantánamo's history, Judge Garland joined an opinion by Judge Randolph holding that, in light of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the District of Columbia district court lacked habeas corpus jurisdiction over Guantánamo detainees. *Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The Supreme Court reversed this judgment in *Rasul v. Bush*, 542 U.S. 466 (2004), holding that *Eisentrager* did not preclude the exercise of statutory habeas corpus jurisdiction over detainees at Guantánamo Bay.

In *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), Judge Garland wrote an opinion invalidating a Combat Status Review Tribunal's ("CSRT") decision that Huzaifa Parhat was properly detained as an "enemy combatant." It was undisputed that Parhat, an ethnic Uighur who fled his home in China due to his opposition to the policies of the Chinese government, was not a member of al Qaeda or the Taliban, and that he had never participated in any hostile action against the United States or its allies. *Id.* at 835–36. The CSRT nevertheless determined that Parhat was an enemy combatant, finding that he was "affiliated" with a Uighur independence group and that the group was "associated" with al Qaeda and the Taliban. Judge Garland reversed the tribunal, holding that the evidence before the CSRT was insufficient to categorize Parhat as an "enemy combatant" under DOD's definition of the term. *Id.* at 836. In reaching this conclusion, Judge Garland underscored that the CSRT's findings rested on statements in State and Defense Department documents that "provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability." *Id.* at 836. "To affirm the Tribunal's determination under such

circumstances," he wrote, "would be to place a judicial imprimatur on an act of essentially unreviewable executive discretion." *Id.* Rejecting the government's argument that unsupported statements were reliable because they appeared in multiple documents, Judge Garland observed that, "Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true." *Id.* at 848. (Judge Garland also denied, without prejudice, a government motion to protect from public disclosure all nonclassified record information that it had labeled "law enforcement sensitive," because its motion rested on generic claims that were equally applicable to all other detainee cases pending in the D.C. Circuit. *Id.* at 836.)

Notably, in *Parhat*, Judge Garland did not reach the question of whether the government's definition of an "enemy combatant" exceeded the authorization that Congress gave the President in the Authorization for Use of Military Force ("AUMF"). In addition, although Judge Garland held that the government could not rely on certain evidence because the CSRT was not presented with related exculpatory evidence, he declined to hold that the government's failure to present exculpatory evidence was an independent ground for invalidating the CSRT's determination. *Id.* at 846. Finally, rather than decide whether the court had the power to order the release of a detainee in these circumstances, Judge Garland presented the government with the option of expeditiously holding a new CSRT. *Id.* at 850.

Though he has had several opportunities, Judge Garland has never ruled in favor of a detainee on the merits in a Guantánamo habeas case, and the opinions he has authored and joined on the subject have taken a parsimonious view of the rights of military detainees held by the United States in Cuba.

Notably, he joined Judge Sentelle's opinion affirming the denial of a habeas petition in *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), a case that is frequently cited for its articulation of evidentiary standards that are overly deferential to the government. Although prior circuit precedent had deemed hearsay evidence admissible in Guantánamo habeas cases, the *Awad* court affirmed this precedent in unnecessarily broad terms, stating that "the fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay." *Id.* at 7. The *Awad* court also affirmed and clarified circuit precedent holding that the government must prove its authority to continue to detain an

individual under the AUMF by only a preponderance of the evidence, not by the higher "clear and convincing evidence" standard. *Id.* at 10.

In *Khan v. Obama*, 655 F.3d 20 (D.C. Cir. 2011), Judge Garland wrote for the court in affirming the denial of a habeas petition because he concluded the evidence sufficiently established that the petitioner was "part of" an associated force of al Qaeda and the Taliban. Khan challenged the district court's ruling on several grounds, including on the ground that the intelligence reports that the court considered were unreliable. *Id.* at 25. Judge Garland rejected Khan's argument and concluded that the district court did not err in finding that the reports contained sufficient indicia of reliability. *Id.* at 31. Similarly, in *Alsabri v. Obama*, 684 F.3d 1298 (D.C. Cir. 2012), Judge Garland affirmed the denial of a habeas petition, concluding that the evidence sufficiently established that the petitioner was "part of" the Taliban or al Qaeda and thus properly detained under the AUMF.

Judge Garland again affirmed the denial of a habeas petition in *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012). Among other things, al-Alwi challenged the district court's reliance on his own statements that were insufficiently corroborated—citing the common law "corroboration rule," applicable in federal criminal trials, which provides that conviction may not rest solely on the uncorroborated admission of an accused. *Id.* at 18–19. Judge Garland reasoned that habeas proceedings are not "subject to all the protections given to defendants in criminal prosecutions," and that the D.C. Circuit had not previously regarded corroboration as a requirement of a meaningful habeas proceeding. *Id.* at 19. At oral argument, al-Alwi's counsel "clarified that he was not advocating the per se application of the common law rule," and instead contended that "the court must take the absence of corroboration into account in assessing the reliability of the petitioner's out-of-court statements." *Id.* Judge Garland agreed that the court must take the absence of corroboration into account, but he found neither clear error nor an abuse of discretion in the district court's determination that al-Alwi's statements were reliable. *Id.* at 20.

And finally, in *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014), Judge Garland joined an opinion by Judge Griffith that reversed a district court's grant of an emergency motion brought by detainees. The motion asserted that new policies at Guantánamo concerning genital searches and the location of attorney meetings placed an undue burden on detainees' ability to meet with

their lawyers. Applying the test announced by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987), to the military-detention context, the court concluded that these regulations were "reasonably related to legitimate penological interests." *Hatim*, 760 F.3d at 58 (quoting *Turner*, 482 U.S. at 84–85).

In *Bismullah v. Gates*, 514 F.3d 1291 (D.C. Cir. 2008), Judge Garland concurred separately in denying the government's petition for rehearing en banc of a panel opinion that addressed (i) the scope of the record available to the D.C. Circuit when reviewing CSRT determinations and (ii) access by detainees' counsel to classified information. Judge Garland's brief concurrence observed that a rehearing en banc would delay the Supreme Court's disposition of *Boumediene v. Bush*, 551 U.S. 1160 (2007), and that such a delay would be contrary to the interests of all of the parties, as well as to the public interest.

In *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), petitioners sought en banc review of, among other issues, the three-judge panel's conclusion that the international laws of war do not limit the President's detention authority. Judge Garland concurred in the denial of rehearing on the grounds that the panel's discussion of international law was not necessary to the disposition on the merits. He was joined by Judges Sentelle, Ginsburg, Henderson, Rogers, Tatel, and Griffith.

In *Al-Bahlul v. United States*, 767 F. 3d 1 (D.C. Cir. 2014), Judge Garland joined an en banc opinion that (i) affirmed a detainee's conspiracy conviction in the military commissions, and (ii) vacated his convictions for providing material support for terrorism and solicitation of others to commit war crimes. Although the court concluded that the detainee's convictions for material support and solicitation were plainly erroneous because the offenses were not triable by a law-of-war military commission when the conduct occurred, the court held that the detainee's conspiracy conviction did not plainly violate the Ex Post Facto Clause. *Id.* at 9, 18.

And in *Dhiab v. Obama*, 787 F.3d 563 (D.C. Cir. 2015), the government sought review of a district court decision unsealing videotapes of force-feeding at Guantánamo. The district court's unsealing order was made in response to the intervention of media groups in an ongoing habeas case, which had not yet terminated. Judge Garland joined a per curiam opinion finding that the court lacked jurisdiction over the government's interlocutory appeal, because no final decision had issued and the district court's decision was not effectively unreviewable. *See id.* at

563–68. The court also concluded that a writ of mandamus should not issue because the government would have a chance to appeal the district court's order in due course.

2. Alien Tort Statute, Sovereign Immunity, and Political Question

Judge Garland has shown a willingness to permit military-related claims against private parties and against foreign organizations or states, but not against the U.S. government.

Judge Garland's most progressive opinion in this regard is his dissent in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011), objecting to the majority's dismissal of state-law claims against private military contractors brought by detainees tortured and abused at Abu Ghraib prison in Iraq. The plaintiffs alleged that "they were beaten, electrocuted, raped, subjected to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison," and that this conduct had not been authorized by the U.S. military. *Id.* at 17. The D.C. Circuit ruled in favor of the contractors, holding that tort claims under state law were preempted whenever "a private service contractor is integrated into combatant activities over which the military retains command authority." *Id.* at 9. The court found that states "have no involvement in federal wartime policy-making," *id.* at 11, and that Congress, through the Federal Tort Claims Act, had established a "policy of eliminating tort concepts from the battlefield." *Id.* at 7. The D.C. Circuit also rejected the plaintiffs' claims under the Alien Tort Statute, finding claims under international law unavailable against private military contractors. *Id.* at 14–17.

Judge Garland dissented. Without specifically addressing the Alien Tort Statute claims, he disagreed that there was any basis for dismissing the plaintiffs' claims as preempted. His dissent focused on the fact that the plaintiffs' claims arose entirely from the contractors' actions and did not result from any decisions by the U.S. military. He also found that the Federal Tort Claims Act, which specifically exempted private contractors from its reach, could not be read to conflict with obligations imposed by state tort law. Finally, he observed that the Executive Branch had declined to seek dismissal of the lawsuit, and that the Department of Defense had explicitly advised that military contractors may be subject to tort law.

Judge Garland permitted claims of torture and murder to go forward against Libya over its assertion of sovereign immunity. In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004), which arose out of the torture and murder of an American

citizen by a terrorist organization sponsored by Libya, Judge Garland wrote for a unanimous panel that Libya was not entitled to sovereign immunity under the Foreign Sovereign Immunity Act because its support for the terrorist organization that carried out the torture and murder stripped it of immunity under the Act's terrorism exception. Judge Garland rejected the argument that the terrorism exception applied only where a state was the "but for" cause of an injury inflicted by terrorists, finding that allegations establishing proximate causation were sufficient to satisfy the Act's terrorism exception.

And, in *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), he wrote for a unanimous panel reversing the dismissal of Alien Tort Statute claims brought against Osama bin Laden and al Qaeda by Kenyan citizens injured in the bombing attack on the American Embassy in Nairobi. The court found that the district court had erred in in failing to find personal jurisdiction over the defendants, because "defendants' decision to purposefully direct their terror at the United States, and the fact that the plaintiffs' injuries arose out of one of those terrorist activities," sufficed to establish sufficient contacts with the forum. *Id.* at 14. The court affirmed the dismissal of claims against Afghanistan, because the claims fell within none of the statutory exceptions to sovereign immunity established by the Foreign Sovereign Immunities Act.

But Judge Garland joined a unanimous decision rejecting claims against the Palestine Liberation Organization by the family members of a U.S. citizen who had been tortured and murdered by Palestinian Authority security officers in the West Bank. The D.C. Circuit held in *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), *aff'd sub nom.*, *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), that only natural persons could be liable under the Torture Victim Protection Act. The Act runs against "individuals;" the court concluded that the ordinary meaning of the term precluded liability for organizations. The court also refused to recognize a cause of action under "customary international law, as part of federal common law," holding that such a claim could be recognized only the Alien Tort Statute and not as a standalone claim under federal-question jurisdiction pursuant to 28 U.S.C. § 1331. *Id.* at 609–10.

And Judge Garland joined an opinion broadly interpreting the scope of the political-question doctrine in *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc), *cert. denied*, 562 U.S. 1178 (2011). He voted with the en banc majority to dismiss, as unreviewable under the political-question doctrine, claims brought by the owners of a Sudanese

pharmaceutical plant that had been targeted by a United States missile strike. The majority held that adjudication of the plaintiffs' claims would require the court to determine whether the military strike was justified, and that such an inquiry was categorically barred: "courts cannot assess the merits of the President's decision to launch an attack on a foreign target." *Id.* at 844. Notably, Judge Garland joined neither of the concurring opinions. In one, Judge Ginsburg rejected the majority's interpretation of the political-question doctrine as overbroad, resulting in a bar on deciding any straightforward, purely legal question "if deciding it could merely reflect adversely upon a decision constitutionally committed to the President." *Id.* at 852. In the other, Judge Kavanaugh wrote that the plaintiffs' claims were so insubstantial as to foreclose federal jurisdiction, because "the mistaken destruction of property during extraterritorial war-related activities" did not violate customary international law, and no cause of action for defamation was available against the United States. *Id.* at 854–55.

RELIGIOUS LIBERTY

During his tenure on the D.C. Circuit, Judge Garland has not written any opinions that substantively address the Free Exercise Clause, Establishment Clause, or statutory free exercise claims.

In *Payne v. Salazar*, 619 F.3d 56 (2010), Judge Garland did author an opinion addressing a procedural question relating to a religious discrimination claim under Title VII. In the case, a Department of the Interior employee filed a discrimination complaint with the EEOC after her supervisor repeatedly refused requests for weekends off so she could attend church and Bible study. She subsequently alleged in another complaint that the supervisor had retaliated against her. *Id.* at 59. Payne won her discrimination claim before the EEOC but lost the retaliation claim. *Id.* In the opinion, Judge Garland wrote for a unanimous court that Title VII did not require Payne to judicially challenge the favorable, final determination she received on her religious discrimination claim as a prerequisite to filing a lawsuit challenging the final, unfavorable determination she received on her retaliation claim. *Id.* at 63-64.

In addition, although he did not author any opinions, Judge Garland has been on panels in several cases addressing free exercise issues. In *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), *reh'g denied*, 265 F.3d 1072 (D.C. Cir. 2001), the court unanimously held that a National Park Service regulation barring t-shirt sales in certain areas of the National Mall did not violate

the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C.§ 2000bb *et seq*. The RFRA claim was brought by two self-described evangelical Christians who, as part of their religious outreach efforts on the Mall, had previously sold t-shirts bearing religious messages. The court reasoned that the regulation did not substantially burden the plaintiffs' religious exercise, in part, because "the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means" of spreading the gospel. 253 F.3d at 17. ("Plaintiffs can still distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall.").

In *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002), the court unanimously held that a religious practice need not be mandatory "to warrant First Amendment protection." The case involved a free-exercise claim brought by Catholic prisoners after a federal prison ended its practice of permitting prisoners to consume a small amount of wine during Communion. *Id.* at 1316-17. Reversing the district court's decision in favor of the prison, the panel remanded the case, ordering the district court "to determine whether appellants have met the threshold requirement of showing a substantial burden on the free exercise of their religion" and if so, whether the change in wine-consumption practices were reasonably related to legitimate penological interests. *Id.* at 1321-23.

LGBT RIGHTS

Judge Garland has not written any opinions related to LGBT or HIV/AIDS issues. He has joined four decisions involving LGBT plaintiffs, but each of those cases was decided on grounds unrelated to the plaintiff's sexual orientation. *See Pinson v. Samuels*, 761 F.3d 1 (D.C. Cir. 2014)(holding that a gay federal prisoner was not entitled to a waiver of filing fees because of past frivolous filings and failure to meet "imminent danger" standard); *Int'l Action Ctr, v. United States*, 365 F.3d 20 (D.C. Cir. 2004)(suit by a gay rights organization against police supervisors for the actions of their subordinates dismissed for failure to allege the facts necessary to prove supervisory liability); *Turner v. Dep't of Navy*, 325 F.3d 310 (D.C. Cir. 2003)(holding that any error committed by naval investigators in asking a witness whether he was gay did not affect proceedings against plaintiff or decision to grant him an "other than honorable" discharge); *Grid Radio v. F.C.C.*, 278 F.3d 1314 (D.C. Cir.), *cert. denied*, 537 U.S. 815 (2002)(upholding fine against an unlicensed operator of low power radio station serving "gay men and women and the arts community").

REPRODUCTIVE RIGHTS

Judge Garland has not written any opinions addressing the merits in a case involving either abortion or contraceptive care. In *Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012), he was part of a panel that issued a per curiam opinion holding "in abeyance" a religious college's challenge to the contraceptive coverage provisions of the Affordable Care Act based on the government's representation that it was in the process of developing a new rule on religious exemptions and would not enforce the old rule against Wheaton College in the interim. Judge Garland was not part of a different panel that upheld the subsequently developed rule against a challenge brought under the Religious Freedom Restoration Act, *Priests for Life v. U.S. Dep't of Health and Human Services*, 808 F.3d 1 (D.C. Cir. 2015), although he did vote to deny a rehearing petition in that second case, which is one of several consolidated cases argued before the Supreme Court on March 23, 2016, under the caption, *Zubik v. Burwell*, 14-1418.

GENDER DISCRIMINATION

Judge Garland's decisions in this area recognize the fundamental importance of our landmark civil rights protections and an unwillingness to erode those protections through cramped interpretations of the law or to allow violators to evade accountability on technicalities. In several decisions, he demonstrates a rejection of formalistic legal reasoning in favor of a more flexible, practical, and fact-intensive inquiry.

For example, in *Czekalski v. Peters*, 475 F.3d 360 (D.C. Cir. 2007), the plaintiff was an employee of the Federal Aviation Administration who claimed she had been reassigned by her male supervisor for discriminatory reasons. Judge Garland's unanimous opinion faulted the lower court's presumption that a lateral transfer could not constitute adverse employment action in the absence of a loss in salary, grade level, or benefits. Judge Garland noted that the transfer was from a director position with responsibility for several hundred employees, multiple programs, and an annual budget of $400 million to a position in which she reported to a former peer, supervised fewer than ten employees, managed a single program, and lacked a separate budget. As Judge Garland explained,"a reasonable jury could well find it difficult to reconcile the government's insistence that the [new] job was a position of 'extreme importance' to the agency, with [the supervisor's] assertion that he reassigned her to that position because she had failed to perform up to expected standards." *Id.* at 365.

In *Lathram v. Snow*, 336 F.3d 1085 (D.C. Cir. 2003), the plaintiff claimed that her employer, the U.S. Customs Service, discriminated against her in several decisions relating to hiring and promotion and then retaliated against her when she complained. The district court had granted summary judgment to the defendant on all of plaintiff's claims. Judge Garland affirmed the ruling for the employer on one of plaintiff's claims, finding that she had not adduced evidence that she had actually applied for the position in question. However, Judge Garland reversed the grant of summary judgment on her second and third claims, finding that there was a "wide and inexplicable gulf" in qualifications and experience between the plaintiff and the person who was hired, which evidence could be used both to satisfy the plaintiff's burden at the prima facie phase and to demonstrate pretext to rebut the employer's defense. Judge Garland also reversed the grant of summary judgment on her discrimination and retaliation claim related to a directorship position that plaintiff had sought but that was given to a male applicant. Judge Garland emphasized that the employer had deviated from custom by opening the application process to non-employees, leading to consideration of a male candidate who would not have been considered under the customary process. Judge Garland warned that accepting the government's explanation for why it categorized the vacant position in a manner that led to the consideration of outside applicants "would open a potential loophole in Title VII" because "'[a]gencies seeking to prevent minority employees from advancing to higher level positions could simply' structure the positions in a way that made the employees 'technically' unqualified." 336 F.3d at 1090, n.6 (quoting *Cones v. Shalala*, 199 F.3d 512, 518 (D.C. Cir. 2000)).

And, in *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998) *vacated,* 527 U.S. 526 (1999), the Circuit Court considered the appropriate standard for the imposition of punitive damages in Title VII claims. The case was brought by a female employee of the American Dental Association who had prevailed at trial on the claim that she had been passed over for a vacant directorship. She was awarded backpay, but the district judge denied her request to instruct the jury on punitive damages. Defendants moved for judgment as a matter of law and the plaintiff cross-appealed on the denial of the punitive damage instruction. A panel of the D.C. Circuit affirmed the denial of JMOL, but reversed and remanded for trial on punitive damages. The employer petitioned for en banc review and the majority of the panel held that defendant's conduct had not been sufficiently egregious to warrant an instruction on punitive damages.

Judge Garland joined a dissent by Judge Tatel from the en banc decision, which criticized the majority for requiring that Title VII plaintiffs prove "something more serious than intentional discrimination—some undefined quantum of egregiousness-before a jury may consider punitive damages." 139 F.3d at 971. Finding that this amorphous requirement nullified the plain language of the statute, and conflicted with relevant Supreme Court decisions, the dissenters argued that nothing more than a showing of intentional discrimination was required to permit a jury to assign punitive damages. The dissent's reasoning was adopted by the Supreme Court upon appeal.

When Judge Garland has ruled against civil rights plaintiffs alleging gender (or other) discrimination, it has generally been on the ground that they have failed to allege or prove the relevant facts. *McGrath v. Clinton*, 666 F.3d 1377 (D.C. Cir. 2012), is typical. There, the court considered Title VII claims for race and sex discrimination and retaliation brought by a white male employee at the Department of State. The plaintiff claimed that his supervisor gave him poor marks leading to his termination because he refused to participate in his supervisor's effort to have the only Black female officer in his unit fired for underperformance. In a unanimous decision affirming the district court's grant of summary judgment to the defendant, Judge Garland found that the plaintiff had failed to show any evidence that his supervisor's actions violated Title VII. Judge Garland observed that Title VII does not protect failure to follow a supervisor's directives unless it can be shown that those directives are accompanied by discriminatory animus, which plaintiff had failed to show. Judge Garland further held that there was ample evidence that the plaintiff had been terminated due to performance issues, which he had failed to rebut. The same deficiencies precluded his retaliation claim.

Similarly, in *Montgomery v. Chao*, 546 F.3d 703 (D.C. Cir. 2008), the court considered Title VII claims brought by a Black male financial specialist employed by the Pension Benefit Guarantee Corporation, who asserted that a failure to increase his pay constituted race, gender, and age discrimination, and that two subsequent jobs to which he applied had been denied to him because of discrimination or alternatively because of retaliation. In a unanimous decision, Judge Garland affirmed the district court's grant of summary judgment to the defendant, finding that (i) the plaintiff had not shown that the comparators he identified, whose pay had increased, were similarly situated to him because they were neither in similar jobs nor had they received their promotions on the basis he was claiming had been denied to him; (ii) that the denial of plaintiff's applications for other positions had legitimate nondiscriminatory justifications (that the chosen

applicant was more qualified for the position—it was "not even close"), which there was no valid evidence to rebut; and (iii) that the employer had hired a candidate from the "preferred status" list, and there was no evidence that the employer had received an application from the plaintiff to be placed on that list.

RACE DISCRIMINATION

Judge Garland has not written any opinions that expressly address racial discrimination in education or housing. He has written a handful of opinions addressing racial discrimination in employment. Some also involve claims of gender discrimination and are discussed above. Overall, he has shown sympathy towards civil rights plaintiffs and a disinclination to dismiss claims at the outset.

In *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999), Judge Garland reversed a grant of summary judgment to the Panama Canal Commission on both disparate treatment and disparate impact wage discrimination claims brought by Black American citizens of Panamanian descent. He found that stark statistical evidence of differential impact was strong enough to make out the prima facie case for both the impact and treatment claims and noted flaws in the employer's proffered reasons for the policies. But, while he noted plaintiffs' allegations that the policies continued a long history of explicit discrimination, he avoided discussing that issue in depth.

In *Steele v. Schafer*, 535 F.3d 689, 691 (D.C. Cir. 2008), Judge Garland reversed the district court's grant of summary judgment for the Department of Agriculture when a Black former employee brought hostile work environment and retaliation claims under Title VII. He noted errors in the district court's conflation of the hostile work environment standard with the constructive discharge standard but was careful to state that the appellate court "express[ed] no opinion as to whether Steele's hostile work environment claim is meritorious." *Id.* at 695.

In *Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65 (D.C. Cir. 2015), Judge Garland reversed the dismissal of a retaliation claim after the trial court held that the plaintiff had failed to adequately plead a causal connection between his complaints of race discrimination in the workplace and his termination. Likewise, in *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000), Judge Garland ruled that the trial court had improperly used an overly strict pleading standard in dismissing the plaintiff's claim of employment discrimination. *See also*

Hunter-Boykin v. George Washington Univ., 132 F.3d 77 (D.C. Cir. 1998) (university and professor alleging discrimination entered into an agreement to toll the statute of limitations before the filing of litigation in order to discuss settlement; after complaint was filed arguably outside the agreed-upon period, trial court granted summary judgment in favor of university and Judge Garland reversed, finding that a reasonable juror could find filing timely).

Here, too, Judge Garland's opinions are thoughtful, well-reasoned, and deeply fact-bound. *See, e.g., Calhoun v. Johnson*, 632 F.3d 1259 (D.C. Cir. 2011) (where trial court had entered summary judgment in favor of employer, affirming on one claim of discrimination and reversing on another based on specific facts); *Morgan v. Fed. Home Loan Mortgage Corp.*, 328 F.3d 647 (D.C. Cir. 2003) (affirming grant of summary judgment for employer on race discrimination and retaliation claim in absence of evidence supporting plaintiffs' claims).

Judge Garland's only housing discrimination opinion involved the federal rental assistance program known as Section 8. In *Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. 2008), the owner of a housing development in Washington, D.C. sought to end its participation in the Section 8 program as part of an effort to sell the development and notified the existing tenants that it would no longer accept their Section 8 vouchers. The district court granted summary judgment for the plaintiffs on their claim to remain in their residences with Section 8 vouchers, and Judge Garland's opinion affirms that finding. However, he reversed the district court's grant of summary judgment in favor of the defendant on the D.C. Human Rights Act claim of disparate treatment. Because the D.C. Act prohibits source-of-income discrimination, Judge Garland found that the defendant's actions represented a facial violation. Although there were no explicit race or gender discrimination claims in the case, Section 8 law disproportionately affects women and people of color.

VOTING RIGHTS

Judge Garland has been a positive, but cautious voice on voting rights. He has written or joined opinions with robust interpretations of the Voting Rights Act. At the same time, the voting rights decisions that he has joined have been modest in terms of their outcomes, revealing a penchant for consensus and reluctance to issue sweeping rulings that would push the envelope in aggressive ways.

1. <u>The Voting Rights Act</u>.

Judge Garland has written opinions or sat on panels involving claims under the Voting Rights Act on several occasions. The most significant of these cases was *Florida v. United States*, 885 F. Supp.2d 299 (D.D.C. 2012) (three-judge court), in which a three-judge panel (on which Judge Garland presided) considered the question whether five Florida counties covered by Section 5 of the Voting Rights Act were entitled to federal preclearance for a law that: (i) reduced the number of days available for early voting and (ii) required citizens who move between Florida counties to re-register in order to vote by regular ballot. Under Section 5, Florida bore the burden of establishing that these changes in election procedures did not have the purpose and would not have the effect of discriminating against minority voters. African Americans in the five covered counties disproportionately used early voting, *id*. at 323 – at rates nearly double those of white voters in 2008, *id*. at 324 – and were disproportionately likely to move between counties. *Id*. at 338.

In a per curiam opinion, the court concluded that Florida's cutbacks in early voting violated Section 5 of the Voting Rights Act. In so ruling, the court articulated a clear standard for how Section 5's results prong applies to voter access cases, holding that "a change that alters the procedures or circumstances governing voting and voter registration will result in retrogression if: (1) the individuals who will be affected by the change are disproportionately likely to be members of a protected minority group; and (2) the change imposes a burden material enough that it will likely cause some reasonable minority voters not to exercise the franchise." *Id*. at 312. With respect to the early voting cutbacks, the court carefully and thoroughly considered the expert political science evidence in the case, and ultimately held in strong language that "a dramatic reduction in a form of voting disproportionately used by African–Americans would be analogous to (although certainly not the same as) closing polling places in disproportionately African–American precincts. Although such action would not bar African–Americans from voting, it would impose a sufficiently material burden to cause some reasonable minority voters not to vote." *Id.* at 329.

Judge Garland's moderation and instinct for compromise, however, were on display in other aspects of the decision and in subsequent proceedings. The court approved Florida's new voter registration requirements for inter-county movers, noting that inter-county movers could

still vote by provisional ballots, and that the law included other provisions making it easier for registrants to update their address after they move. *Id*. at 382. Moreover, the Court's decision indicated that Florida could likely obtain federal preclearance if the state maintained the same number of total hours for early voting as it had offered previously – in essence, inviting the state to go forward with its plans to reduce early voting days so long as it simultaneously expanded the hours of voting available on each remaining day, so that the total number of early voting hours remained constant. *Id*. at 373. The state followed the court's roadmap, and the matter settled.

In *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033 (D.C. Cir. 2003), Judge Garland joined a decision affirming the dismissal of a Voting Rights Act challenge to the District of Columbia Council ward redistricting plan, but in so ruling recognized the viability of a particular type of voting rights claim that the district court had held was not cognizable. The plaintiffs in this case alleged that the D.C. ward redistricting plan "packed" Black voters into a few supermajority districts, which had the effect of reducing the Black proportion of voters in a neighboring district. The district court held that this claim was not cognizable because Black remained a numerical majority in the neighboring district, and therefore had not suffered any injury. The Court of Appeals reversed that analysis, holding that "[v]ote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have 'less . . . opportunity to elect representatives of their choice' even where they remain an absolute majority in a contested voting district." *Id.* at 1041.

Ultimately, the court affirmed dismissal of the plaintiffs' claims, because they had not satisfied various preconditions for a vote dilution claim, most significantly, by failing to allege that minority voters were politically cohesive or that voting was racially polarized. *See id.* at 1042. Nevertheless, the D.C. Circuit's ruling was important in that it recognized that minority voters' ability to elect their preferred candidates, as protected by the Voting Rights Act, is not dependent on bare population thresholds, but rather on a variety of factors particular to the local circumstances of a jurisdiction.

2. <u>D.C. Voting Rights</u>

In a case arising under the Constitution rather than the Voting Rights Act, Judge Garland joined Judge Colleen Kollar-Kotelly in a per curiam opinion holding that D.C. residents are not

entitled to vote in Congressional elections. *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge court) (per curiam), *aff'd mem.*, 531 U.S. 941 (2000). The plaintiffs were 75 D.C. residents and the District of Columbia itself, bringing claims under several Constitutional provisions: Article I (election of House members by "People of the several States"); the Seventeenth Amendment (election of Senators by the people "from each State); the Fourteenth Amendment (equal protection; privileges or immunities); the Fifth Amendment (due process); and Article IV (republican guarantee for "every State in this Union"). The opinion noted that the members of the panel were sympathetic to the plaintiffs' cause, but held that the denial of D.C. residents' right to vote in Congressional elections does not violate the Constitution because the District could not properly be considered a state. The Court also held that, despite the fact that the exclusion of D.C. residents from congressional representation implicated the fundamental right to vote, strict scrutiny was inappropriate with respect to classifications that are prescribed by the Constitution. The Supreme Court summarily affirmed, 531 U.S. 941 (2000).

3. Ballot Access and Political Parties

Judge Garland has also joined or written opinions in cases concerning ballot access and the right of political parties. In *Libertarian Party v. Dist. of Columbia Bd. of Elections & Ethics*, 682 F.3d 72 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1589 (2013), Judge Garland joined an opinion by Judge David Tatel rejecting the Libertarian Party's claim that their ballot access rights were unduly burdened by the D.C. Board of Elections' practice of refusing to publish totals for write-in candidates who receive relatively low levels of support. Plaintiffs were the Libertarian Party and its 2008 write-in Presidential candidate, Bob Barr, as well as D.C. residents who voted for Barr. They challenged the D.C. Elections Board's practice of publishing only the overall number of write-in votes cast, but not the number of write-in votes for any particular candidate, if the total number of write-in votes would not be sufficient to change the election's outcome. Plaintiffs brought the challenge under the First Amendment (free speech and association) and Fifth Amendment (equal protection). The Circuit affirmed the District Court's grant of summary judgment to the Board, finding through an balancing test that the Board's practice did not constitute a severe burden on the plaintiffs, and that the Board had a legitimate interest in minimizing cost by avoiding manually tallying every write-in ballot and instead counting the total number of write-ins and determining whether they could impact the election outcome.

In *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), Judge Garland wrote an opinion affirming the right of political parties to define who is a bona fide member of the party. A presidential candidate seeking the nomination of the Democratic Party challenged the Democratic National Convention's denial of delegates to LaRouche based on a finding that he was not a "bona fide Democrat" (in part because of his anti-Semitism and racism). In a careful and thoughtful opinion, Judge Garland discussed at length the hybrid nature of political parties, as state actors with the potential to infringe upon First Amendment rights and as private actors who themselves have associational First Amendment rights. The lengthy opinion thoroughly analyzed decades of sometimes contradictory precedent and ruled in favor of the Democratic National Convention because the "ability to define who is a 'bona fide Democrat' is nothing less than the Part's ability to define itself," where its associational rights are at their "zenith." *Id.* at 966**.** Balancing those interests with the First Amendment rights of LaRouche and his followers, Judge Garland found it relevant that LaRouche's chances of becoming President, including as a third-party candidate, were not materially diminished by the DNC's rules.

IMMIGRATION

The D.C. Circuit, on which Judge Garland sits, hears very few immigration cases. He has joined fewer than 10 published opinions involving a substantial immigrants' rights issue and has apparently not authored a single such opinion. It is therefore difficult to draw any firm conclusions about Judge Garland's views regarding immigration issues frequently before the Supreme Court, such as deportability based on criminal convictions and eligibility for asylum and other relief from removal. However, Judge Garland has joined opinions ruling against noncitizens in the areas of federal court review of the executive branch's immigration decisions, criminal sentencing, and the scope of noncitizens' rights under the Due Process Clause.

1. Judicial Review in Immigration Proceedings

Judge Garland has joined two opinions restricting the scope of judicial review of immigration matters. *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005), held that 8 U.S.C. § 1252(a)(2)(B)(ii), which eliminated jurisdiction to review certain discretionary actions of the Attorney General under the Immigration and Nationality Act, barred review of the government's refusal to grant the plaintiffs' requests for waivers of a labor certification requirement for employment visas. The court noted a circuit split regarding the interpretation of

§ 1252(a)(2)(B)(ii), but showed some restraint in not reaching a conclusion as to the broader question and holding that under either of the two varying interpretations adopted among the circuits, there was no jurisdiction to review the particular decision at issue. *Id*. at 295.

Judge Garland also joined a less restrained opinion in *Hadera v. I.N.S.*, 136 F.3d 1338 (D.C. Cir. 1998), which concerned a complex new regime of judicial review rules enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The court held that the noncitizen in *Hadera*, who sought review of a removal order denying her asylum claim, had untimely filed under a transitional rule that applied to removal orders issued during a narrow window of time after IIRIRA's enactment but before the majority of its provisions went into effect. Among other arguments, the noncitizen pointed to a written notation by an immigration official indicating a later deadline (under which her petition would have been timely). The court also held that the noncitizen had filed her petition for review in the wrong circuit court under the new IIRIRA rules. *Id*. at 1341. The panel recognized that it had the authority to transfer the case to the correct court, but denied her request for transfer so that she could raise her colorable jurisdictional arguments to the proper circuit court, even though the government apparently did not oppose the transfer request. *Id*.

2. Immigration Issues in Criminal Proceedings

Judge Garland has joined several opinions rejecting noncitizen defendants' requests for downward departures from the federal sentencing guidelines for immigration-related reasons. For example, in *United States v. Leandre*, 132 F.3d 796 (D.C. Cir.), cert. denied, 523 U.S. 1131 (1998), the defendant argued for a downward departure on a combination of grounds, including that he was likely to be deported as a result of the conviction. Previous D.C. Circuit precedent established that a downward departure "may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence." *Id.* at 808 (quoting *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994)). In *Leandre,* the court seems to have found that the defendant's counsel had not sufficiently linked the likelihood-of-deportation argument to the *Smith* departure ground and affirmed the district court's denial of the downward departure. The other opinions Judge Garland has joined addressing this sentencing issue are similarly narrow.

3. Due Process Rights of Noncitizens and the Use of Secret Evidence

Judge Garland joined a troubling opinion concerning the use of secret evidence and the due process rights of noncitizens in the aftermath of the September 11, 2001, attacks. *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004), cert. denied, 523 U.S. 1131 (1998), was a challenge by two nonresident noncitizen pilots to the revocation of their U.S. airman certificates on security grounds. The agency gave no specific reason for the revocation and relied almost entirely on secret evidence that was never disclosed to the public or the pilots. *Id.* at 1181. Moreover, one week after an administrative law judge ordered discovery on the pilots' administrative appeals, the agency promulgated restrictive new administrative procedures without notice and comment, effectively depriving the pilots of discovery and, they claimed, any meaningful hearing. *Id.* at 1177.

In ruling against the pilots, the D.C. Circuit relied on classified evidence that was kept secret from the plaintiffs. *Id.* at 1181-82. The court's opinion, however, contains indications that the evidence against the pilots was flimsy; an unsealed affidavit from an administration official who had reviewed the classified evidence made generalized statements about the potential use of aircraft as "weapons of terrorism" and concluded that "it was important to err on the side of caution" with regard to the pilots. *Id.* at 1181 (internal quotation marks omitted). Of even greater concern, in the course of rejecting the pilots' due process challenge to the new procedures, the court reached out to articulate a very broad general proposition that "non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Id*. at 1182-83. (That broad categorical rule has since been rejected by the Supreme Court, which held in *Boumediene v. United States*, 553 U.S. 723, 762-64 (2008), that a case-by-case, flexible test applies to questions concerning the applicability of the Constitution.) It is particularly troubling that the D.C. Circuit panel in *Jifry* reached out to discuss the extraterritoriality issue when it was unnecessary for the resolution of the case as the court ultimately held that, *assuming* the pilots had due process rights, the new procedures afforded were constitutional. *Id*. at 1183.

AGE DISCRIMINATION

Judge Garland's recognition of the broad remedial purposes of the civil rights laws is reflected in an opinion he wrote construing the reach of the Age Discrimination in Employment

Act (ADEA). In *Miller v. Clinton*, 687 F.3d 1332 (D.C. Cir. 2012), the appeals court considered the question of whether State Department employees posted abroad were subject to the ADEA. Plaintiff was a safety inspector at the U.S. embassy in Paris who was fired upon turning 65 in accordance with a mandatory retirement clause that applied to foreign service employees in France under the applicable "local compensation plan." He sued under the ADEA and the district court dismissed, agreeing with the State Department that the Provision of the Basic Authorities Act that authorizes the Secretary of State to employ individuals by contract for services abroad and incorporated the local "compensation plan" for U.S. foreign service employees in France (including a mandatory retirement age of 65) created an exemption from the ADEA.

In reversing, Judge Garland declined "to remove the protections of landmark legislation like the ADEA from a class of U.S. citizens" in the absence of unambiguous expression of Congressional intent to do so, 687 F.3d at 1345, noting "[w]henever Congress has decided to exempt either groups of U.S. citizens or specified circumstances from the coverage of those statutes, it has done so clearly. It has not hidden those decisions in obscure references that require trips through multiple statutes, only to end in still further ambiguous provisions. . . . It did not do so here." *Id.* at 1352. The opinion places heavy emphasis on the critical importance of the ADEA and its place in the "wider statutory scheme," including Title VII and the ADA, that were enacted as "part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *Id.* (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995)). Judge Garland further warned of the slippery slope that the State Department's position would create, noting that it would have the effect of cancelling out the protections not only of the ADEA but also of the ADA and Title VII for U.S. government employees working abroad.

DISABILITY RIGHTS

Judge Garland has written eleven opinions with a disability focus (he has also written one dissent on a disability case and signed on to more than 20 other disability-related opinions). He has written in strong support of the medical privacy rights of people with disabilities, has articulated and endorsed the Spending Clause basis for damage claims against state entities under the Rehabilitation Act, and has supported access to benefits for people with disabilities. His opinions on education and employment matters, however, are mixed. In several disability

employment cases, Judge Garland has written or joined opinions that narrowly construed evidence and legal principles to rule against the employee with a disability.

1. Employment

More than half of Judge Garland's own opinions on disability law issues are employment cases (six of eleven).

In two of the six cases, he wrote opinions ruling for the plaintiff. In *Mogenhan v. Napolitano*, 613 F.3d 1162 (D.C. Cir. 2010), Judge Garland reversed a district court's grant of summary judgment for the employer. He found that there was triable evidence that the Secret Service retaliated against the plaintiff, a person with severe migraines, for filing a disability discrimination claim by increasing her workload and posting her complaint on the Agency intranet. Similarly, in *Breen v. Dep't of Transp.*, 282 F.3d 839 (D.C. Cir. 2002), Judge Garland's opinion reversing summary judgment for the employer found triable evidence that the plaintiff – a person with disabilities, including obsessive-compulsive disorder – would have been able to perform her job with the accommodation of an alternative work schedule.

In the four opinions ruling for the defendants, one ruling appears supported by the record (*Kersey v. Washington Metro. Area Transit Auth.*, 586 F.3d 13 (D.C. Cir. 2009)).

Three other cases, however, raise concerns. In *McGill v. Muñoz*, 203 F.3d 843 (D.C. Cir. 2000), Judge Garland's opinion overturned a jury verdict in favor of an employee with depression, stating that there was "no evidence" that the employer violated its sick leave policy, which permitted the employer to impose special leave provisions whenever an employee "appears to be using sick leave improperly." 203 F.3d at 847. However, given that stress can exacerbate depression, a reasonable jury could have concluded that the employer's decision to invoke the more onerous procedures when the employee took sick time after negative performance appraisals was disability discrimination.

In *Haynes v. Williams*, 392 F.3d 478 (D.C. Cir. 2004), a case decided before the ADA Amendments Act of 2008, Judge Garland affirmed summary judgment for defendant employers on the ground that the employee failed to raise a genuine issue of fact that he had a disability under the ADA, reasoning that the plaintiff's allergic reaction causing sleep deprivation was caused by only one location, his workplace. Without a regulatory basis, this analysis extended

the Supreme Court's standard for showing a substantial limitation in a major life activity of *working* to a different major life activity, *sleeping*. The faulty extension may have been conceded by appellant's counsel, however.

Most troubling – and most recent – is *Minter v. D.C.*, 809 F.3d 66 (D.C. Cir. 2015). There, Judge Garland wrote an opinion affirming the district court's summary judgment ruling for the employer, reasoning that no reasonable jury could find that Ms. Minter was denied reasonable accommodation, was retaliated against, or was a qualified individual with a disability when she was terminated. The record, however, shows considerable evidence that Ms. Minter had successfully worked for the city for almost 20 years with reasonable accommodations before these accommodations were abruptly withdrawn and that Ms. Minter's workplace ADA Coordinator was openly hostile and refused accommodations that her supervisors had approved. A fair reading of the record would have allowed the case to go to trial.

Of the employment cases that Judge Garland has joined but not written, several indicate a troubling attitude toward people with disabilities. Most concerning among these is *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110 (D.C. Cir. 2001). In this a pre-ADA Amendments Act en banc opinion, Judge Garland joined the majority in reversing a jury verdict for the plaintiff, a manual laborer with degenerative disc disease. The majority, including Judge Garland, required detailed evidence from the plaintiff about jobs in the Washington metropolitan employment pool. *Amicus curiae* parties, including the United States and civil rights and disability rights organizations, urged the court to uphold the verdict.

2. Benefits Cases

In *Salazar v. D.C.*, 671 F.3d 1258 (D.C. Cir. 2012), Judge Garland wrote a panel opinion refusing to rule on the District of Columbia's request to lift a consent decree creating court oversight of the city's implementation of Medicaid provisions. While his decision is based on procedural grounds, (the District Court's decision was not appealable as a final order), Judge Garland reprimanded D.C. for making no effort to demonstrate that the terms of the consent decree had been met.

In *Jones v. Astrue*, 647 F.3d 350 (D.C. Cir. 2011), Judge Garland's panel opinion reversed the district court's affirmance of a denial of Social Security benefits. Judge Garland found that the Social Security Administration improperly gave weight to its own doctor's

opinion instead of the opinion of the applicant's treating physician. (The case was fairly egregious, as the Social Security Administration doctor had been formally reprimanded for false representations in his report.)

3. Education Cases

In *DL v. D.C.*, 713 F.3d 120 (D.C. Cir. 2013), a post-*Wal-Mart* panel opinion, Judge Garland joined the majority in vacating the class certification of students with disabilities in the D.C. public schools, in the face of an *amicus* brief joined by civil and disability rights organizations arguing that the class survived *Wal-Mart*.

In *Singh v. George Washington Univ. Sch. of Med.*, 667 F.3d 1 (D.C. Cir. 2011), Judge Garland joined the panel opinion affirming summary judgment against a medical student with disabilities. Although the outcome in this case may have been inevitable, the tone of the opinion is unnecessarily hostile to the plaintiff and her disability.

Finally, in *Akinseye v. Dist. of Columbia*, 339 F.3d 970 (D.C. Cir. 2003), Judge Garland dissented from a majority opinion denying interest payments on attorneys' fees from a voluntary IDEA settlement. Judge Garland cited cases that allow such an adjustment under Title VII to support his dissent.

4. Medical Privacy

In re: Sealed Case (Medical Records), 381 F.3d 1205 (D.C. Cir. 2004), is one of Judge Garland's more strongly worded opinions on disability. Judge Garland found that the district court had abused its discretion by requiring the District of Columbia to provide all of the appellant's "mental retardation records" to opposing counsel. The language in this opinion indicates strong support for medical privacy and awareness that the importance of privacy is not diminished where the patient has an intellectual disability, including an observation that "the scope of this intrusion into the appellant's privacy is breathtaking." *Id*. at 1217.

5. Eleventh Amendment Immunity under the Rehabilitation Act

In an important disability decision, *Barbour v. Washington Metro. Area Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004), Judge Garland affirmed the district court's denial of Eleventh Amendment immunity, finding that the Washington Metropolitan Area Transit Authority waived its immunity from damage claims under the Rehabilitation Act when it accepted federal funds.

Again analogizing to parallel antidiscrimination statutes, Judge Garland wrote, "We see no reason why it should matter, for purposes of the Spending Clause, that in the case before us Congress' concern runs to discrimination on the basis of disability rather than race."

PRISONERS' RIGHTS

Judge Garland his written little on the rights of prisoners. Consistent with his overall approach to judicial decisionmaking, the few opinions he has authored in prisoners' rights cases have shown a careful attention to precedent and the factual record.

Writing for the court in *Daskalea v. Dist. of Columbia*, 227 F.3d 433 (D.C. Cir. 2000), Judge Garland upheld a jury verdict in favor of a former prisoner at the District of Columbia Jail who had been forced to perform a striptease in front of guards and other prisoners. Plaintiff sued the District of Columbia and the director of the Department of Corrections under a 42 U.S.C. § 1983 municipal liability claim as well as common law claims; the jury found for plaintiff and awarded her compensatory and punitive damages. On appeal, Judge Garland rejected defendants' argument that plaintiff failed to show that defendants' inaction amounted to "deliberate indifference," as required under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), to establish municipal liability. Judge Garland held that the jury had sufficient evidence on which to base its findings, pointing to the longstanding openness and pervasiveness of sexual abuse at the jail. 227 F.3d at 441-443. He noted specifically that, just months before the events of the present case, a district court had found officers at the jail liable under § 1983 for sexual abuse and harassment of female prisoners. *Id.* at 441. Judge Garland upheld the award of compensatory damages, noting that mental and emotional distress are compensable under § 1983 and that a plaintiff need not show permanent physical injury in order to recover damages for a constitutional violation. *Id.* at 444.

Judge Garland did reverse the jury's award of punitive damages based on plaintiff's common law claims. Case law from the D.C. Court of Appeals holds that the District of Columbia is immune from punitive damages in all but "extraordinary circumstances," which were not present in this case. *Id.* at 446. Plaintiff was also unable to recover damages from the director of the Department of Corrections because, as Judge Garland explained, she did not make clear in the "course of proceedings" that she was suing the director in her individual capacity, rather than official capacity. *Id.* at 447-48.

In *Malik v. D.C.*, 574 F.3d 781 (D.C. Cir. 2009), Judge Garland reversed the district court's grant of summary judgment in favor of the defendants, finding that the *pro se* plaintiff did not fail to exhaust administrative remedies against two of the defendants because there was no administrative process to exhaust, and that the plaintiff was "plainly and reasonably confused" over whether the other defendant's summary judgment motion remained pending when he failed to respond. *Id.* at 783. The prisoner brought a claim under 42 U.S.C. § 1983 against the District of Columbia, the correctional service retained by the District, and the service's transportation subsidiary, alleging that they violated his Eighth Amendment rights during a forty-hour bus ride from an Ohio facility to one in Arizona. *Id.* at 782-83. The prisoner contended that he was handcuffed at the waist with a belly chain that was attached to the chain of another prisoner, that he was restrained with leg shackles, and that throughout the trip he was unable to use the restroom or his inhaler for his asthma, and was deprived of water. *Id.* at 783. In determining that the plaintiff did not concede summary judgment by failing to respond to the defendant's motion, Judge Garland reasoned that the procedural history of the case was objectively confusing and that the prisoner plainly manifested his subjective confusion to the district court. *Id.* at 787. Judge Garland concluded that "it was incumbent upon the district court . . . to inform [plaintiff] of the pendency of the defendants' motion and to accord him an explanation of the risks attending failure to respond" in order to satisfy the "fair notice" requirements of the summary judgment rule. *Id.* at 787-88 (internal quotation marks omitted).

In *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160 (D.C. Cir. 2007), Judge Garland wrote for the court to affirm a judgment in favor of a plaintiff who brought suit under 42 U.S.C. § 1983, alleging violations of due process and common law negligence, after her child was murdered while in the custody of a residential program for juvenile offenders. *Id.* at 164-65. The plaintiff's son was permitted to leave the residence unaccompanied one evening, was assaulted, and later died from the injuries he sustained. *Id.* at 164. As Judge Garland noted, the decedent had already been assaulted on a previous occasion under similar circumstances and he was one of several juveniles to be assaulted or killed while under the care of the defendant facility. *Id.* at 163-64. Judge Garland upheld the lower court's denial of defendant's post-verdict motion for judgment as a matter of law. *Id.* at 165-66. He rejected defendant's argument that plaintiff's son was contributorily negligent, noting that a defendant is still liable under § 1983 if it has acted with "reckless disregard" for the plaintiff's safety. *Id.*

In *Skinner v. U.S. Dep't of Justice & Bureau of Prisons*, 584 F.3d 1093 (D.C. Cir. 2009), *cert. denied*, 562 U.S. 946 (2010), Judge Garland wrote for the court to affirm the district court's grant of summary judgment in favor of the Bureau of Prisons (BOP) against a federal prisoner. *Id.* at 1094. The prisoner sued the BOP under the Privacy Act, 5 U.S.C. § 552a, seeking damages and amendment of his prison records, which indicated that he was found in possession of a white powder that tested positive for cocaine. *Id.* In response to the recovered contraband, the BOP conducted a disciplinary hearing and subsequently imposed sanctions that included a loss of 40 days of good-time credits. *Id.* Judge Garland affirmed the district court's conclusion that prison records were exempt from the Privacy Act and therefore could not be amended. *Id.* at 1096. As for the damages claim, Judge Garland cited Supreme Court precedent holding that the prisoner's sole federal remedy is a writ of habeas corpus when the prisoner, in effect, seeks a "determination that he is entitled to immediate release or a speedier release from [his] imprisonment." *Id.* at 1098 (internal quotation marks omitted). Judge Garland found the claim for damages indistinguishable from the claims barred in *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Razzoli v. Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000), concluding that awarding damages would "implicitly question the validity of conviction or duration of sentence," even if the prisoner seeks only damages and not restoration of good time. *Id.*

DEATH PENALTY

Judge Garland has never ruled on a death penalty case during his tenure on the court of appeals. During his Senate confirmation hearings in 1995, Judge Garland was questioned about the death penalty by Senator Spector. The exchange is a brief one.

> Q: Do you favor, as a personal matter, capital punishment?
>
> A: That is really a matter of settled law now. The Court has held that capital punishment is constitutional and lower courts are to follow that rule.
>
> Q: Well, I shall now push you on a direct response to my question. You are prepared to apply the law which supports capital punishment as a constitutional punishment?

> A: Yes, Mr. Chairman, I have been a prosecutor. As a prosecutor, I have recommended that the government seek the death penalty. I don't see any way in which my views would be inconsistent with the law in this area.

Nomination of Merrick B. Garland to Be U.S. Circuit Judge Before the S. Committee on the Judiciary, 104th Cong. 1062 (1995).

One could certainly read Judge Garland's second response as a statement that he was not personally opposed to the death penalty at the time and did not regard it as unconstitutional. On the other hand, the statement was made in response to a question asking whether Judge Garland could apply the Supreme Court's death penalty jurisprudence. However construed, the exchange tells us nothing about how Judge Garland would have voted if he had been on the Supreme Court when it struck down the death penalty for juvenile murderers. *See Roper v. Simmons*, 543 U.S. 551 (2005). Nor does it tell us how Judge Garland would vote today on the constitutionality of the death penalty, given its diminished use and increasing evidence that it is applied arbitrarily and discriminatorily.

While working at the Justice Department, Judge Garland was involved in two high-profile death-eligible prosecutions. In the Oklahoma City bombing case, the government sought the death penalty against Timothy McVeigh and Terry Nichols. McVeigh ultimately received the death penalty; Nichols received a life sentence. In the Unabomber case, the Justice Department worked out an agreement with the defendant, Ted Kaczynski, who pled guilty in exchange for a life sentence without the possibility of parole.

The only judicial decision in which he was involved that even tangentially touched on the death penalty was In *In re Charges of Judicial Misconduct*, 769 F.3d 762 (D.C. Cir. 2014). Judge Garland served in that case on a three-person special committee appointed to investigate charges of misconduct filed against Chief Judge Edith Jones of the Fifth Circuit based, in large measure, on comments she made during a speech on the death penalty at the University of Pennsylvania. The complainants alleged that the remarks by Judge Jones demonstrated racial bias, among other things. After investigating the charges, the committee recommended that the charges be dismissed, and that recommendation was adopted by a judicial panel that again included Judge Garland. In its report, the committee stated:

> We have no doubt that suggesting certain racial or ethnic groups are "prone to commit" acts of violence or are "predisposed to crime" would "reflect adversely on [a] judge's impartiality," reduce "public confidence in the impartiality of the judiciary," and "have a prejudicial effect on the administration of the business of the courts." Such comments would therefore violate both the Code of Conduct and the Judicial-Conduct Rules.

Id. at 775.

The committee concluded, however, that there was insufficient evidence to prove that Judge Jones had actually made the alleged comments in the absence of any recording and given conflicting recollections by those who were there. The committee further held that alleged comments by Judge Jones that claims of systemic racial bias in the administration of the death penalty were a "red herring" and nonviable were not "improper" given the Supreme Court's decision rejecting such claims in *McCleskey v. Kemp*, 491 U.S. 292 (1976).

FREEDOM OF INFORMATION ACT

Judge Garland's FOIA jurisprudence further confirms his reputation as a careful and cautious judge. *See, e.g.*, *Pub. Citizen Health Res. Grp. v. Food & Drug Admin.*, 185 F.3d 898 (D.C. Cir. 1999) (Garland, J., concurring) (emphasizing that the court should not have decided an important legal issue concerning Exemption 4 where it was raised only in passing by the parties). In interpreting FOIA's structural provisions, Judge Garland has manifested a commitment to the general purposes of FOIA by broadly construing the statute's fee-waiver and expedited-processing provisions and procedural requirements for agencies' withholding of records. And while he has generally upheld government withholdings under FOIA exemptions on the merits, he has written several important pro-disclosure opinions that form a critical part of his record.

1. Structural and Procedural Issues

Judge Garland's jurisprudence relating to the structural provisions of FOIA is largely favorable to FOIA requesters. His most significant such opinion is *Cause of Action v. F.T.C.*, 799 F.3d 1108 (D.C. Cir. 2015), in which he wrote for a unanimous panel broadly interpreting FOIA's fee-waiver provisions. Relying heavily on the plain text of FOIA and on Congress's

modifications of FOIA over time to make fee waivers easier to obtain, Judge Garland crafted an authoritative explanation of the requirements of FOIA's fee-waiver provisions. In the course of that explanation, he rejected multiple efforts by the FTC to narrow the availability of those statutory waivers through its own regulations.

Judge Garland's FOIA jurisprudence has been helpful to FOIA requesters in other ways, as well. For example, in *Baker & Hostetler LLP v. U.S. Dep't of Commerice*, 473 F.3d 312 (D.C. Cir. 2006), he joined Judge Kavanaugh's opinion holding, over Judge Henderson's dissent, that a law firm representing itself in a FOIA lawsuit is eligible for attorney's fees. In *Edmonds v. F.B.I.*, 417 F.3d 1319 (D.C. Cir. 2005), he wrote for a unanimous panel holding that a requester was eligible for fees for time spent obtaining an order compelling expedited processing. In *Al-Fayed v. C.I.A.*, 254 F.3d 300 (D.C. Cir. 2001), he wrote for a unanimous panel holding that district courts must review a requester's entitlement to expedited processing *de novo*, rather than defer to the agency's own review.

In two FOIA cases where precedent did not directly control crucial legal questions, Judge Garland treaded cautiously. In *Consumer Fed. of Am. v. Dep't of Agric.*, 455 F.3d 283 (D.C. Cir. 2006), he developed a middle ground in deciding whether electronic calendars of six USDA employees were "agency records" under FOIA. Applying the D.C. Circuit's "totality of the circumstances" test of "creation, possession, control, and use," Judge Garland held that the electronic calendars of five more senior USDA officials were agency records subject to FOIA, largely because they were distributed to multiple USDA employees for the purpose of scheduling agency business, *id.* at 206–07, while a more junior official's calendar, whose use was limited to his secretary, was not an agency record. *Id.* at 208. Notably, a concurring opinion by Judge Henderson questioned the majority's reliance on D.C. Circuit precedent predating "the paperless world" and warned against equating multiple employees' ability to access electronic calendars with actual use. *See id.* at 294–95 (Henderson, J., concurring).

And in *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013), Judge Garland wrote for a unanimous panel to conclude that White House visitor logs created by the U.S. Secret Service were not agency records subject to FOIA. He began by observing that the Office of the President is not an agency for FOIA purposes, and that not all documents in the possession of FOIA-covered agency are "agency records" for the purposes of FOIA. *Id.* at 448–

49. Finding a D.C. Circuit test for "agency record" status to be inconclusive in the case, Judge Garland looked to related cases and to constitutional avoidance to decide that the logs were not subject to FOIA, as they were subject to White House control. *Id.* at 453–56, 461–63.

2. Exemptions

While Judge Garland has been generally deferential to the executive branch on substantive withholding questions under FOIA, there are several important and significant exceptions—two of which involved the ACLU.

In *American Civil Liberties Union v. C.I.A.*, 710 F.3d 422 (D.C. Cir. 2013), Judge Garland rejected the CIA's assertion of a "Glomar response" refusing to either confirm or deny whether it possessed any records related to the agency's use of drones for targeted killing. Writing for a unanimous panel, Chief Judge Garland reversed the district court's grant of summary judgment, holding that the CIA had waived, through a series of official acknowledgments, its right to assert a Glomar response. The court reasoned that the agency's possession of records relating to drones was not a secret, because the agency had already revealed its "intelligence interest" in drone strikes generally, even if it had not acknowledged that it operates or uses drones itself (a question the court declined to reach). *Id.* at 429; *see id.* at 431 ("And more to the point, as it is now clear that the Agency does have an interest in drone strikes, it beggars belief that it does not also have documents relating to the subject."); *id.* at 431 (calling the CIA's position "indefensib[le]"). In an important passage, Judge Garland wrote:

> The *Glomar* doctrine is in large measure a judicial construct, an interpretation of FOIA exemptions that flows from their purpose rather than their express language. In this case, the CIA asked the courts to stretch that doctrine too far—to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible. "There comes a point where ... Court[s] should not be ignorant as judges of what [they] know as men" and women. *Watts v. Ind.,* 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949) (opinion of Frankfurter, J.). We are at that point with respect to the question of whether the CIA has any documents regarding the subject of drone strikes.

ACLU v. C.I.A., 710 F.3d at 431. The court remanded the case to the district court so that the agency could file a *Vaughn* index listing its responsive records and the agency's bases for withholding them.

In *American Civil Liberties Union v. U.S Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011), the ACLU sought docket information (case name, docket number, and court) for criminal cases in which judges granted applications for cell phone location data without a determination of probable cause. The district court ordered the government to produce docket information for cases that resulted in convictions or public guilty pleas, but upheld the withholding of docket information in cases that ended acquittals, dismissals, or had been sealed. In balancing the privacy interests protected by FOIA Exemption 7(c) against the public interest in requested information, Judge Garland observed that "disclosure of convictions and public pleas is at the lower end of the privacy spectrum." *Id.* at 7–8. He noted that, even if a third party used the docket information to reveal the underlying proceedings, it would only lead to "the fact of a single conviction, not a comprehensive scorecard of a person's entire criminal history across multiple jurisdictions." *Id.* at 10. On the other side of the balance, the requested information was clearly within the core of FOIA's purpose to promote "the citizens' right to be informed about what their government is up to." *Id.* at 12. Significantly, Judge Garland rejected the government's arguments that the public interest hinged on whether disclosure would reveal wrongdoing, and that information already in the public domain reduced the public interest in the records at issue. *Id.* at 14. The unanimous panel upheld the district court's summary judgment in favor of the ACLU with respect to the first category of docket information. Because the record did not reveal whether any of the 255 docket numbers identified by the agency resulted in acquittals or dismissals, it remanded the second category of docket information to the district court. *See also Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26 (D.C. Cir. 2002) (joining opinion finding, under Exemption 6, that the public interest in disclosure outweighed any privacy interest in EPA documents containing site-specific information about owl habitats and, under Exemption 5, that factual information about the owl habitats did not qualify for the deliberative-process privilege under Exemption 5).

In *Davis v Dep't of Justice,* 460 F.3d 92 (D.C. Cir.), *cert. denied*, 551 U.S. 1144 (2007), Judge Garland, writing for an unanimous panel, concluded that the FBI could not rely on FOIA's Exemption 7(c) – which exempts law enforcement records from disclosure if their release "could

reasonably be expected to constitute an unwarranted invasion of personal privacy" – to withhold audiotapes of a conversation between an FBI informant and subject of an investigation recorded in 1979–80. The only issue on appeal was whether the FBI had "made a reasonable effort to ascertain life status" of the speakers, in light of FBI's policy of presuming speakers over 100 years old are presumed dead, thus diminishing the privacy interest protected by Exemption 7(c). *Id.* at 98. The panel held that the agency had not. Because the agency relied on effectively futile search methods (vague "institutional knowledge," consulting a printed manual of noteworthy deaths, references to social security numbers and birthdates on the audiotapes), *id.* at 98–102, and ignored readily-available alternatives (like internet inquiries) the panel reversed the district court's grant of summary judgment in favor of the government, *Id.* at 103.

And, in a rare concurrence, *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1194 (D.C. Cir. 2004) (Garland, J., concurring in part and dissenting in part), he explained his view that FOIA's trade-secrets exemption (Exemption 4) should generally not permit the withholding of prices paid by the government to contractors.

In general, though, Judge Garland has upheld agency withholdings under FOIA—especially where national-security information is at issue. In *Students Against Genocide v. Dep't of State*, 257 F.3d 828 (D.C. Cir. 2001), Judge Garland wrote for a unanimous panel to affirm the district court's grant of summary judgment to the government, which relied on Exemptions 1 and 3 to withhold records relating to human-rights violations by Bosnian Serb forces in Bosnia during the summer of 1995. In the court's core ruling, Judge Garland held that the government had not waived, by official acknowledgment, its right to withhold certain photographs by showing them to various U.N. Security Council delegates because the photographs had never been released to the public. In *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937 (D.C. Cir. 2013) (per curium), *cert. denied*, 134 S. Ct. 900 (2014), Judge Garland voted with the per curium panel to uphold CIA withholdings of post-mortem photographs of Osama bin Laden, holding that the photographs pertained to intelligence sources and methods and foreign activities and that the government had established foreseeable harm to those interests. While the panel credited CIA assertions that release of the photographs might endanger U.S. personnel, reveal an intelligence method related to facial recognition, and lead to violence to American interests, the panel specifically did not endorse (but neither rejected) the CIA's argument that the release of the bin Laden images could foster anti-American propaganda. And in *DiBacco v. U.S. Army*, 795

F.3d 178 (D.C. Cir. 2015), Judge Garland joined an opinion affirming withholdings by the CIA of records related to the ex-chief of a Nazi spy ring with alleged connections to the U.S. government. The panel focused on the plaintiff's procedural objections to the CIA's withholdings—that the CIA was required to classify information under an Executive Order in effect at the time of litigation, not the time of original classification; and that the CIA Director had not been delegated authority to withhold records under Exemption 3 under the National Security Act—concluding they were wholly unfounded. *See also Schrecker v. Dep't of Justice*, 254 F.3d 162, 166 (D.C.Cir. 2001) (affirming withholding of "information related to the identity of intelligence sources," under Exemption 1, on the basis of the agency's assertion that disclosure would "damage national security by dissuading current and future sources from cooperating").

BIVENS

Counter to the general hostility of the federal bench to "constitutional tort" claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), Judge Garland has twice voted to reverse district courts' dismissals of such claims and has joined several opinions expressing openness to the doctrine.

In *Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660 (D.C. Cir. 2013), Judge Garland joined Judge Griffith's unanimous panel opinion reversing the dismissal of a *pro se* plaintiff's *Bivens* claim. The plaintiff had not sued a federal officer or requested damages, as required under *Bivens*, and the district court dismissed the claim as "patently insubstantial." However, on appeal, the D.C. Circuit—even as it expressed doubt about whether the claims were valid—concluded that the pleading errors could be corrected through the liberal construction afforded *pro se* plaintiffs.

In *Stewart v. Evans*, 275 F.3d 1126 (D.C. Cir. 2002), Judge Garland voted with a unanimous panel in holding that a *Bivens* claim challenging a warrantless search of a federal employee's private papers by other employees was not precluded by the Civil Service Reform Act, contrary to the Ninth Circuit's view in *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991). The court therefore reversed the district court's dismissal of the *Bivens* claim.

And though Judge Garland joined the D.C. Circuit's affirmance of a district court's *Bivens* dismissal in *Munsell v. Dep't of Agric.*, 509 F.3d 572 (D.C. Cir. 2007), the panel decided the case on administrative-exhaustion grounds while expressing a fairly broad understanding of *Bivens* law. The appellant, a meat processor, had sued the Department of Agriculture and one of its officials, alleging that USDA pursued retaliatory enforcement actions against the plaintiff in order to chill constitutionally protected speech. The panel held that the plaintiff's failure to exhaust administrative remedies under a statute governing actions against the USDA was fatal to the *Bivens* claim. But the court took the occasion to elaborate on *Bivens* law, surveying Supreme Court *Bivens* decisions, suggesting (without deciding) that the possibility of relief under the Administrative Procedures Act would not foreclose a *Bivens* remedy, and noting that the Supreme Court had not "abandoned" *Bivens*, but rather continued to apply its common-law balancing test. *Id.* at 590–91.

Likewise, in *Sloan v. HUD*, 231 F.3d 10 (D.C. Cir. 2000), Judge Garland voted to dismiss a *Bivens* claim but in a doctrinally protective, rather than restrictive, way. The appellants, owners of a demolition contracting company, had filed *Bivens* claims against officials of the Department of Housing and Urban Development for investigating and barring the plaintiffs from government contracting for a five-year period. The panel affirmed the district court's dismissal, but on different grounds. While the district court had concluded that the availability of relief under the APA precluded a *Bivens* remedy, the court of appeals declined to rule on that issue. Instead, the panel concluded that, assuming the plaintiffs had a cognizable liberty or property interest in due-process protections, they had failed to allege a constitutional right not to be investigated and, besides, they had already received a panoply of due-process protections.

STANDING

A party seeking to sue in federal court must establish that she has suffered an injury in fact that resulted from the defendant's alleged actions and that can be redressed by a favorable decision. When permitted by existing law, Judge Garland has generally interpreted these standing requirements to allow suits to go forward rather than shutting the courthouse doors.

In *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), Judge Garland held that the Mongolian government had standing to challenge the U.S. government's designation of argali sheep within Mongolian borders as a threatened species.

In *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100 (D.C. Cir. 2008), Judge Garland ruled that the plaintiff had standing to pursue a claim under the Fair Debt Collections Practices Act, emphasizing that the question of standing is preliminary to and separate from a decision on the merits.

In *U.S. Telecom Ass'n v. F.C.C.*, 295 F.3d 1326 (D.C. Cir. 2002), Judge Garland upheld associational standing to challenge an FCC rule by noting that injury in fact exists when an agency rule increases competition or subsidizes a competitor to the detriment of the organization's members. *See also La. Energy and Power Auth. v. F.E.R.C.*, 141 F.3d 364 (D.C. Cir. 1998).

In *Ranger Cellular v. F.C.C.*, 348 F.3d 1044 (D.C. Cir.), *cert. denied*, 541 U.S. 1096 (2004), Judge Garland ruled that a party alleging that he was denied the ability to compete for a government license need not allege that he would have won the competition to prove injury in fact, but there is no injury in fact when the party's chances of winning are entirely illusory.

In *Info. Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024 (D.C. Cir. 2003), Judge Garland reiterated that a plaintiff's allegation of injury in fact must be accepted as true when a defendant moves to dismiss on standing grounds. *See also Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940 (D.C. Cir.), *cert. denied*, 133 S.Ct. 497 (2012)(finding injury in fact).

In *Schnitzler v. United States*, 761 F.3d 33 (D.C. Cir. 2014), Judge Garland ruled that a prisoner challenging the government's refusal to recognize his renunciation of citizenship had alleged injury in fact based on forced association.

On the other hand, in *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192 (2011), Judge Garland held that an associational plaintiff lacked standing to challenge an EPA decision because it relied on the claim that its members would suffer future injury without proving a substantial likelihood that the alleged future injury was imminent.

In *Klamath Water Users Ass'n v. F.E.R.C.*, 534 F.3d 735 (D.C. Cir. 2008), Judge Garland held that a party whose redressability claim rests on the actions of a third party not before the court must show that a favorable decision will significantly increase the likelihood of that third party action.

In *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013), Judge Garland ruled that plaintiffs lacked standing to challenge the Fish and Wildlife Service's alleged delay in processing permits to import a species of wild goat into the U.S. because there was no record evidence that plaintiffs had such plans for the future (and their past claims had been rendered moot).

And, in *Rempfer v. Sharfstein*, 583 F.3d 860 (D.C. Cir 2009), *cert. denied*, 559 U.S. 973 (2010), Judge Garland held that plaintiffs lacked standing to challenge a portion of DOD's mandatory anthrax vaccination program for members of the armed forces when they had not alleged they had had been or would soon be subject to the portion of the program they challenged.

SECOND AMENDMENT

In *Parker v. Dist. of Columbia*, 478 F.3d 370 (D.C.Cir. 2007), a panel of the D.C. Circuit struck down D.C.'s handgun ban as a violation of the Second Amendment, in a decision later affirmed by the Supreme Court. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). Judge Garland did not sit on that panel. He was, however, one of four judges to vote in favor or rehearing by the full court. Based on that vote, Judge Garland has been criticized by some as hostile to the rights of gun owners. The record does not fairly support that criticism. Because the full court never in fact reheard the case, Judge Garland never expressed a position on the merits of the case. Moreover, his unexplained vote in favor of rehearing may have rested on a number of grounds – including his view that the issue was of sufficient importance that it warranted full court review on that basis alone.