Legal Sidebar

Merrick Garland's Nomination to the Supreme Court: Initial Observations

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On March 16, 2016, President Obama nominated Merrick Garland of the federal Court of Appeals for the District of Columbia Circuit to fill the vacancy on the Supreme Court created by the unexpected death of Justice Antonin Scalia in February. As noted in an earlier <u>Sidebar</u> posting, the vacancy has significant implications for the Court, Congress, and the nation as a whole. The scope and nature of those implications depend on who ultimately succeeds Justice Scalia. As a follow up to the previous Sidebar, this posting—one of several CRS projects on Justice Scalia and the Court vacancy—discusses the potential implications of Judge Garland's confirmation as the newest Justice, were he to be confirmed. It is presently unclear whether, when, or how the Senate might act on Judge Garland's nomination.

Who is Merrick Garland?

As the President noted in announcing the nomination, Judge Garland is well known in "law enforcement circles and in the legal community at large." He has served on the D.C. Circuit, a court President Franklin Roosevelt once described as the "the second most important court in the country," for nearly two decades and been its chief judge since 2013. Because it is located in the nation's capital and various statutes grant it jurisdiction over specific matters, the D.C. Circuit is widely seen to issue a greater number of significant opinions each year reviewing the decisions of federal agencies whose rules and practices impact the entire nation more than the other appellate courts. Thus, as a result of his membership on this court for the past 19 years, Judge Garland has authored numerous opinions on such high-profile issues as the status of detainees at Guantanamo Bay; the validity of rules issued by the Environmental Protection Agency (EPA) under the Clean Air Act; and the constitutionality of campaign finance regulations promulgated by Federal Election Commission (FEC).

Prior to his appointment to the federal bench in 1997, Judge Garland <u>served</u> in the Criminal Division of the U.S. Department of Justice and, notably, oversaw the prosecution of the 1995 Oklahoma City bombing case. Much like his former colleague on the D.C. Circuit, current Supreme Court Chief Justice John Roberts, Judge Garland clerked for Judge Henry Friendly of the Second Circuit before clerking on the High Court (Garland clerked for Justice William Brennan during the 1978 term; Roberts clerked for then-Justice William Rehnquist two years later). Also <u>similar</u> to his potential colleagues on the Court, Judge Garland is Ivy League educated, receiving his undergraduate and law degrees from Harvard University.

What Would Merrick Garland's Appointment to the Court Mean?

Predicting how a nominee to the Supreme Court may affect the Court's jurisprudence is notably difficult. For example, Felix Frankfurter, who had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939, disappointed some because he was a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties and civil rights during World War II and the Red Scare. Similarly, Harry Blackmun, who served on the Eighth Circuit Court of Appeals for more than a decade prior to his appointment to the Court in 1970, was considered by President Richard Nixon to be a "strict constructionist," in the sense that he viewed the judge's role as interpreting the law, rather than making new law. In the years that followed, however, Justice Blackmun authored the majority opinion constitutionalizing the right to terminate a pregnancy in *Roe v. Wade* and was generally considered

one of the more liberal voices on the Court by the time of his retirement in 1993. Nonetheless, to the extent Judge Garland's past practice may indicate his future conduct if he were confirmed to the High Court, his general approach and style could be seen as contrasting, in many ways, with those of the Justice he would be succeeding. As noted in an earlier <u>Sidebar</u>, Justice Scalia was a well-known proponent of textualism and originalism both within and outside the Court, regularly arguing his views on the summer lecture circuit and dissenting from the Court's opinions that, in his <u>view</u>, failed to construe legal texts in accordance with their ordinary meaning at the time of enactment.

In contrast, Judge Garland's approach does not appear to be guided by any overarching legal philosophy beyond general statements that judges must "follow the law" and "not make it." In his public appearances outside the court, he has tended to participate in conferences on discrete issues, such as prosecutorial misconduct, indigent criminal defense, or changing the rules of civil procedure, rather than broadly discussing or defending particular interpretative methodologies. In his judicial opinions, Judge Garland has, at times, relied on originalism as a method of constitutional interpretation, including in a jointly issued 2000 opinion that relied on the Constitution's text and structure, as well as materials from the 1787 Constitutional Convention and subsequent ratifying conventions, in rejecting a lawsuit brought by a group of D.C. voters seeking the right to elect representatives to Congress. On the other hand, in neither that opinion nor in other opinions, does Judge Garland purport to rely on textualism or originalism as the sole or primary method of interpreting the law. As a lower court judge, Judge Garland has relied on precedent from the Supreme Court and the D.C. Circuit as a necessary guide for his opinions. More telling, however, Judge Garland's opinions appear, at times, to be motivated by pragmatic concerns about how particular rulings may affect the democratic branches of government. For example, in Wagner v. FEC, Judge Garland, writing on behalf of a unanimous en banc court, upheld against a First Amendment challenge a law that banned individuals who contracted to perform work for federal agencies, among others, from contributing to campaigns for federal offices while they are negotiating and performing the contract. Notably, approximately one fourth of Judge Garland's opinion for the court in Wagner was devoted to the "long historical experience" of corruption involving federal contractors, which he viewed as evidencing "the concerns that spurred [congressional action] remain as important today as when the statute was enacted." This approach highlights an awareness of the "real world" implications of the court's rulings that underlie Judge Garland's more functional approach to judging.

Perhaps the sharpest contrast between Justice Scalia and Judge Garland lies in their personalities and temperaments. While noted for his humor, outgoing personality, and friendships with persons who could be seen as his ideological opposites, Justice Scalia was often pointed and even acerbic in his writing, causing some to suggest that his approach to the law alienated colleagues, including the influential Justice Sandra Day O'Connor. In contrast, Judge Garland may be more low key in his approach to his judicial colleagues. Anonymous lawyer evaluations in the *Almanac of the Federal Judiciary* describe him almost uniformly as having an "excellent temperament" and being "courteous" and "cerebral." Judge Garland's supporters suggest that he could be successful in finding consensus in contentious cases, and his work on the D.C. Circuit could be said to support such claims. For example, in 2003, Judge Garland authored a unanimous opinion, joined by a Reagan-era Supreme Court nominee, Judge Douglas Ginsburg, that rejected a challenge alleging that, in the circumstances of the case, Congress had exceeded its powers under the Commerce Clause when enacting the Endangered Species Act. And in 2008, in *Parhat v. Gates*, Judge Garland, joined by Judges David Santelle and Thomas Griffith—two of the court's more judicially conservative members, invalidated a determination by a Guantanamo Bay combatant status review tribunal that the petitioner, a Chinese Uighur, was an enemy combatant.

Beyond general approaches to judging, substantive differences may also exist between how Justice Scalia and Judge Garland would have resolved particular cases before the High Court. For example, in *Parker v. District of Columbia*, Judge Garland voted for *en banc* review of a three-judge panel's opinion that a handgun ban in the nation's capital was unconstitutional, suggesting that he disagreed with the underlying decision. The Supreme Court, in contrast, affirmed the panel's opinion on appeal in an opinion written by Justice Scalia. More broadly, commentators have speculated that Justice Scalia's death and Judge Garland's potential appointment to the Court could alter the landscape as to various areas of law, including campaign finance, religious freedom, and environmental law. Judge Garland's views on these and other areas of the law will be the subject of future CRS analysis.

Judicial opinions, publications, and other materials concerning Judge Garland are being collected in a separate post.

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