

Garland's Environmental Record Shows a Preference for Consensus

Merrick Garland of the D.C. Circuit, President Obama's nominee to succeed Antonin Scalia on the Supreme Court, is in limbo. Assuming, however, Chief Judge Garland becomes Justice Garland, what might be the import of his joining the Court for environmental law?

To that end, I reviewed every opinion that Garland has written in environmental cases. To be clear, I did not review all of his votes; I limited myself to his opinions, because they reveal far more than a mere vote. An opinion shows how a judge analyzes legal issues, how a judge reasons, and what kinds of arguments and precedent the judge uses to try to persuade others to join the opinion. With 19 years under his belt on the D.C. Circuit, that is more than enough time to offer a window into Garland's thinking and his ability to achieve consensus.

So how many opinions and what do they reveal? Garland has written 13 environmental opinions. Seven of them arise wholly or at least in part under the Clean Air Act. Of the remaining six, three raise Endangered Species Act issues, two relate to the work of the Nuclear Regulatory Commission, and the last is a Toxic Substances Control Act case.

Garland's environmental opinions make clear he is an outstanding and careful jurist. His opinions are rigorous, painstakingly thorough, and exhaustive in their analysis. He is a clear thinker and writer. He presumes the regularity of governmental action, frequently rejects claims by both industry and environmentalists against federal agencies, but is nonetheless willing to rule occasionally for either kind of challenger against the government when persuaded of a clear shortfall.

Garland is also the quintessential modest judge. With the possibility of

one exception noted below, his opinions suggest a predisposition against making new precedent and are drafted to address only the precise legal and factual issues presented. Justice Scalia, by contrast, often seemed to relish swinging for the fences.

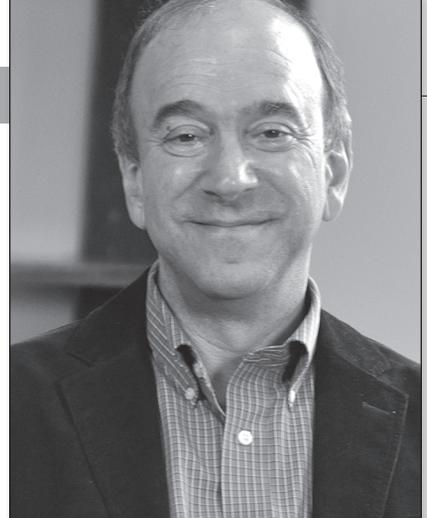
Garland's environmental opinions, unlike Scalia's, also reflect a remarkable preference for consensus. In none did any colleagues on the three-judge panels dissent from any aspect of his opinions for the court. And those judges almost always included judges from a wide spectrum based on the party affiliation of the president who nominated them to the bench. For instance, looking just at his seven CAA opinions, the pairings were Chief Judge Patricia Wald and Judge Karen LeCraft Henderson, Judges Douglas Ginsburg and David Tatel, Judges Raymond Randolph and Henderson, Judges Henderson and Janice Rogers Brown, and Judges Judith Rogers and Brett Kavanaugh. Garland's

court opinions were consistently embraced by all.

The only environmental case in which Judge Garland dissented is to the same effect.

The two other judges on the panel (Harry Edwards and Randolph) were themselves appointed by presidents of different political party affiliation and widely differing political ideologies. And Garland's dissent was limited to one of several of the court's rulings in that case.

The one exception to the jurist's affinity for noncontroversial rulings is his opinion in *Rancho Viejo LLC v. Norton* in 2003. The case raised, among other issues, a challenge to the Department of the Interior's Commerce Clause authority under the ESA to bar a residential development based on its adverse effects on the endangered arroyo southwestern toad. Embracing a prior D.C. Circuit ruling that had ad-



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opted a narrow reading of the Supreme Court's 1995 decision in *United States v. Lopez*, Garland's opinion upheld the constitutionality of Interior's exercise of authority on the ground that the building of a large residential development substantially affected interstate commerce, discounting the significance of the toad's own wanderings being more local in nature. Then-Judge John Roberts dissented from denial of rehearing en banc, puckishly describing how the "hapless toad . . . for reasons of its own, lives its entire life in California."

When it comes to a penchant for engaging turns of phrases, there is a final way in which a Justice Garland would differ greatly from the justice he has been nominated to replace. Scalia was famous for his lively and sometimes over-the-top rhetoric. Lawyers frequently read his opinions first for their entertainment value.

Garland's opinions are comparatively dull. They lack memorable phrasing, clever analogies, or hints of passion. Humor? Essentially none. Attorneys before the Supreme Court may rest easy: also absent from Garland's opinions is the barbed rhetoric and ridicule that Scalia was known for launching at counsel whose legal arguments he considered wholly unpersuasive.

If Judge Garland becomes Justice Garland, what then can we fairly expect? If past is prologue, narrow opinions that promote consensus, rule largely (but not exclusively) in favor of government, and, alas for the legal academy, are eminently unquotable.

**He is a modest judge.
He addresses the
precise legal and
factual issues raised**