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JUDICIAL **SCORECARD**

JUDGE MERRICK GARLAND

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NFIB Judicial Scorecard for Judge Merrick Garland

Prepared by the National Federation of Independent Business (NFIB)

Executive Summary:

In the past 20 years the number of federal regulations has increased dramatically. Between 1993 and 2003 the federal register grew from 4,369 pages to more than 49,000. By 2012 the number of pages exceeded 81,000. Many more rules have been approved since, and the administration is currently rushing to finalize others.

The dizzying proliferation of new rules has brought businesses and regulators into more frequent legal disputes. The most consequential cases are those in which the very legality of federal action is in question. Here the Supreme Court is the final arbiter and its decisions affect not just the immediate parties but the entire country. It is therefore crucially important to small businesses, which form the basis of the US economy, that the next Supreme Court justice be strictly unbiased. Regrettably, we find in Judge Merrick Garland's record an unmistakable preference for federal agencies.

Indeed, over the course of decades the Judge has ruled against private parties and especially private businesses with striking regularity. He sided with the government in nearly 80 percent of the cases involving federal regulatory agencies. In cases involving private businesses, he ruled against them 90 percent of the time.

Garland issued 36 opinions in labor cases. Among those, federal agencies won 28, lost 7, and split 1. Businesses were on the losing end of Garland's decisions 95 percent of the time in those cases. In six cases pitting labor unions against the National Labor Relations Board (NLRB), however, the Judge agreed with the unions every time. We would note that those six cases involved unions seeking an enforcement action against an employer. So, Judge Garland routinely defers to the NLRB—except when its positions don't produce the outcome that unions are seeking.

The Judge's record on environmental cases is just as one-sided. Garland has heard 8 cases involving the EPA versus private businesses. He agreed with the EPA in every one them. Even in disputes between environmental agencies and environmental activist groups the Judge sided with the agencies 62 percent of the time.

To be fair, not every government agency can boast a winning record with Judge Garland. The US Department of Agriculture (33 percent wins), the Federal Energy Regulatory Commission (50 percent wins), and the Social Security Administration (50 percent wins) haven't fared nearly as well. Nevertheless, there is a much longer list of regulatory bureaucracies with whom the Judge nearly always agrees.

After an extensive examination of Judge Merrick Garland's record, we can predict with high certainty that he would bring to the US Supreme Court a strong bias against private business in cases involving regulation, unionization, private property rights, separation of powers, federalism, and other core constitutional principles. We have little doubt about how he would decide on important cases likely to reach the Court: the EPA Waters of the US Rule; the EPA Clean Power Plan; the NLRB ambush election rule; and many others. The outcome of each of these cases will determine whether federal regulators, often in cooperation with activist organizations, can exert more power over American small businesses. We therefore oppose Judge Merrick Garland's nomination to the US Supreme Court.

Findings:
NFIB has reviewed 235 of Judge Garland's opinions as a member of the DC Court of Appeals. In addition to his record on the bench NFIB analyzed several law articles that Garland published, which we believe shed light on his judicial philosophy. Among the thousands of pages of material we find a clear and quantifiable disposition in favor of federal regulatory agencies, organized labor unions, and environmental advocacy groups:

Total federal agency winning percentage: 77%
90% against commercial actors: (86 Wins – 6 Losses – 7 Split Decisions)

<u>Labor Scorecard</u>:

- **Federal agency wins 79% of cases:** (28 Wins – 7 Losses – 1 Split Decision)
  - **95% against businesses:** (28 Wins – 1 Loss – 1 Split Decision)
  - **0% against unions: (**0 Wins – 6 Losses)

<u>Environmental Scorecard</u>:

- **Federal agency wins 90% of cases:** (13 Wins – 1 Loss – 1 Split Decision)
  - **100% against businesses:** (11 Wins – 0 Losses)
  - **62% against environmentalists: (**2 Wins – 1 Loss – 1 Split Decision)

<u>Civil Justice Reform Scorecard</u>:

- **Employee, Former Employee or Job Applicant wins 46% of cases:**
  (15 Wins – 18 Losses – 6 Split Decisions)
  - **50% against private employers:** (6 Wins – 6 Losses – 2 Split Decisions)
  - **44% against public employers: (**9 Wins – 12 Losses – 4 Split Decisions)
- **Tort and consumer plaintiffs win 44% of cases:**
  (8 Wins – 10 Losses – 1 Split Decision)

- **75% against private defendants:** (6 Wins – 2 Losses)
- **25% against public defendants: (**2 Wins – 7 Losses – 1 Split Decision)

Other Regulatory Scorecard:

- **Government wins 59% of Medicaid, Medicare and Social Security cases:** (6 Wins – 4 Losses – 1 Split Decision)
- **Government wins 50% of FOIA and Privacy Act cases:** (5 Wins – 5 Losses – 1 Split Decision)
- **Government wins 100% of personnel and government contracting cases:** (6 Wins – 0 Losses)
- **Government wins 78% of all other regulatory cases:** (58 Wins – 13 Losses – 8 Split Decisions)

Federalism Scorecard:

- **Government wins 100% of Commerce Clause cases:** (2 Wins – 0 Losses)

Federal Agency Scorecard:

- **NLRB wins 78% of cases:** (19 Wins – 5 Losses – 1 Split Decision)
  - **98% against businesses:** (19 Wins – 0 Losses – 1 Split Decision)
  - **0% against unions: (**0 Wins – 5 Losses)
- **DOL (including OSHA) wins 87% of cases:** (8 Wins – 2 Losses)
  - **85% against businesses:** (8 Wins – 1 Losses – 1 Split Decision)
  - **0% against unions: (**0 Wins – 1 Loss)
- **EPA wins 94% of cases:** (8 Wins – 0 Losses – 1 Split Decision)
  - **100% against businesses:** (8 Wins – 0 Losses)
  - **50% against environmentalists: (**1 Split Decision)
- **Department of Interior (including U.S. Fish & Wildlife Service) wins 66% of cases:** (2 Wins – 1 Loss)
  - **100% against businesses:** (1 Win – 0 Losses)
  - **50% against environmentalists: (**1 Win – 1 Loss)
- **IRS wins 100% of cases:** (2 Wins – 0 Losses)
- **FTC wins 100% of cases:** (1 Win – 0 Losses)
- **FDA wins 88% of cases:** (3 Wins – 0 Losses – 1 Split Decision)
- **FCC wins 85% of cases:** (13 Wins – 1 Loss – 3 Split Decisions)
- **SEC wins 100% of cases:** (6 Wins – 0 Losses)
- **USDA wins 33% of cases:** (1 Win – 2 Losses)
- **HUD wins 100% of cases:** (1 Win – 0 Losses)
- **Department of Justice wins 100% of cases:** (2 Wins – 0 Losses)
- **Nuclear Regulatory Commission wins 100% of cases:** (3 Wins – 0 Losses)

- **Fed. Energy Reg. Comm. wins 50% of cases:** (6 Wins – 6 Losses – 2 Split Decisions)
- **Dept. of Transportation wins 88% of cases:** (10 Wins – 0 Losses – 3 Split Decisions)
- **Health and Human Services wins 72% of cases:** (6 Wins – 2 Losses – 1 Split Decision)
- **Social Security Admin. wins 50% of cases:** (1 Win – 1 Loss)
- **U.S. Postal Service wins 75% of cases** (3 Wins – 1 Loss)
- **Copyright Royalty Board wins 100% of cases** (1 Win – 0 Losses)
- **Dept. of Defense wins 75% of cases:** (3 Wins – 1 Loss)
- **Fed. Labor Relations Authority wins 100% of cases:** (1 Win – 0 Losses)

LABOR

Ruled for the agency 28 times –

AE Staley Manufacturing Co. v. Secretary of Labor, 295 F.3d 1341 (2002)

Facts: The Occupational Safety & Health Review Commission determined that a corn refiner willfully committed 89 health and safety violations after an inspection found electrical equipment in unsafe places. The employer admitted that the violations occurred, but denied that they were willful violations because that determination would result in much more severe penalties.

Decision: Judge Merrick Garland recited the facts in the record and concluded that they fully justified the Commission's finding of a willful violation of the Occupational Safety and Health Act.

Quotes: None

Scorecard: Secretary of Labor wins.

Assoc. of Civ. Tech., Puerto Rico Army v. FLRA, 534 F.3d 772 (2008)

Facts: The Federal Services Labor-Management Relations Act (FSLMRA) requires the head of an agency to approve a collective bargaining agreement between the agency and a union "if the agreement is in accordance with… [the law]." Accordingly, in this case a labor union representing the Puerto Rico National Guard sought to compel the Federal Labor Relations Authority (FLRA) to approve a collective bargaining agreement (CBA), which the Department of Defense (DoD) had refused to approve. DoD argued that it could not approve the CBA because one of the provisions improperly interfered with DoD's statute forbidding any agreement that would interfere with the agency's ability to assign work as it deems efficient and appropriate. Specifically at issue was a provision requiring reimbursement for personal expenses incurred as a result of DoD's decision to cancel previously approved leave. The union argued that this provision was not contrary to law, and that it was permissible as an "appropriate arrangement" under the FSLMRA.

Decision: Judge Garland affirmed the decision of the FLRA, which had affirmed DoD's position that the contested CBA provision was not an "appropriate arrangement," on the ground that it impermissibly interfered with DoD's capacity to assign work. Garland emphasized that the FLRA was entitled to deference in its interpretation of the Act.

Quotes: None

Scorecard: Federal Labor Relations Authority and Department of Defense win.

Antelope Valley Bus Co., Inc. v. NLRB, 275 F.3d 1089 (2002)

Facts: The National Labor Relations Board (NLRB) issued an order finding Antelope Valley Bus Company violated the National Labor Relations Act in refusing to bargain with a union. The company maintained that it was not required to bargain with the union because it disputed whether it had validly won the support of its employees through a mail-in ballot. The employer argued that the election was invalid because four of the employees did not receive ballots. If those four employees had voted against unionization the union would not have been certified.

Decision: Judge Garland ruled that NLRB recognition of the union and its order finding the company in violation of the Act were consistent with precedent and supported by substantial evidence.

Quotes: None

Scorecard: NLRB wins.

Ark Las Vegas Restaurant Corp. v. NLRB, 334 F.3d 99 (2003)

Facts: A restaurant in a casino sought to vacate NLRB's order finding that it committed eight unfair labor practices in allegedly having unlawful workplace rules, and for threatening, disciplining, and terminating employees for union activities.

Decision: Judge Garland ruled that substantial evidence supported all eight of NLRB's findings.

Quotes: None

Scorecard: NLRB wins.

Bally's Park Place, Inc. v. NLRB, 646 F.3d 929 (2011)

Facts: A casino employee was discharged for using Family and Medical Leave Act (FMLA) leave to attend a union rally. NLRB thereafter issued orders finding the casino violated the National Labor Relations Act for discharging an employee—allegedly because of his union activities. The employer appealed that decision to the D.C. Circuit.

Decision: Judge Garland ruled that the employee had stated a valid claim that he had been discharged for his union activities, and concluded that the employer's stated justification for the dismissal was mere pretext. Additionally, Garland affirmed NLRB's

order, notwithstanding the fact that it had misconstrued testimony from the casino's director of operations.

Quotes: None

Scorecard: NLRB and the union win.

Ceridian Corp. v. NLRB, 435 F.3d 352 (2006)

Facts: The employer refused to meet with the employee's choice as bargaining representative during working hours. The employer allowed the employee time off from work for negotiations, but told him that he would have to use paid time off (PTO). The NLRB found this to be an unfair labor practice, insisting that the employer should give unpaid time off without any such condition. The employer argued this was a departure from past practice and that NLRB's rule was inconsistent with the act.

Decision: Judge Garland affirmed NLRB's finding of an unfair labor practice, ruling that NLRB's rule was reasonable and non-arbitrary.

Quotes: None

Scorecard: NLRB wins.

Dean Transportation, Inc. v. NLRB, 551 F.3d 1055 (2009)

Facts: A private company took a contract to handle bus routes for a public school district. Thereafter the union that had previously represented the employees who had performed these services for the school district sought to negotiate with the company; however, it refused to recognize the union. NLRB cited the company for an unfair labor practice.

Decision: Judge Garland affirmed NLRB's judgment—ruling that the company was the successor to the school district and was therefore obligated under the National Labor Relations Act to bargain with the union.

Quotes: None

Scorecard: NLRB wins.

Edison Electric Institute v. OSHA, 411 F.3d 272 (2005)

Facts: An industry association sought to challenge the legality of new standards set forth by OSHA in a compliance directive. OSHA argued that the compliance directive was non-reviewable because it merely restated standards promulgated in previous regulation.

Decision: Judge Garland wholly deferred to OSHA's interpretation of its pre-existing regulation, so as to conclude that the challenged compliance directive imposed no new standard—and was therefore not subject to judicial review.

Quotes: None

Scorecard: OSHA wins.

FedEx Home Delivery v. NLRB, 563 F.3d 492 (2009) (dissenting)

Facts: A small package delivery provider petitioned for review of NLRB determination that it had committed an unfair labor practice by refusing to bargain with a union. The business argued that it was not required to negotiate with the union because it was not their employer, insisting that they were independent contractors.

Decision: The majority ruled that the workers in question were independent contractors and not employees for the purposes of the National Labor Relations Act. Judge Garland dissented, arguing that the Court should have applied a different test that would make it harder to classify workers as independent contractors.

Quotes: "While the NLRB may have authority to alter the focus of the common-law [employment] test, this Court does not."

Scorecard: Garland sided with NLRB.

Flying Food Group, Inc. v. NLRB, 471 F.3d 178 (2006)

Facts: The NLRB issued an order finding that the Flying Food Group, Inc. had committed an unfair labor practice in withdrawing from negotiations with a union that claimed to represent its employees. The company maintained that there was no violation because the union no longer had the support of the majority of its employees.

Decision: Judge Garland ruled that the Administrative Law Judge properly refused to dismiss NLRB's order on technical grounds, and that NLRB did not have to provide evidence in its case-in-chief that a majority of employees still supported the union.

Quotes: None

Scorecard: NLRB wins.

Halle Enterprises, Inc. v. NLRB, 247 F.3d 268 (2001)

Facts: The NLRB issued an order requiring Halle Enterprises, Inc. to reinstate and to make whole eleven employees whom the company had fired for complaining about wages, hours, and working conditions. The company argued that its obligation to

provide back pay was tolled, with regard to some of the employees, from the time it made an offer to reinstate them to their posts; however, NLRB found that the offer was conditioned on a requirement that they agree not to initiate legal action. Accordingly, NLRB concluded that the obligation to pay back wages was not tolled.

Decision: Judge Garland concluded that substantial evidence in the record supported NLRB's inference that the offer for reinstatement was conditional.

Quotes: None

Scorecard: NLRB wins.

ITT Industries, Inc. v. NLRB, 413 F.3d 64 (2005)

Facts: The NLRB determined that ITT Industries violated the National Labor Relations Act when it refused to permit employees from one ITT plant to distribute pro-union handbills in the parking lot of another ITT facility. ITT argued that NLRB's findings should have been set aside, contending that the company did not violate the Act.

Decision: Judge Garland emphasized that NLRB was entitled to deference on its interpretation of the NLRA, and concluded that there were reasonable grounds to find the company committed unfair labor practices.

Quotes: None

Scorecard: NLRB wins.

Lee Lumber and Bldg. Material Corp. v. NLRB, 310 F.3d 209 (2002)

Facts: Lee Lumber was previously sighted for an unfair labor practice for allegedly refusing to bargain with a union representing its employees. In this action NLRB found another violation of labor law when the business walked away from negotiations; NLRB concluded that the employer's prior unlawful refusal to bargain was not followed by a "reasonable period" of good faith bargaining, as required to remove taint of this earlier refusal to bargain. The employer petitioned to set aside NLRB's order.

Decision: Judge Garland ruled that NLRB's order was justified by substantial evidence in the record.

Quotes: None

Scorecard: NLRB wins.

Millard Refrigerated Services, Inc. v. Secretary of Labor, 718 F.3d 892 (2013)

Facts: Federal safety and health regulations require employers using chemicals deemed "toxic and reactive highly hazardous" to conform to training, monitoring, and record-keeping requirements devised by OSHA. This entails a requirement that the employer must provide adequate training to employees and maintain and regularly update a report addressing risks involved in its use of such chemicals, and reporting incidents that had the potential for "cartographic consequences in the workplace." OSHA cited Millard Refrigerated Services, Inc. for failing to abide by these conditions, and the company petitioned to set aside OSHA's citations.

Decision: Judge Garland ruled that OSHA's citations were supported by substantial evidence in the record, and deferred to OSHA's interpretation of its regulations.

Quotes: None

Scorecard: OSHA wins.

Mohave Elec. Co-op, Inc. v. NLRB, 206 F.3d 1183 (2000)

Facts: The NLRB determined that Mohave Electric Cooperative unlawfully discharged an employee for protected concerted activity in violation of the National Labor Relations Act after the employee filed a petition for an injunction against harassment. The employer contended that the employee had been terminated for his part in a conflict with an independent contractor working for the firm, exaggerated a complaint against that worker and for disloyalty to the company.

Decision: Judge Garland ruled that NLRB properly found labor violations, concluding that the employee's filing of a petition for injunctive relief against a contractor whom the company worked with was protected activity. He emphasized that the Board had broad discretion in fashioning remedial orders.

Quotes: None

Scorecard: NLRB wins.

Northeast Bev. Corp v. NLRB, 554 F.3d 133 (2009) (dissenting)

Facts: A beverage distributing company was considering closing down one of its existing facilities. The union representing the employees at that facility was in the process of negotiating with the employer when a number of the company's employees left work to attend the meeting—notwithstanding a provision in their collective bargaining agreement prohibiting walkouts and strikes. When the employer disciplined these employees for inappropriately walking out of work, the union filed a complaint with NLRB, which then concluded that the company had violated the National Labor Relations Act.

Decision: The majority held that the walkout was not protected by the National Labor Relations Act. Judge Garland dissented, and would have deferred to NLRB's broad interpretation of the Act.

Quotes: "Of course, reasonable minds can differ about what is reasonable, and I certainly understand my colleagues' reservations. But I am unable to conclude that the Board's [decision] … was unreasonable."

Scorecard: Garland sided with NLRB and the union.

Pacific Bell v. NLRB, 259 F.3d 719 (2001)

Facts: The NLRB issued an order citing an employer for an unfair labor practice in violation of the National Labor Relations Act for withdrawing from negotiations with a union. The employer argued that it was justified in withdrawing from negotiations in light of a memorandum of understanding contemplating merger between two unions—one of which represented its employees.

Decision: Judge Garland held that the employer was unjustified in withdrawing from negotiations and that there was no good faith reasonable basis for the employer to believe that the union now lacked support of the employees.

Quotes: None

Scorecard: NLRB wins.

Pacific Coast Supply, LLC v. NLRB, 801 F.3d 321 (2015)

Facts: A lumber supply company chose to withdraw recognition of a labor union that had represented fifteen of its employees after its labor consultant concluded that the union no longer enjoyed majority support among the employees. In support of that proposition the company relied on written statements from eight of those employees; however, the NLRB rejected those statements and charged the company with an unfair labor practice. The employer appealed.

Decision: Judge Garland ruled that substantial evidence supported the Board's judgment that the company had violated the National Labor Relations Act. Specifically, the opinion held that the Board reasonably rejected the employee's statements because five of the eight employees had testified that they had help in writing those statements in English.

Quotes: None

Scorecard: NLRB wins.

RAG Cumberland Res. LP v. FMSHRC, 272 F.3d 590 (2001)

Facts: A mining company was cited for repeated safety violations, which resulted in escalating penalties. But the company argued that it had undergone a "clean inspection," which should have stopped the chain of escalating penalties.

Decision: Judge Garland held that the Federal Mine Safety & Health Review Commission was entitled to deference in its interpretation of the governing statute, and ruled that there was substantial evidence supporting the agency's determination that there had not been any "clean inspection."

Quotes: None

Scorecard: Federal Mine Safety & Health Review Commission wins.

Ross Stores, Inc. v. NLRB, 235 F.3d 669 (2001) (dissenting)

Facts: A terminated employee alleged that he was fired because of his support of the union. NLRB agreed, finding this to be an unfair labor practice. NLRB also determined that the employer violated the National Labor Relations Act in warning an employee about union solicitation on the premises.

Decision: The majority ruled that the employee's termination constituted an unfair labor practice in violation of the National Labor Relations Act; however, the majority determined that the Board was wrong in finding a second violation. Garland argued in a partial dissent that he would have affirmed NLRB's judgments on both issues.

Quotes: None

Scorecard: Garland sided entirely with NLRB.

Secretary of Labor, Mine Safety and Health Admin. v. Spartan Mining Co., 415 F.3d 82 (2005)

Facts: The Secretary of Labor sought review of a decision of the Federal Mine Safety and Health Review Commission, which had vacated its citation against a mine operator for violating safety standards. The Secretary of Labor and the cited company disagreed as to the proper interpretation of Department of Labor regulations.

Decision: Judge Garland deferred to DOL's interpretation, ruling that its interpretation was reasonable.

Quotes: None

Scorecard: Department of Labor wins.

Sec. of Labor, Mine Safety and Health Admin. v. Excel Mining, LLC, 334 F.3d 1 (2003)

Facts: The Secretary of Labor issued a citation to Excel Mining, LLC for violating federal standards limiting miner's exposure to respirable coal dust. The company appealed arguing that the Secretary's methodology for determining acceptable exposure rates violated the Federal Mine Safety and Health Act. The Federal Mine Safety and Health Review Commission agreed with the petitioning business, dismissing the citations. The Secretary of Labor then appealed that decision to the D.C. Circuit Court of Appeals.

Decision: Judge Garland ruled decisively in favor of the Secretary of Labor's interpretation of the Act. He ruled that the agency's position was entitled to deference and that it must be accepted as reasonable.

Quotes: None

Scorecard: Department of Labor wins.

Secretary of Labor v. Twentymile Coal Co., 456 F. 3d 151 (2006)

Facts: The Administrative Law Judge (ALJ) agreed with the Secretary of Labor and found a mine operator liable for safety violations of its independent contractor. The Federal Mine Safety and Health Review Commission overturned the ALJ decision finding that the Secretary of Labor's enforcement discretion was reviewable and finding that she had abused her discretion in citing the owner-operator for the safety violations of its independent contractor.

Decision: Garland vacated the Commission's ruling and reinstated the citations against Twentymile for the safety violations of its independent contractor. Garland cited D.C. Circuit precedent to find that Secretary had authority to cite owner-operators of mines for safety violations of their independent contractors. Garland also found that the Mine Act did not provide a "meaningful standard against which to judge the agency's exercise of discretion" and, as a result, the Secretary had broad discretion in enforcement actions limited only by constitutional protections, much like the enforcement discretion provided under the Criminal Code to an U.S. Attorney.

Quotes: None

Scorecard: Agency wins.

Shamrock Foods Co. v. NLRB, 346 F.3d 1130 (2003)

Facts: A union filed a complaint against the Shamrock Foods Company for allegedly committing an unfair labor practice in terminating an employee engaged in union activities. The employer maintained that the employee was fired for physically intimidating his coworkers when pushing them to support the union after two employees complained. The terminated employee denied threatening his coworkers. NLRB choose to reject the testimony of those employees who said they were intimidated, and instead relied on testimony from another employee who supported the story of the one who was terminated.

Decision: Judge Garland ruled that he must defer to NLRB's judgment, concluding that it was based on substantial evidence. He went on to rule that the employer's good faith belief that the employee had engaged in misconduct was entirely irrelevant and would not be considered.

Quotes: None

Scorecard: NLRB wins.

***Spectrum Health—Kent Community Campus v. NLRB*, 647 F.3d 341 (2011)**

Facts: Spectrum Health withdrew recognition from its employee's union after receiving a petition indicating that the union no longer had majority support of its employees. The NLRB found this action unlawful because it occurred within the first three years of the parties' collective bargaining agreement (CBA)—during which time a union enjoys a conclusive presumption of majority support. The company argued on appeal that the terms of their CBA began more than three years before it withdrew recognition. The NLRB disagreed with the employer's interpretation of the CBA.

Decision: Judge Garland held that the NLRB properly construed the CBA, and that it had not been in effect for three years at the time the employer withdrew recognition of the union. Accordingly, Garland affirmed NLRB's order.

Quotes: None

Scorecard: NLRB wins.

***Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131 (2015)**

Facts: Employees of a construction firm went on strike, which they said was intended to protest the company's unlawful termination of, and failure to reinstate a prominent union supporter. The company then refused to reinstate the striking workers to their position, which prompted this action. NLRB determined that failure to reinstate these employees to their posts was in itself an unfair labor practice. Additionally, NLRB held that another company with whom the other worked could be held liable as a joint employer because

it determined that there was common ownership, management and financial control between the two entities, and that the two operations were interrelated.

Decision: Judge Garland ruled that the National Labor Relations Act requires reinstatement when a striking union employee is protesting an unfair labor practice, and held that substantial evidence in the record supported NLRB's judgment that this was the purpose of the contested strike. Additionally, he held that it matter not whether there were any other motives for the strike. Finally, he ruled that the Administrative Law Judge appropriately determined that separate businesses in this case could be treated as a joint-employer for purpose of NLRA liability.

Quotes: None

Scorecard: NLRB wins.

***Sturm, Ruger & Co., Inc. v. Chao*, 300 F.3d 867 (2002)**

Facts: Strum, Ruger & Company, Inc. brought suit against the Department of Labor, challenging a requirement to respond to a survey requesting information on workplace injuries and illnesses. The District Court held that it lacked jurisdiction and that the company needed to pursue its claim through a review process outlined in the Occupational Safety and Health Act.

Decision: Judge Garland affirmed.

Quotes: None

Scorecard: Department of Labor wins.

***Tasty Baking Co. v. NLRB*, 254 F.3d 114 (2001)**

Facts: The NLRB issued and ordered finding that Tasty Baking Company committed unfair labor practices in disciplining a union activist and demoting the activist's wife. The company argued that the complaint was time-barred. The company also challenged NLRB's conclusion that its managers could be excluded from the hearing. The company also disputed whether there was evidence to support NLRB's order.

Decision: Judge Garland rejected the argument that the complaint was time-barred and ruled in favor of NLRB—holding that there was substantial evidence and that NLRB's conclusions were reasonable.

Quotes: None

Scorecard: NLRB wins.

Six union wins over agency –

Carpenters and Millwrights, Local Union 2471 v. NLRB, 481 F.3d 804 (2007)

Facts: A.J. Mechanical, Inc. was a Florida company, which went out of business while unfair labor practice complaints were pending against it. Ultimately NLRB ruled that the company had violated the National Labor Relations Act and ordered the company to provide back pay to some of its employees; however, by that time, the company had already been dissolved and its assets distributed. Thereafter, the union sought to hold the owners personally liable. NLRB refused to pierce the corporate veil, finding that the business was legitimately being wound down before the unfair labor complaints were filed.

Decision: Judge Garland ruled that NLRB should have pierced the corporate veil and therein imposed a $462,755 liability on one of the owners who had yet to settle. He ruled that notwithstanding contradictory evidence, NLRB should have concluded that the company was dissolved and the assets distributed in a ruse to evade financial obligations, and that NLRB failed to explain its position adequately.

Quotes: None

Scorecard: Union wins.

Guard Publishing Co. v. NLRB, 571 F.3d 53 (2009)

Facts: A newspaper was alleged to have violated the National Labor Relations Act in disciplining an employee for sending union-related emails. The company argued that it had a neutral policy prohibiting the use of company emails for solicitations of any kind. But, the union argued that the company selectively enforced the policy against union activists. NLRB issued an order finding the employer committed unfair labor practices by selectively enforcing its email policy, and by prohibiting employees from displaying union insignia. But, NLRB concluded that the employer's discipline of the employee for content of her email was not an unfair labor practice. On appeal to the D.C. Circuit, the union argued NLRB should have found that this constituted a violation, while the employer argued that NLRB lacked any basis to find it in violation at all.

Decision: Judge Garland held that NLRB had substantial evidence supporting its conclusion that the company committed unfair labor practices in selectively enforcing its email policy, and in refusing to allow employees to wear union insignias. And, he went on to side with the union in concluding that NLRB erred in failing to conclude that the employer had committed an unfair labor practice in disciplining a union employee for the content of her emails.

Quotes: None

Scorecard: NLRB wins over employer; and union wins over employer and NLRB.

In re United Mine Workers of America International Union, 190 F.3d 545 (1999)

Facts: The United Mine Workers of America brought a petition to compel the Mine Safety Health Administration (MSHA) of the Department of Labor to issue final regulations controlling gaseous emissions in the exhaust of diesel engines used in underground coal mines. The National Mining Association intervened, arguing that this petition constituted an untimely challenge to another set of regulations that MSHA finalized in 1996, which also imposed rules on the use of diesel equipment.

Decision: Judge Garland rejected the industry group's argument that the union's petition was time-barred under the Mine Act. He went on to rule that MSHA violated its statutory obligation to finalize the regulation of gaseous emissions.

Quotes: None

Scorecard: Union wins.

Monmouth Care Center v. NLRB, 672 F.3d 1085 (2012)

Facts: A union representing employees from three different nursing homes/long-term care facilities were renegotiating their bargaining contracts. Negotiations failed and the union filed Unfair Labor Practices against employers for refusing to (1) meet and bargain with, and (2) provide promised information to the union. Nursing homes/long-term care facilities raised an affirmative defense that they were at an "impasse" with the unions. NLRB found no impasse and, as a result, issued an order finding that the nursing homes/long-term care facilities committed unfair labor practices.

Decision: Garland upheld the decision of the NLRB citing DC Circuit precedent that it has a "limited role … in reviewing an NLRB decision, particularly a decision regarding the existence of impasse."

Quotes: None

Scorecard: Union wins.

United Food & Commercial Workers Intern. Union Local 400, AFL-CIO v. NLRB, 222 F.3d 1030 (2000)

Facts: The NLRB found labor law violations against Farm Fresh. The NLRB argued that Farm Fresh committed unfair labor practices when non-employee union organizers

were ejected from a Farm Fresh store snack bar and when the company excluded non-employee union organizers from sidewalks in front of four other stores.

Decision: Garland held that evidence didn't support Farm Fresh evicting non-employee union organizers from the snack bar and that NLRB erred in finding that Virginia law allows Farm Fresh to exclude non-employee union organizers from sidewalks within 50 feet of stores.

Quotes: None

Scorecard: Union wins.

***Wayneview Care Center v. NLRB*, 664 F.3d 341 (2011)**

Facts: The NLRB found the employers unlawfully locked out employees without a legitimate business justification and in an effort to coerce the union into accepting unilaterally implemented terms and conditions of employment. The petitioners countered that the lockouts were defensive and intended to ensure continued patient care.

Decision: Garland upheld the unfair labor practice (ULP) finding that the employer offered no evidence that the union was planning another strike or further picketing, actions that might have justified a defensive lockout.

Quotes: None

Scorecard: Union wins.

One split decision between business and agency –

***Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939 (1999)**

Facts: The NLRB issued an order finding an employer violated the National Labor Relations Act—concluding that the employer had committed unfair labor practices for allegedly (i) firing a supervisor for refusing to commit an unfair labor practice; (ii) interrogating an employee about her union involvement; (iii) directing employees to remove union buttons; (iv) denying an employee access to an employee dining room when attempting to circulate a union petition; and (v) reducing hours and laying-off employees who engaged in pro-union activities.

Decision: Judge Garland ruled that there was no substantial evidence to justify NLRB's findings with regard to the first two alleged violations. There was simply nothing in the

record to suggest the employee was fired because of his union involvement. And the alleged interrogation was a single conversation in which a manager asked an employee if she was happy with the way she was being treated, which could not reasonably be construed as coercive. However, Judge Garland then went on to rule that NLRB had properly determined the employer to be in violation of the National Labor Relations Act with regard to the other four incidents.

Quotes: None

Scorecard: Employer wins on two issues; NLRB wins on the remaining four.

ENVIRONMENTAL

Ruled 13 times for the agency –

Allied Local and Regional Manufacturers Caucus v. EPA 215 F.3d 61 (2000)

Facts: A paint manufacturer and an association of manufacturers and distributors of architectural coatings petitioned the D.C. Circuit to review an EPA rule limiting the content of volatile organic compounds (VOCs) in a number of commercial products like architectural coatings and paints.

Decision: The rule was appropriately promulgated. Among other things, Judge Garland found that the Clean Air Act allowed EPA to regulate VOCs nationally and the Commerce Clause did not preclude regulation. Judge Garland also found that under the Regulatory Flexibility Act (RFA), the Court does not have jurisdiction to review whether or not EPA appropriately considered regulatory alternatives and alleged non-compliance with the RFA did not make the rule arbitrary and capricious.

Quotes: None

Scorecard: EPA wins.

American Corn Growers Ass'n v. EPA, 291 F.3d 1 (2002)

Facts: In 1999, the Environmental Protection Agency (EPA) promulgated regulations intended to address regional haze. Similar to EPA's Clean Power Plan, these regulations required the states to play the lead role in designing and implementing regional haze programs to clear the air in national parks and other wilderness areas.

Industry groups challenged the regulations on statutory grounds because they would have ultimately imposed costly requirements to retrofit existing commercial facilities with the best available technology to reduce haze.

Decision: The majority ruled that the haze regulations violated the Clean Air Act by requiring the states to engage in regional rather than source-by-source analysis in deciding whether to designate an existing facility as subject to retrofit requirements. But Judge Garland dissented, arguing that the court should have deferred to EPA's interpretation of the CAA. His dissent emphasized his view that the court should interpret statutes not strictly in accordance with the plain text, but to facilitate the goals or purpose of the enactment. He insisted that notwithstanding the majority's textualist approach, EPA's interpretation was reasonable.

Quotes: None

Scorecard: Garland would have ruled for EPA.

***American Trucking Ass'n v. EPA*, 195 F.3d 4 (1999) (Garland, J., joins dissent)**

Facts: Industry groups challenged the Environmental Protection Agency's revised national ambient air quality standards (NAAQS) regulating emissions of particulate matter into the air. The industry groups argued that EPA's interpretation of the Clean Air Act left the agency with an effective blank check to impose regulation however it might like in violation of the Constitution's non-delegation doctrine—which forbids Congress from giving an agency lawmaking power.

Decision: The majority held that EPA had failed to advance a construction that would sufficiently cabin its discretion to avoid a non-delegation problem. Judge Garland joined in dissent arguing that EPA's interpretation of the Act was reasonable and did not violate the Constitution.

Quotes: None

Scorecard: Garland would have ruled for EPA.

***Appalachian Power Co. v. EPA*, 135 F.3d 791 (1998)**

Facts: Industry groups challenged new regulations from the Environmental Protection Agency (EPA), promulgated under the Clean Air Act, which limit emission of nitrogen oxides from electric utility boilers.

Decision: Judge Garland's panel ruled that EPA had reasonably interpreted the Clean Air Act as permitting revision of nitrogen oxide emission limits, and that the agency's

reliance on linear regression models and other technical calculations were reasonable. Further, the decision emphasized that EPA's conclusion that the Act required regulated parties to meet certain deadlines was reasonable and entitled to deference. Judge Garland's portion of the opinion emphasized that agencies are entitled to broad deference on statutory questions.

Quotes: None

Scorecard: EPA wins.

Cement Kiln Recycling Coalition v. EPA, 493 F. 3d 207 (2007)

Facts: An association that includes manufacturers of Portland cement that use hazardous waste as an alternative fuel in some of their kilns petitioned EPA for review of a regulation that governed the permitting process for facilities that burned hazardous waste as a fuel. The association also challenged related guidance document as a legislative rule for which EPA did not properly engage in notice-and-comment rulemaking under the Administrative Procedures Act (APA).

Decision: Judge Garland held, among other things, that the regulation properly listed information required in a permit application and that the "trigger" requiring a site-specific risk assessment was not impermissibly vague. Garland also found the Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities was a guidance document and not a legislative rule requiring notice-and-comment rulemaking under the APA.

Quotes: None

Scorecard: EPA wins.

Chamber of Commerce of U.S. v. EPA, 642 F.3d 192 (2011)

Facts: Industry groups challenged a regulation from the EPA authorizing California to impose heightened emission standards for automobiles under the Clean Air Act. They argued that they had standing to challenge EPA's decision because it would impose substantial costs on manufacturers and would therein force car dealers to pay more to acquire inventory, and may also reduce profit margins for car dealerships.

Decision: Judge Garland ruled that the industry group lacked standing to challenge EPA's decision. In so holding he rejected claims that an association should be allowed to sue to protect its members who may have been forced to pay more to acquire a product as a result of the contested regulation.

Quotes: None

Scorecard: EPA wins.

Conservation Force, Inc. v. Jewell, 733 F.3d 1200 (2013)

Facts: A group of conservationists and safari hunters petitioned the Secretary of Interior to reclassify a species of mountain goat from "endangered" to "threatened," in light of studies demonstrating that the species had rebounded from the brink of extinction. The agency sat on the petition and did nothing for years, until finally the group brought a lawsuit to compel the agency to take action. As the suit was pending on appeal in the D.C. Circuit, the agency promulgated a rule relisting the goat as "threatened," and therein giving the plaintiffs exactly what they had asked for. Nonetheless, they argued that they should be allowed to continue their suit because the agency has established a practice of failing to act promptly on such petitions.

Decision: Judge Garland ruled that the suit was mooted by the agency's decision to promulgate regulations as requested in their petition.

Quotes: None

Scorecard: U.S. Secretary of Interior wins.

Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455 (1998)

Facts: Both environmentalists and an industry group challenged new regulations promulgated by the Federal Aviation Administration limiting the number of overhead flights it would permit over the Grand Canyon in an effort to reduce non-natural noises. The environmentalists argued that the FAA regulation did not go far enough in restoring natural silence, while the industry group argued that the regulation violated the Administrative Procedures Act in failing to provide sufficient notice and opportunity to comment. Additionally, the industry group argued that the new regulation was arbitrary in its definition of "substantial restoration of natural quiet." Finally the industry group alleged a violation of the Regulatory Flexibility Act.

Decision: Judge Garland ruled against both the industry and environmental petitioners, deferring to the agency's "reasonable exercise of its judgment and technical expertise." The opinion ruled that several claims advanced by the industry petitioners were unripe. Garland ruled that FAA had properly allowed for an opportunity for notice and comment and had properly responded to comments raised in its analysis under the Regulatory Flexibility Act—concluding that the FAA had considered alternatives. Garland ruled against the environmentalists' claim that the rule didn't go far enough.

Quotes: None

Scorecard: FAA wins.

National Association of Home Builders v. EPA, 682 F.3d 1032 (2012)

Facts: In 2010, EPA amended a 2008 lead paint rule to eliminate the "opt-out" provision, which exempted owner-occupied housing from the rule's requirements if the homeowner certified that no pregnant women or young children lived there. The National Association of Home Builders (NAHB) sought to vacate the rule in part because EPA failed to hold a Small Business Advocacy Review Panel as required under the Regulatory Flexibility Act (RFA).

Decision: Judge Garland narrowly interpreted the RFA's judicial review provision and held that the court did not have jurisdiction to rule on the issue.

Quotes: Regarding arguments that EPA acted in an arbitrary and capricious manner, Garland said that two events "go a long way toward explaining why EPA reconsidered the opt-out provision: namely, the inauguration of a new President and the confirmation of a new EPA Administrator."

Scorecard: Government/Environmentalist win.

NRDC, Inc. v. Nuclear Regulatory Com'n., 216 F.3d 1180 (2000)

Facts: An environmentalist group brought suit challenging a regulation promulgated by the Nuclear Regulatory Commission defining the term "meeting" under the Sunshine Act—which requires that gatherings of members of certain agencies must be open to the public if they constitute "meetings."

Decision: Judge Garland ruled that the agency's regulation was valid because it had defined the term "meeting" consistent with Supreme Court precedent. Garland emphasized that the court was forbidden from imposing procedural requirements on agencies that are not clearly required by statute.

Quotes: None

Scorecard: Nuclear Regulatory Commission wins.

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (2003)

Facts: A real estate company sought to challenge the constitutionality of restrictions imposed on its property under the Endangered Species Act. The company argued that the regulation could not be justified under the Commerce Clause because the species has no commercial value, and does not leave the State of California.

Decision: Judge Garland ruled that the Commerce Clause justified imposition of land use restrictions prohibiting development of the property in question because it was restricting economic activity. He rejected the company's argument that the subject of the

regulation—*i.e.* the regulated species—was beyond the reach of Congress, notwithstanding that it had no connection to interstate commerce.

Quotes: None

Scorecard: Secretary of Department of Interior wins.

U.S. Air Tour Assoc. v. FAA, 298 F.3d 997 (2002)

Facts: In 1987, Congress enacted the National Parks Overflights Act, which ordered the Secretary of Interior to make recommendations for reducing sound impacts from commercial flights in National Parks—which the Federal Aviation Administration was required to adopt in regulations, unless they posed a threat to public safety. In light of studies suggesting that the commercial flights were still interfering with natural noise levels in the park, FAA revised its regulations to limit the number of commercial flights commercial tour guides would be allowed to take. The tour guide companies challenged the new regulations on numerous grounds, including in challenging the agency's decision to redefine acceptable sound levels. The companies also contested the science on which the rule was predicated, argued that FAA did not comply with the Regulatory Flexibility Act and failed to take into account the needs of elderly and disabled persons. In the same action, environmentalists challenged the rule on other grounds—arguing that the agency had overestimated the progress that had been made in restoring natural quiet.

Decision: Judge Garland ruled that FAA was entitled to deference in its interpretation of the statute, notwithstanding that its proffered interpretation was a marked departure from its previous interpretation. Garland went on to reject all of the other claims raised by the industry petitioners, holding that FAA had offered a sufficient defense of its scientific modeling, that the Regulatory Flexibility Act claim must be rejected because the FAA had reasonably considered and rejected less burdensome alternatives, and that the rule did not ignore the needs of the elderly and disabled. With regard to those claims raised by environmentalists, Garland held that their claims were ripe for review and agreed with the environmentalists on the merits—holding that FAA's noise methodology was arbitrary and capricious.

Quotes: "An agency is not required to establish 'rules of conduct to last forever,' but rather 'must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances."

Scorecard: FAA wins over private industry and environmentalists win over FAA.

Utility Air Regulatory Group v. EPA, 744 F.3d 741 (2014)

Facts: Industry groups and the State of Texas challenged rules promulgated by the Environmental Protection Agency under the Clean Air Act, which imposed more burdensome performance standards on steam-generating units. The industry groups petitioned the agency for reconsideration and then sought judicial review.

Decision: Judge Garland ruled that the court would not entertain legal arguments raised for the first time in a petition for reconsideration, and that the court could only consider arguments presented in the notice-and-comment period before the agency finalized the rule. Garland also went on to hold that EPA's rule could not be set aside as arbitrary and capricious. Judge Kavanaugh dissented, disagreeing with Garland's conclusion that the court was jurisdictionally barred from hearing some of petitioners' arguments.

Quotes: None

Scorecard: EPA wins.

One split decision between environmentalist and agency –

Sierra Club v. EPA, 356 F.3d 296 (2004)

Facts: Under the Clean Air Act, states may develop State Implementation Plans (SIPs) outlining how the state will come into compliance in so called "non-attainment" zones, where air quality is said to be out of compliance with regulatory goals or standards. In this case, an environmental group petitioned the court to vacate EPA's approval of a SIP based on a letter from the state affirming that it would move to come into compliance in the future. The environmentalist group also objected to the substance of the proposed SIP, in part because it disagreed with EPA's technical assessments and interpretation of the Act.

Decision: Judge Garland agreed with Sierra Club's principle contention that EPA inappropriately approved the SIP, and that the Clean Air Act required immediate action—not a promise for future action. But Garland rejected additional objections raised by Sierra Club, differing to EPA on those points.

Quotes: None

Scorecard: Environmentalists win on principle issue, EPA wins on secondary issues.

Environmentalists win one –

Gerber v. Norton, 294 F.3d 173 (2002)

Facts: An environmental organization brought an action challenging a decision of the U.S. Fish & Wildlife Service to issue a developer an incidental take permit—which was needed for construction of a residential subdivision in an area deemed critical habitat for the endangered Delmarva fox squirrel. They argued that the agency was required by law to demonstrate that the developer's plans reduced the impact of the taking to the maximum extent practical. They also argued that the Endangered Species Act requires an opportunity for public comment on key components of a permit application.

Decision: Judge Garland ruled that the agency violated the Act in failing to make publically available a map showing where the developer would mitigate environmental impacts, and ruled that this was not harmless error.

Quotes: None

Scorecard: Environmentalists win.

CIVIL JUSTICE REFORM

Employment Lawsuits: Ruled 15 times for the employee, former-employee or job-applicant –

Anderson v. Zubieta, 180 F.3d 329 (1999)

Facts: In this action, employees of the Panama Canal Commission (PCC), which is a wholly-owned United States government corporation, alleged that they were paid less than other employees on the basis of their national origin and/or race. At issue were separate benefits packages, which the PCC made eligible only to employees who met certain conditions, including requirements that they had to have been Americans by a certain date. The PCC defended in part by arguing that the plaintiffs should have filed their complaints long ago; however, the plaintiffs argued that there was a continuing violation of law—which tolled the statute of limitations. The District Court granted defendant's motion for summary judgment.

Decision: As an initial matter, Judge Garland ruled that the plaintiff's claims were not untimely filed because they had alleged a continuing violation of law. As for the merits, Judge Garland ruled that the plaintiffs had set forth a prima facie case for discrimination

and that the burden had shifted to the employer to demonstrate non-discriminatory business justification for its policies. Accordingly, he ruled that summary judgment was inappropriate.

Quotes: None

Scorecard: Plaintiffs (employees) and trial bar win.

***Barbour v. WMATA*, 374 F.3d 1161 (2004)**

Facts: An employee **(**plaintiff) sued their employer for disability discrimination/wrongful termination. The District Court denied summary judgment for the employer based on a finding that WMATA was not immune from suit under the Rehabilitation Act. WMATA argued that the Eleventh Amendment renders WMATA immune from suit under the Rehabilitation Act in federal court and that the agency did not waive immunity by accepting federal financial assistance.

Decision: Judge Garland reversed and found WMATA was subject to jurisdiction based on the acceptance of federal funds. Judge Sentelle dissented noting that he disagreed "with the majority that Congress has the power under the Spending Clause to expose the states to liability for the sort of suit [plaintff[brought."

Quotes: None

Scorecard: Employee wins (with a holding that isn't good for states' rights).

***Breen v. Dept. of Transportation*, 282 F.3d 839 (2002)**

Facts: A former federal employee sued her employer, alleging discrimination on the basis of her disability. She had proposed an alternative work schedule to help her cope with her obsessive compulsive disorder. The District Court granted summary judgment for the agency.

Decision: Judge Garland reversed, holding that the suit should be allowed to proceed because there was a question of fact as to the reasonableness and effectiveness of the alternative work schedule the employee had proposed as an accommodation.

Quotes: None

Scorecard: Employee and trial bar win.

***Czekalski v. Peters*, 475 F.3d 360 (2007)**

Facts: An employee alleged gender discrimination claim under Title VII based on a reassignment. The District Court dismissed the case in favor of the employer and the plaintiff appealed.

Decision: Judge Garland reversed the District Court finding the plaintiff had produced evidence showing that her reassignment might be based on gender discrimination.

Quotes: None

Scorecard: Employee wins.

Figueroa v. D.C. Metro. Police Dept., 633 F.3d 1129 (2011)

Facts: Police officers alleged violations of the Fair Labor Standards Act for failure to pay overtime. The Department maintained that these claims were barred by the statute of limitations. The District Court agreed, and granted summary judgment dismissing their claims.

Decision: Judge Garland affirmed in part and reversed in part. He held that some of their overtime claims were time-barred, but that other claims were not time-barred and that the officers could proceed with their suit.

Quotes: None

Scorecard: Employees and trial bar wins.

Harris v. District of Columbia Water and Sewer Authority, 791 F.3d 65 (2015)

Facts: An employee sued WASA for discriminatory termination under Title VII. The District Court granted employer's motion to dismiss, and the plaintiff appealed.

Decision: Judge Garland ruled that the employee alleged sufficient facts to support a retaliation claim and remanded the case for trial.

Quotes: None

Scorecard: Employee wins.

Hunter-Boykin v. GWU, 132 F.3d 77 (1998)

Facts: A university professor retained counsel and was contemplating a lawsuit, alleging racial discrimination. Because the statute of limitations was fast approaching, the professor's attorney wrote a letter to the university with an aim to buy more breathing room for the parties to conduct settlement negotiations. The parties thereafter entered into an agreement to "toll the running of any statute of limitations period." In the end, the professor initiated her lawsuit against the university, which sought to dismiss the case on a motion for summary judgment—arguing that the claim was barred by the statute of limitations. The parties disagreed as to the legal effect of their prior agreement.

Decision: Judge Garland ruled that the District Court erred in granting summary judgment for the university, opining that a reasonable jury might well interpret the agreement—as pressed by the plaintiff—as tolling the statute of limitations. The opinion concludes that such a private agreement to toll a statute of limitations is lawful.

Quotes: None

Scorecard: Employee and trial bar win.

***Miller v. Clinton*, 687 F. 3d 1332 (2012)**

Facts: John R. Miller, Jr. a State Department employee working outside of the U.S. was terminated on his 65th birthday. Mr. Miller sued the State Department arguing that his termination violated the Age Discrimination in Employment Act (ADEA). The State Department argued that the section 2(c) of the Basic Authorities Act (BAA) (under which Mr. Miller was hired) exempts Miller from ADEA protections. The District Court agreed and upheld the State Department's termination of Mr. Miller.

Decision: Judge Garland reversed finding, among other things, that the BAA's allowance for the State Department to enter into contracts with employees serving abroad without regard to "statutory provisions" relating to "the negotiation, making, and performance of contracts and performance of work in the United States" did not expressly exempt the State Department from following ADEA requirements. Garland also held that *Chevron* deference was not due to agencies interpreting statutes, like the ADEA, that apply to all government agencies and where not just one agency is entrusted with its "primary interpretation."

Quotes: None

Scorecard: Employee wins/Government loses.

***Payne v. Salazar*, 619 F.3d 56 (2010)**

Facts: A Department of Interior employee filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging (1) religious discrimination because the Department did not accommodate her request for leave on Sundays to attend church and Bible study and (2) retaliation for filing a complaint with EEOC. The EEOC found religious discrimination but not retaliation. The employee then brought the original retaliation claim plus an additional retaliation claim in the District Court. The District Court dismissed the case for "failure to state a claim" arguing that Title VII of the Civil Rights Act requires that plaintiffs suing in civil court to bring all claims, not just those they lost at the EEOC.

Decision: Judge Garland reversed the District Court ruling regarding the original retaliation claim saying that Title VII does not require a plaintiff bringing a Title VII civil claim to jeopardize a favorable EEOC ruling by requiring all related claims to be brought in civil court, even those the plaintiff originally won at the EEOC. Garland did uphold the dismissal of the second retaliation claim.

Quotes: None

Scorecard: Trial bar wins.

Peterson v. Archstone Communities, LLC, 637 F.3d 416 (2011)

Facts: A job applicant representing herself without counsel filed suit against Archstone Communities LLC, alleging discrimination on the basis of her age. Her suit was dismissed after she failed to appear at a hearing. She appealed, arguing her case should not have been dismissed for her failure to appear in court for a single hearing.

Decision: Judge Garland ruled that the plaintiff's failure to appear at a single motions hearing did not constitute egregious conduct and that it was therefore improper to dismiss her case for failure to prosecute.

Quotes: None

Scorecard: Plaintiff/job applicant wins.

Singletary v. D.C., 351 F.3d 519 (2003)

Facts: A former employee of the District of Columbia Department of Health Services brought this action alleging discrimination under Title VII of the Civil Rights Act. The District Court granted summary judgment in favor of the defendant-employer.

Decision: Judge Garland reversed, ruling that the employee had made sufficient allegations to raise factual questions as to whether he was denied a promotion for a discriminatory reason, and whether he was discriminated against by employer's decision to have him work in an unheated storage room. Judge Garland ruled that the later claim was not barred by a statute of limitations because it would constitute a continuing violation.

Quotes: None

Scorecard: Employee and trial bar win.

Sparrow v. United Airlines, 216 F.3d 1111 (2000)

Facts: The employee alleged discriminatory termination under Title VII. The District Court dismissed the complaint on a 12(b) (6) for failure to state a claim and allege a prima facie case.

Decision: Judge Garland reversed and remanded the case for further proceedings noting the difference between 12(b) (6) dismissals as compared with a motion for summary judgment. Under 12(b) (6) motion, the complaint alone need not allege a prima facie case.

Quotes: None

Scorecard: Employee wins.

***Steele v. Schafer*, 535 F.3d 689 (2008)**

Facts: An employee of the Department of Agriculture brought a claim alleging discrimination under Title VII of the Civil Rights Act. The employee alleged a hostile work environment because of her race, and alleged that the employer had retaliated against her for complaining about discriminatory treatment. She also alleged constructive discharge. The District Court granted summary judgment on behalf of the agency, dismissing the case.

Decision: Judge Garland ruled that the case should not have been dismissed on summary judgment because there was an open factual question as to whether the employee had exhausted her administrative remedies. He also ruled that the employee had stated a claim for hostile work environment and retaliation.

Quotes: None

Scorecard: Employee and trial bar win.

***Summers v. Howard University*, 374 F.3d 1188 (2004)**

Facts: Security officers sued Howard University for unpaid overtime. Howard agreed to a settlement of $318,000 for the plaintiffs; $220,000 in attorneys' fees. But, after agreeing, the university asked the District Court to vacate the settlement because: (1) the plaintiffs were misrepresented in depositions that they had not brought similar claims in other courts (they had); and (2) the magistrate's calculation of damages was done analyzing 20% rather than 100% of payroll data.

Decision: Judge Garland held: (1) even though the plaintiffs intentionally withheld a second lawsuit from Howard, including failing to serve Howard the court papers, it didn't prejudice Howard enough to warrant vacating the settlement award and (2) Howard

didn't offer evidence that its methodology for determining back wages was statistically preferable to the way the special master calculated the award.

Quotes: None

Scorecard: Trial bar wins.

U.S. ex rel. Yesudian v. Howard Univ., 153 F.3d 731 (1998)

Facts: A former university employee, who worked in the university's purchasing department, was terminated for insubordination; however, he claimed that he was discharged in retaliation for blowing the whistle on financial improprieties—allegedly committed by the Purchasing Department and its director. When the employee brought this action, the jury rendered a verdict in his favor, both with regard to his retaliation claims against his supervisor and the university. Additionally, the jury found a breach of contract and awarded back pay of $180,000. Thereafter, the university and the supervisor sought to set aside the jury verdicts—asking the court to render judgment as a matter of law in their favor. The District Court denied the university's motion, but granted the supervisors' motion.

Decision: Judge Garland reversed the District Court's decision to issue judgment in favor of the manager—holding that a reasonable jury could have found that the employee was engaged in protected activities and that the manager was on notice of those activities. Further, Garland ruled that it was for the jury to determine whether the there was a binding contract.

Quotes: None

Scorecard: Employee and trial bar win.

Six split decisions –

Calhoun v. Johnson, 632 F.3d 1259 (2011)

Facts: An African-American employee filed suit against her employer, the U.S. General Services Administration, under Title VII of the Civil Rights Act, alleging discrimination when it failed to promote her. She also alleged that the employer retaliated against her in failing to promote her because she engaged in protected activities seven years earlier.

Decision: Judge Garland ruled that the suit should be allowed to proceed on the discrimination claim because there was a factual question as to whether the employer

had discriminated against her in failing to promote her; however, Garland ruled that the employee had not established that the employer's justification for not promoting her was pretext. Garland also rejected the employee's retaliation claim because it was unreasonable to infer retaliation for protected conduct that occurred nearly a decade ago.

Quotes: None

Scorecard: Partial win for employer and partial win for trial bar.

Gilvin v. Fire, 259 F.3d 749 (2001)

Facts: A former secretary-treasurer for a union brought suit against the union and its president for allegedly terminating his employment in violation of federal protections under the Labor-Management Reporting and Disclosure Act (LMRDA). Specifically, he alleged that he was terminated because of his criticism of the union's policies—which he maintains constituted protected speech, and because of his testimony as a witness in a legal proceeding. Additionally, he alleged that the termination was motivated by the fact he wrote a letter to a Congressional subcommittee, which he alleged was also protected conduct. The District Court ruled for the union on all counts.

Decision: Judge Garland reversed in part, holding that the plaintiff had stated a valid claim for a violation of the LMRDA with regard to his first two claims. Garland affirmed in part as well, holding that the District Court properly dismissed the other claims.

Quotes: None

Scorecard: Employee wins in part, Union-employer wins in part.

Kassem v. Washington Hosp. Cntr., 513 F.3d 251 (2008)

Facts: A former employee brought a claim for wrongful discharge and intentional infliction of emotional distress. The employee had been a nuclear medical technologist and during his time at the Washington Hospital Center, he had reported regulatory violations to the Nuclear Regulatory Commission. The employer took no action in response to those reports and discouraged the employee from making further reports to the Commission. Later when a significant violation occurred the Hospital initiated an investigation and allegedly tried to pin responsibility on this employee. He was then discharged and initiated this action.

Decision: Judge Garland ruled that the employee's wrongful discharge claim was barred by the employee at will doctrine, and that the employee had failed to establish a public policy exception. But Garland ruled in favor of the employee on his intentional infliction of emotional distress claim.

Quotes: None

Scorecard: Partial win for employer and partial win for trial bar.

Lathram v. Snow, 336 F.3d 1085 (2003)

Facts: A former employee of the Department of Treasury brought an action alleging sex discrimination and claiming retaliation for engaging in protected activities. Specifically, she alleged discrimination on the ground that the agency had failed to promote her to a new position; however, she did not apply for that position. But she alleged discrimination also with regard to another promotion, which she was denied—for which she had applied. The District Court granted summary judgment for the agency, dismissing the case.

Decision: Judge Garland ruled that the employee could not claim discrimination for not being promoted to a job that she had not applied for; however, he reversed the District Court judgment in so far as it rejected her claims of discrimination and retaliation with regard to the second promotion that she claimed she should have received.

Quotes: None

Scorecard: Partial win for public employer and partial win for trial bar.

Mogenhan v. Napolitano, 613 F.3d 1162 (2010)

Facts: A female employee sued her employer, the U.S. Secret Service, for allegedly retaliating against her for filing a discrimination complaint and for failing to reasonably accommodate her disability.

Decision: Judge Garland ruled that she had stated a claim for unlawful retaliation, but ruled in favor of her employer on the disability claim—concluding that the Service took steps to provide reasonable accommodations.

Quotes: None

Scorecard: Partial win for employer and partial win for trial bar.

Segar v. Mukasey, 508 F.3d 16 (2007)

Facts: Drug Enforcement Administration (DEA) agents alleged a pattern and practice race discrimination claim arguing that DEA's procedures for Senior Executive Service promotion were discriminatory. Parties entered into a stipulated agreement after a bench trial in District Court. To remedy violations, the parties agreed on a set of stipulated procedures governing the promotion of DEA special agents to positions in the

agency's SES. District Court ruled that DEA violated the agreement and issued an injunction prohibiting DEA from promoting anyone to SES level. DEA appealed.

Decision: Judge Garland vacated the injunction but also interpreted some provisions in the agreement in a manner favorable to the plaintiffs.

Quotes: None

Scorecard: Draw. Employees and employer both prevailed in claims.

Ruled 18 times for the employer –

Boivin v. U.S. Airways, Inc., 446 F.3d 148 (2006)

Facts: A retired pilot brought a lawsuit alleging violations of the Employee Retirement Income Security Act (ERISA). The suit alleged miscalculation of retirement benefits and breach of fiduciary duties; however, the defendant airline was in bankruptcy and the successor trustee for the company's benefits plan argued that it had yet to make formal determinations on the matters in question.

Decision: Judge Garland ruled in favor of the defendant trustee, holding that the retired employee had not yet pursued administrative remedies.

Quotes: None

Scorecard: Defendant (employer) wins.

Borgo v. Goldin, 204 F.3d 251 (2000)

Facts: An employee sued for discriminatory termination and retaliation under Title VII. The District Court ruled in favor of the employee.

Decision: Judge Garland reversed the District Court ruling and remanded back to the lower court for further proceedings based on the fact that NASA presented evidence showing the termination was for a legitimate non-discriminatory reason.

Quotes: None

Scorecard: Employer wins.

Ciralsky v. CIA, 355 F.3d 661 (2004)

Facts: A former employee of the Central Intelligence Agency brought this action alleging ethnic and religious discrimination under Title VII of the Civil Rights Act and

alleging various constitutional violations. The District Court dismissed the complaint without prejudice because it had failed to properly provide a short and plain statement of the claim.

Decision: Judge Garland affirmed, holding that it was within the discretion of the District Court to dismiss the claim without prejudice. But he remanded the case again to allow the judge an opportunity for reconsideration as to whether it should allow an opportunity for the plaintiff to amend the complaint.

Quotes: None

Scorecard: Public employer wins.

***Egan v. U.S. Agency for Intern. Dev.*, 381 F.3d 1 (2004)**

Facts: A former employee of the Foreign Service sought to challenge a decision by the Foreign Service Grievance Board denying his request for reconsideration of grievances. Since he filed suit more than 180 days from the date of the Board's decision, the Service maintained that his action was time-barred by the Foreign Service Act. He disagreed, arguing that under the Act he was entitled to file within 180 days of returning to the United States.

Decision: Judge Garland ruled that the Act's tolling of the 180-day time period for filing suit upon return to the United States only applied to current employees of the Foreign Service—meaning that his claim was time-barred, since he was, at the time of the suit, working for a private company abroad.

Quotes: None

Scorecard: Foreign Service wins.

***Evans Financial Corp. v. Director, Office of Workers' Comp. Programs*, 161 F.3d 30 (1998)**

Facts: The Benefits Review Board found that the employer waived its right to setoff against the claimant's future medical expenses, and employer petitioned for review.

Decision: Judge Garland concluded that there was "not a scintilla of evidence to support the [Board's] conclusion that Evans Financial waived its right to a credit against its liability for future medical expenses."

Quotes: None

Scorecard: Employer wins.

Davenport v. International Broth. of Teamsters, AFL-CIO, 166 F.3d 356 (1999)

Facts: A flight attendant brought action against a union and their employer (NW Airlines) challenging the union's failure to put an agreement on work hours to a vote. The District Court denied the employee's motion for a preliminary injunction to force the union/employer to bring the agreement to a vote.

Decision: Judge Garland upheld District Court decision, finding that the employees failed to establish entitlement to preliminary injunction.

Quotes: None

Scorecard: Employer wins.

Haynes v. Williams, 392 F.3d 478 (2004)

Facts: A former employee of the District of Columbia brought this action alleging the District violated the Americans with Disabilities Act in insisting that he needed to work in accordance with office hours set by his superiors. He maintained that he suffered from a condition that made him feel like he had bugs crawling over him—which he maintained was exacerbated by the environmental conditions in the building in which he worked. He maintained that the condition was so severe that he had a hard time sleeping at night, and that this was the reason he was frequently late in arriving to work.

Decision: Judge Garland ruled that his condition did not substantially limit his major activities enough to qualify as a disability under the ADA.

Quotes: None

Scorecard: Public employer wins.

Kersey v. WMATA, 586 F.3d 13 (2009)

Facts: The plaintiff filed a disability discrimination claim against their employer based on non-promotion. The District Court granted summary judgment in favor of the employer and the plaintiff appealed.

Decision: Judge Garland affirmed the dismissal.

Quotes: None

Scorecard: Employer wins.

Lacson v. Dept. of Homeland Security, 726 F.3d 170 (2013)

Facts: Plaintiff, a federal air marshal, was terminated for posting sensitive security information (SSI), including staffing levels and location of marshals, online. The plaintiff appealed, not his termination, but the determination that the information he posted online constituted SSI.

Decision: Judge Garland affirmed the bulk of the agency order, finding three breaches of security by the air marshal.

Quotes: None.

Scorecard: Employer wins.

McGill v. Munoz, 203 F.3d 843 (2000)

Facts: A public employee brought suit, alleging discrimination. The jury ruled in favor of the employee. Thereafter, the defendant agency sought a directed verdict to invalidate the jury's finding. The District Court denied the agency's motion.

Decision: Judge Garland reversed, holding that there was not sufficient evidence from which a reasonable jury would conclude that the agency had engaged in discriminatory conduct.

Quotes: None

Scorecard: Public employer wins.

McGrath v. Clinton, 666 F.3d 1377 (2012)

Facts: A former State Department employee initiated this action alleging that he was terminated in violation of Title VII of the Civil Rights Act because he pushed back against orders to give critical reviews of an African American employee who had missed deadlines. The District Court granted summary judgment in favor of the State Department.

Decision: Judge Garland affirmed—holding that the plaintiff had failed to offer any evidence from which a reasonable jury could conclude that he had been terminated for protected conduct.

Quotes: None

Scorecard: Public employer wins.

Metz v. BAE Systems Technology Solutions & Serv., Inc., 774 F.3d 18 (2014)

Facts: A defense contractor laid-off an employee, who thereafter went to work for another firm. His former employer thereafter began to threaten legal action, alleging that

he was forbidden from working for a competitor under the terms of a non-compete agreement that he had signed during his employment with the first firm. Ultimately this prompted the new employer to terminate the employer-employee relationship in order to avoid the threat of legal action. He then filed suit against his former employer, alleging tortious interference with contract, and breach of implied covenant of good faith and fair dealing. The District Court dismissed the action, accepting the defendant's argument that D.C. law does not recognize these sort of claims where a terminated individual was an at will employee. On appeal to the D.C. Circuit, the former employee asked the D.C. Circuit to certify the question to the D.C. Court of Appeals.

Decision: Judge Garland ruled that the question was not of great enough importance to submit to the D.C. Court of Appeals. The opinion emphasized that the employee should not have brought his case in federal court if he wanted the D.C. courts to decide upon this question.

Quotes: None

Scorecard: Former employer wins.

***Minter v. District of Columbia*, 809 F.3d 66 (2015)**

Facts: An employee sued for failure to provide reasonable accommodation under the ADA. The District Court dismissed the complaint.

Decision: Judge Garland affirmed the dismissal. Plaintiff failed to allege an ADA or retaliation claim.

Quotes: None

Scorecard: Employer wins.

***Montgomery v. Chao*, 546 F.3d 703 (2008)**

Facts: A financial specialist filed suit against his employer, alleging discrimination on the basis of race, gender and age because of the employer's failure to promote him, and to give him certain duties. The District Court dismissed his claims.

Decision: Judge Garland affirmed the District Court ruling, finding that it had offered legitimate, non-discriminatory and non-retaliatory justifications for its actions.

Quotes: None

Scorecard: Employer wins.

***Morgan v. Federal Home Loan Mortgage Corp.*, 328 F.3d 647 (2003)**

Facts: A former employee of the Federal Home Loan Mortgage Corporation (Freddie Mac) brought this action, alleging discrimination on the basis of his race and political affiliation under Title VII of the Civil Rights Act when he was dismissed from his position and Freddie Mac refused to re-hire him to several other positions, for which he believed he was qualified. The District Court granted summary judgment, dismissing the case.

Decision: Judge Garland affirmed, ruling that the employee had failed to demonstrate his qualifications for three of the positions for which he had applied, and that he had failed to offer evidence that might call into question the legitimate reasons that Freddie Mac claimed motivated its decision not to offer him another position in 1997.

Quotes: None

Scorecard: Public employer wins.

Mpoy v. Rhee, 758 F.3d 285 (2014)

Facts: A public school teacher alleged that he was terminated because of an email he sent to the chancellor of the school district, in which he complained about classroom conditions and raised other concerns. He sued the school principal and the chancellor for allegedly violating his First Amendment rights.

Decision: Judge Garland ruled that the speech was not protected because email constituted employee speech. Accordingly, he ruled that the principal and chancellor were entitled to claim qualified immunity.

Quotes: None

Scorecard: Defendant public school employers win.

Robinson-Reeder v. American Council on Educ., 571 F.3d 1333 (2009)

Facts: A former employee brought suit alleging defamation and racial discrimination in violation of Title VII of the Civil Rights Act. The District Court dismissed the Title VII claim, but allowed the plaintiff to amend his complaint with regard to the defamation claim. The plaintiff sought to appeal the dismissal of his Title VII claim.

Decision: Judge Garland ruled that the District Court's order was not an appealable final judgment.

Quotes: None

Scorecard: Defendant company wins.

Waterhouse v. District of Columbia, 298 F.3d 989 (2002)

Facts: An employee alleged termination based on race under Title VII. The District Court dismissed the case; the employee appealed.

Decision: Judge Garland affirmed the dismissal; the employee failed to make any showing that the reason she was fired was racial discrimination rather than poor performance.

Quotes: None

Scorecard: Employer wins.

Torts and Consumer Lawsuits: Ruled 8 times for plaintiffs –

Akinseye v. District of Columbia, 339 F.3d 970 (2003)

Facts: Parents, guardians and court-appointed advocates of minor children initiated an action against the District of Columbia, alleging violation of the Disabilities Education Act and to compel the District to provide special education services to disabled children. The parties ultimately settled, and voluntarily agreed to pay attorney's fees. But they maintained those attorney's fees were paid late and sought—in this action—to recover interest on those late payments. The majority held that the court lacked subject matter jurisdiction to hear this claim.

Decision: Judge Garland dissented. He argued that, although he was unsure that they were entitled to interest, he believed the court had jurisdiction to hear the claim.

Quotes: None

Scorecard: Would have ruled in favor of litigants seeking interest on payment of attorney's fees.

Feemster v. BSA Limited Partnership, 548 F.3d 1063 (2008)

Facts: Plaintiffs in this action were tenants in Section 8 federally subsidized housing. They alleged violations of federal law and the District of Columbia's Human Rights Act when their landlord refused to accept federal vouchers as a form of payment. The District Court ruled that the landlord violated federal law, but not D.C. law in refusing to accept federal vouchers. But the landlord appealed, arguing that it was only required to accept those vouchers so long as it was continuing to make the housing available for rent—a position that the landlord argued was supported by guidance documents from the Department of Housing and Urban Development (HUD). Accordingly, since the

landlord was seeking to vacate the units in question for the purpose of redevelopment, it maintained that it was under no legal obligation to continue renting the units and therefore had no duty to accept HUD's vouchers.

Decision: Judge Garland affirmed the District Court's judgment that federal law required a landlord to continue accepting vouchers—and therein foreclosed the company from exiting the rental market unless the tenants were to commit violations of the lease that might warrant a lawful eviction. Accordingly, he rejected the landlord's reliance on HUD guidance. Further, he ruled that D.C.'s Human Rights Act prohibits landlords from refusing vouchers.

Quotes: None

Scorecard: Section 8 tenants and trial bar wins.

***Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350 (2006)**

Facts: A securities investment firm appealed a decision of the District Court affirming the judgment of an arbitrator that the company had subjected one of its client's accounts to unauthorized trading and churning. According to an expert who testified in proceedings before an arbitrator, this client's account had a turnover rate of over 65- more than 10 times the industry standard for unlawful churning. The arbitrator ordered the company to pay compensatory damages after the clients lost nearly one million dollars. On appeal, the company argued that the arbitrator's decision should be set aside as contrary to law because the client was required—under a customer agreement—to object to unauthorized trading in writing within ten days of receiving an account statement, and that this should have precluded judgment in favor of the client.

Decision: Judge Garland affirmed, holding that an arbitrator's award must be awarded unless plainly contrary to law and emphasizing deference to the arbitrator's judgment. Judge Garland ruled specifically that it was permissible for the arbitrator to award damages for unauthorized trading, notwithstanding the client's failure to provide a timely written objection because the client had taken reasonable actions to address his concerns, was told by the company that his concerns would be addressed, and also because the client did not fully understand the complicated transactions reported in his statements.

Quotes: None

Scorecard: Consumer wins.

***Lucas v. Duncan*, 574 F.3d 772 (2009)**

Facts: A magistrate judge imposed sanctions on an attorney under Rule 11 of the Federal Rules of Civil Procedure for allegedly presenting inferences as facts. The attorney appealed, arguing that sanctions were inappropriate and an abuse of discretion because sanctions are only warranted when an attorney makes assertions that are entirely unsupported by the facts.

Decision: Judge Garland reversed, holding that there was no basis in the law for imposing sanctions on an attorney for drawing inferences from the facts. The opinion emphasized that an attorney opposing a motion for summary judgment has more leeway to present arguments based on inference because an attorney opposing summary judgment is necessarily seeking to demonstrate that there is disagreement over material facts and how they should be construed.

Quotes: None

Scorecard: Trial attorney wins.

Malik v. District of Columbia, 574 F.3d 781 (2009)

Facts: A prisoner brought civil rights action against the District of Columbia, correctional service retained by the District, and service's transportation subsidiary, alleging that defendants violated his rights under Eighth Amendment during a 40-hour bus ride transferring him between two facilities. The District Court granted summary judgment for the defendant.

Decision: Judge Garland reversed the dismissal of the case and remanded to the District Court because the District Court did not provide requisite notice of impending decision.

Quotes: None

Scorecard: Civil rights win.

Muir v. Navy Federal Credit Union, 529 F.3d 1100 (2008)

Facts: Krishna Muir deposited nearly $30,000 into a joint bank account, which he held with his father. He had acquired the money through a loan, which he intended to use for business purposes. Thereafter, the bank refused to return the funds and took them to satisfy a debt owed by his father. Muir then brought this suit alleging unlawful conversion of property, breach of fiduciary duties, violations of the Fair Debt Collection Practices Act and interference with a business expectancy. He also sought punitive damages. The District Court held that the bank had unlawfully converted Muir's property, but dismissed all the other claims. Muir appealed.

Decision: Judge Garland affirmed dismissal of the breach of fiduciary duty claim and the denial of punitive damages. Judge Garland reversed the ruling with regard to the other claims—holding that Muir had standing to bring a claim under the Fair Debt Collection Practices Act, and that Muir had stated a claim for interference with a business expectancy.

Quotes: None

Scorecard: Account holder wins.

Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc., 493 F.3d 160 (2007)

Facts: A mother initiated a lawsuit against a juvenile transitional living facility after her son was murdered during his time under its care. The jury ruled in her favor and the District Court refused to provide judgment as a matter of law in favor of the defendant.

Decision: Judge Garland ruled that the living facility was liable for failing to take proper steps to protect the plaintiff's son, and ruled the District Court did not violate the rules of evidence in disallowing heresy and in allowing expert testimony.

Quotes: None

Scorecard: Plaintiff wins.

Novak v. Capital Mgmt. and Dev. Corp., 570 F.3d 305 (2009)

Facts: The plaintiff was attacked and beaten as he left a nightclub in Washington D.C. He then brought this suit, alleging that the nightclub was negligent in its failure to adequately protect him and/or to police the area. A jury awarded $4,111,722. The club owners appealed.

Decision: Judge Garland ruled in favor of the plaintiff—holding that the jury properly decided questions of fact, not questions of law.

Quotes: None

Scorecard: Plaintiff wins.

One split decision –

Daskalea v. DC, 227 F.3d 433 (2000)

Facts: An inmate brought a lawsuit against the District of Columbia Department of Corrections director under § 1983, alleging that she had been forced to perform a

striptease in front of other prisoners and guards. A jury returned a verdict in her favor, awarding $350,000 in compensatory damages, and $5 million in punitive damages. The Court denied the defendant's motion for judgment as a matter of law and for a new trial.

Decision: Judge Garland ruled that the jury's verdict could not be set aside because it was supported by evidence in the record, and held that the District of Columbia was still subject to liability, notwithstanding the fact that the guards may have violated official policies. Further, he ruled that the compensatory award was reasonable, but reversed the punitive damage award.

Quotes: None

Scorecard: Prisoner wins on one issue, District of Columbia wins on another.

Ruled nine times for defendants –

Gray v. Poole, 243 F.3d 572 (2001)

Facts: Plaintiff brought this action under U.S.C. § 1983 alleging that attorneys for the District of Columbia's Office of Corporation Counsel violated his civil rights in initiated child neglect proceedings against him. The District Court dismissed the case on the ground that the attorney's had an absolute immunity from suit.

Decision: Judge Garland affirmed, holding that absolute immunity extends to government attorneys for their conduct in initiating a prosecution.

Quotes: None

Scorecard: District of Columbia officials win.

In re Sealed Case (Medical Records), 381 F.3d 1205 (2004)

Facts: This suit was initiated by mentally disabled group home residents after a co-resident sexually assaulted another resident. Plaintiffs sought production of all files that the facility maintained regarding the resident alleged to have committed the assault, and the District Court ordered production. Represented by an ad lidum, the resident accused of misconduct appealed that order.

Decision: Judge Garland ruled that the order compelling production was appealable, and that the District Court had abused its discretion in failing to properly weigh privacy interests against the interests of plaintiffs, and in failing to recognize a psychotherapist privilege.

Quotes: None

Scorecard: Defendant wins.

Messina v. Krakower, 439 F.3d 755 (2006)

Facts: This was defamation action brought against a law firm, which assisted a business partner in a dispute with a co-owner. The co-owner alleged that the firm sent a defamatory letter and brought this suit. The law firm argued that it was immune from suit, asserting a special privilege because it was representing a client on a legal matter, and sought judgment. The District Court granted that motion, and dismissed the case.

Decision: Judge Garland affirmed, holding that the firm was protected by the judicial proceedings privilege, and that the District Court did not abuse its discretion in refusing to allow further discovery and in refusing to alter its judgment.

Quotes: None

Scorecard: Defamation defendant wins.

Taylor v. Reilly, 685 F.3d 1110 (2012)

Facts: An inmate brought this suit seeking damages against parole officials for allegedly violating the ex post facto clause of the Constitution. The District Court dismissed the claim in favor of the defendants on the ground that they had a qualified immunity.

Decision: Judge Garland affirmed, ruling that the parole officials were entitled to claim qualified immunity because there was no clear constitutional violation and because there was no basis to think that the parole officers acted unreasonably.

Quotes: None

Scorecard: Defendant (parole officials) wins.

Sibert-Dean v. Washington Metro. Area Transit. Auth., 721 F.3d 699 (2013)

Facts: In this action, a bus passenger brought a personal injury lawsuit seeking damages as a result of an accident. She alleged that the Washington Metro Area Transit Authority was negligent in the accident, and succeeded in obtaining a jury verdict in her favor—which the District Court refused to set aside. The Authority sought a new trial on the ground that the Judge had given improper jury instructions in stating that failure to abide by regulations constituted per se negligence.

Decision: Judge Garland ruled that violation of a regulation merely restating the common law standard could not constitute per se negligence; however, he ruled that this was not a harmless error—and, therefore, could not justify reversal—because, if the regulation merely restated the common law standard then finding a violation necessarily means the jury would have found the Authority to be negligent.

Quotes: None

Scorecard: Washington Metropolitan Area Transit Authority wins.

Sigmund v. Starwood Urban Retail VI, LLC, 617 F.3d 512 (2010)

Facts: The plaintiff was injured by a pipe-bomb planted in his father's car. He sued the owner of the company managing the garage in which the car was parked for alleged negligence; however, the District Court dismissed that claim.

Decision: Judge Garland affirmed, ruling that there was no basis to believe that the parking garage was on notice of potential dangers of this sort, which would be necessary to establish negligence.

Quotes: None

Scorecard: Defendant company wins.

Robinson v. Washington Metropolitan Area Transit Authority, 774 F.3d 33 (2014)

Facts: Bus passenger brought negligence action against WMATA seeking damages for a broken leg attained in a fall while on the bus. Following a jury verdict in the passenger's favor, District Court granted transit authority's motion for judgment as a matter of law.

Decision: Judge Garland affirmed the District Court decision on grounds that there was no evidence supporting causal connection between bus driver's alleged failure to follow standard of care and bus passenger's injury.

Quotes: None

Scorecard: Defendant (WMATA) wins.

Washburn v. Lavoie, 437 F.3d 84 (2006)

Facts: An attorney brought a lawsuit against Georgetown college students living in a neighboring townhouse alleging defamation when the students wrote in a letter that he had violated the law by recording sounds emanating from their home. The attorney

made this recording in an effort to prove that the students had been unacceptably noisy during nighttime hours. The students maintained that they could not be held liable for defamation because they wrote the contested letter in an effort to defend themselves against the attorney's allegations of wrongdoing. The District Court ruled in favor of the students.

Decision: Judge Garland affirmed. Judge Garland also refused to allow discovery of emails the students had sent discussing the dispute, and refused to extend the period for discovery.

Quotes: None

Scorecard: Defendant wins.

***Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36 (2002)**

Facts: An attorney representing a client in a personal injury suit against the Washington Metropolitan Area Transit Authority was dismissed by the client during the course of settlement negations. At the time the Authority had offered a settlement of $55,000. Accordingly, since the attorney's agreement with the client had provided that he would receive one-third of any settlement, he filed a lien alleging he was entitled to a portion of any final settlement agreement. The Authority ultimately settled for $60,000, but refused to recognize the attorney's lien. Accordingly, he initiated this action alleging breach of duty to enforce an equitable lien.

Decision: Judge Garland ruled that the Authority—which was created in a compact between Maryland and Virginia—was protected from suit under the 11th Amendment, which confers sovereign immunity on the states and their agencies. Judge Garland ruled that there had been no waiver of sovereign immunity here.

Quotes: None

Scorecard: Washington Metropolitan Area Transit Authority wins.

OTHER REGULATORY

Medicaid, Medicare and Social Security cases: Ruled six times in favor of the government –

Abington Crest Nursing and Rehabilitation Cntr. v. Sebelius, 575 F.3d 717 (2009)

Facts: A Medicare provider sought reimbursement from the Department of Health and Human Services for bad debt costs, which it could not collect—for deductibles and coinsurance payments. HHS denied the request for reimbursement, but the provider maintained that HHS was required to provide reimbursement by statute and under its regulations.

Decision: Judge Garland ruled that HHS was entitled to deference in its interpretation of the governing statute, and in interpreting its own regulations.

Quotes: None

Scorecard: HHS wins.

Gentiva Healthcare Corp. v. Sebelius, 723 F.3d 292 (2013)

Facts: The HHS authorized a contractor to determine whether a Medicare provider's reimbursement claims exhibited a "sustained or high level of payment error." In this case a Medicare provider challenged that authorization and the contractor's use of extrapolation to calculate overpayment. The District Court granted summary judgment to HHS on both claims.

Decision: Judge Garland ruled that HHS was entitled to delegate authority to make these determinations to contractors and that the agency was entitled to deference on its interpretation of the statute. The opinion also affirmed the District Court's judgment that a challenge to the extrapolation calculation was barred from judicial review by statute.

Quotes: None

Scorecard: HHS wins.

Heartland and Regional Medical Cntr. v. Leavitt, 415 F.3d 24 (2005)

Facts: In the federal Medicare program, reimbursements are made to hospitals on the basis of a prospective payment system, under which they are paid a fixed rate based on the patient's diagnosis. However, a hospital may be entitled to higher payments if it is designated as a "sole community hospital." In this case, a hospital sought certification as a sole community hospital, but the Department of Health and Human Services (HHS) denied that certification. The hospital then sought to compel HHS to make this certification in court. The District Court ruled that the hospital was entitled to summary judgment because HHS had failed to analyze certain factors. Accordingly, the Court remanded the case with orders for HHS to reconsider the hospital's request for

certification. But HHS came to the same conclusion, rejecting certification once again. The hospital then sought an order that it was entitled to be classified as a sole community hospital.

Decision: Judge Garland ruled that HHS had acted properly and that it was not required to issue certification. The opinion concluded that HHS had complied with the earlier court order in properly analyzing required factors.

Quotes: None

Scorecard: HHS wins.

***Tenet HealthSystems HealthCorp. v. Thompson*, 254 F.3d 238 (2001)**

Facts: A Medicare provider brought this suit against the Department of Health and Human Services, alleging that it had inadequately reimbursed it for its losses on the sale of a hospital. The District Court agreed and remanded the case to HHS for redetermination of the amount due.

Decision: Judge Garland reversed—holding that HHS was entitled to deference in its interpretation of its own regulations and that HHS' judgment was supported by substantial evidence in the record.

Quotes: None

Scorecard: HHS wins.

***Transitional Hospitals Corp. of Louisiana v. Shalala*, 222 F.3d 1019 (2000)**

Facts: The Medicare program reimburses certain categories of hospitals—including long-term care hospitals—on a "reasonable cost" basis. In this case, the owners of two new hospitals sought certification as a long-term care hospital; however, Health and Human Services (HHS) denied that request believing that it was statutorily foreclosed from granting such certification until a hospital has been operational for at least six months. The District Court ruled in favor of the plaintiff hospitals.

Decision: Judge Garland reversed ruling that the statute, properly construed, gave HHS discretion in setting qualifications for long-term care certification. Because the Secretary was mistaken in understanding that the agency was bound to impose a waiting period, Judge Garland remanded the case with orders that the agency must decide whether to exercise its discretion to allow certification in this case.

Quotes: None

Scorecard: HHS wins.

United Seniors Ass'n, Inc. v. Shalala, 182 F.3d 965 (1999)

Facts: The Balanced Budget Act of 1997 provided that doctors participating in the Medicare program must abstain from the program for a period of two years if they contract with a Medicare beneficiary outside of Medicare. In response, an organization representing senior citizens brought suit, alleging constitutional violations. During the course of litigation, HHS implemented regulations clarifying the statutory language.

Decision: Judge Garland ruled that he was bound to defer to HHS' interpretation of the statute and that there was no constitutional problem when so construed.

Quotes: "Because the Secretary's reading of Section 4507 eliminates the constitutional injury plaintiffs allege, and because we are bound under *Chevron* to defer to that interpretation, the order of the District Court is affirmed."

Scorecard: HHS wins.

One split decision –

Southeast Alabama Medical Cntr. v. Sebelius, 572 F.3d 912 (2009)

Facts: The Department Health and Human Services (HHS) promulgates regulations annually for reimbursement rates for hospitals that provide inpatient care to eligible Medicare beneficiaries. HHS uses a preset formula to determine reimbursement rates based on national averages of the costs for certain treatments—regardless of the actual costs; however, HHS regulations then allow for geographical adjustments. In this case, a hospital challenged HHS regulations for geographical adjustments in fiscal years 2003 and 2004. The hospital argued that the regulations violated the governing statute.

Decision: Judge Garland ruled that HHS was entitled to deference in its interpretation of the governing statute, and that it was therefore reasonable for HHS to consider the factors they had chosen to rely upon in making its regional rate adjustments. The only consideration that Garland did not approve of was HHS' decision to consider postage costs because the agency had not adequately explained why this was a relevant consideration.

Quotes: None

Scorecard: HHS wins on all but one issue.

Ruled four times against the government –

Arizona v. Thompson, 281 F.3d 248 (2002)

Facts: In this action several states challenged a directive from the Department of Health and Human Services that foreclosed those states from using grants from the Temporary Assistance for Needy Families (TANF) program to pay for Medicaid and Food Stamp programs. HHS argued that the Welfare Reform Act prohibited use of TANF grants for those purposes; however, the states disagreed.

Decision: Judge Garland ruled that HHS was not entitled to *Chevron* deference in this case because it did not purport to exercise reasonable discretion in interpreting the statute, but instead said that its interpretation was the only permissible interpretation. Garland then ruled that HHS had improperly interpreted the Act.

Quotes: None

Scorecard: State challengers win.

Jones v. Astrue, 647 F.3d 350 (2011)

Facts: A social security claimant initiated this action after the Social Security Administration (SSA) denied his application for supplemental insurance without explaining its decision to reject the opinion of his treating physician. The District Court affirmed SSA's decision and the claimant appealed.

Decision: Judge Garland ruled that the case should be remanded for further consideration because SSA failed to explain the reasons for its decision.

Quotes: None

Scorecard: Claimant wins.

Public Citizen, Inc. v. HHS, 332 F.3d 654 (2003)

Facts: The Peer Review Improvement Act requires that a Peer Review Organization (PRO) must "inform" an individual of "the organization's final disposition" of any complaint about the quality of services rendered to a Medicare beneficiary. The Health Care Financing Administration of the Department of Health and Human Services determined that a PRO can comply with this requirement simply by sending a form letter stating that it has examined the complainant's concerns and that it will take appropriate action if warranted. A nonprofit public advocacy group brought this suit challenging those regulations as contrary to the requirements of the Act.

Decision: Judge Garland ruled that the regulations were not entitled to deference because they did not comport with the statute's plain requirement that the PRO must give an explanation of the final determination.

Quotes: None

Scorecard: Medicare advocates win.

Salazar ex rel. Salazar v. District of Columbia, 671 F.3d 1258 (2012)

Facts: In 1993, the District of Columbia entered into a consent decree, which thereafter governed how it would provide early and periodic screening, diagnostic and treatment services under the Medicaid Act. After nearly ten years under the consent decree, the District sought to vacate the consent decree on two grounds. First, the District argued that a recent Supreme Court decision cast doubt on the validity of the consent decree. Second, the District maintained that the consent decree was unnecessary at this juncture because it had come into full compliance with the law. The Court denied the motion to vacate the consent decree with regard to the first argument, but had yet to rule on the second argument when the District appealed.

Decision: Judge Garland ruled that the District of Columbia could not appeal the District Court's decision until there was a final judgment.

Quotes: None

Scorecard: Medicaid recipients win.

Freedom of Information and Privacy Act cases: Ruled five times in favor of the government –

Al-Fayed v. C.I.A., 254 F.3d 300 (2001)

Facts: Father of Dodi Al-Fayed, a man killed in a high-profile automobile accident in Paris along with the Princess of Wales, brought action against the National Security Agency (NSA), Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and Department of State, alleging that such agencies failed to comply with the father's request under the Freedom of Information Act (FOIA) for expedited release of information regarding the automobile accident. The father moved for preliminary injunction directing agencies to expedite processing of FOIA requests. District Court denied the motion.

Decision: Judge Garland affirmed the District Court decision, holding that district courts must review agency denials of expedited processing requests under FOIA *de novo*, and the father's requests did not concern a "matter of current exigency" to the American public, as required to obtain expedited processing.

Quotes: None

Scorecard: Agency wins.

Lee v. Dept. of Justice, 428 F.3d 299 (2005)

Facts: An employee of the Department of Energy was investigated for espionage for the Chinese government and was eventually charged with mishandling classified computer files. During this time several news outlets ran stories on the investigation. In response, the employee brought a Privacy Act suit, alleging that DOE and or the Department of Justice had illegally disclosed private information about him to third parties. In the course of this lawsuit he sought to compel several journalists to provide information on their sources for information in stories they had published about the investigation; however, the journalists claimed a privilege against revealing their sources. A panel of the D.C. Circuit ruled that the journalists could not invoke a privilege against testimony in this case.

Decision: Judge Garland dissented, arguing that the case raised an important question that should be heard by the full Court.

Quotes: None

Scorecard: Would have granted review, as urged by the government and journalists.

McKinley v. Federal Housing Finance Agency, 739 F.3d 707 (2014)

Facts: An author submitted a Freedom of Information Act request with the Federal Housing Finance Agency. The agency invoked statutory exemptions against disclosure, which led to a lawsuit in which the court partially affirmed applicability of the exemptions, but required disclosure of certain documents. Accordingly, he was only partially successful in obtaining the documents he sought. He thereafter sought attorney's fees, but the District Court denied that request. The FOIA petitioner appealed.

Decision: Judge Garland ruled that the District Court did not abuse its discretion in denying an award of attorneys' fees.

Quotes: None

Scorecard: FOIA respondent wins.

Newport Aeronautical Sales v. Department of Air Force, 684 F.3d 160 (2012)

Facts: A company that collects technical information—making it available for a fee to government contractors—requested information from the Air Force under the Freedom of Information Act; however, the Air Force invoked exemptions from disclosure, on the ground that the Air Force was forbidden from disclosing the requested information by another statute.

Decision: Judge Garland ruled that the Air Force was entitled to withhold disclosure under FOIA Exemption 3.

Quotes: None

Scorecard: FOIA respondent wins.

Students Against Genocide v. Department of State, 257 F.3d 828 (2001)

Facts: Citizens' organizations and others brought Freedom of Information Act (FOIA) action seeking information from government agencies regarding human rights violations by Srebrenica area of Bosnia in July 1995. The District Court granted summary judgment to agencies because of national security exemptions to FOIA.

Decision: Judge Garland affirmed the District Court judgment and remanded the plaintiff's request for attorney's fees and costs in connection with one of its requests.

Quotes: None

Scorecard: Agency wins.

One split decision –

Judicial Watch, Inc. v. U.S. Secret Service, 726 F. 3d 208 (2013)

Facts: Judicial Watch filed a Freedom of Information Act request with the Secret Service for a list of every visitor to the White House complex over a seven-month period. The District Court found that all such documents were disclosable under FOIA

Decision: Judge Garland reversed in part and remanded in part, finding that White House visitor records were not "agency records" held by the Secret Service and subject to FOIA in part because Congress made clear in the 1974 FOIA Amendments and the 1978 Presidential Records Act that it did not want the appointment calendars of the President and his/her closest advisors to be subject to disclosure under FOIA. However, Congress did consider certain components of the White House complex, like

the Office of Management and Budget and the Council on Environmental Quality, "agencies" under FOIA and their documents are "agency records" subject to disclosure under that statute.

Quotes: None

Scorecard: Partial win for FOIA petitioner.

Ruled five times favor of the FOIA petitioner –

ACLU v. CIA, 710 F.3d 422 (2013)

Facts: The ACLU filed a Freedom of Information Act (FOIA) request seeking information about the Central Intelligence Agency's role in drone strikes. The agency responded with a "*Glomar* response," which neither confirms nor denies that the agency has documents responsive to the request. Such a response is warranted only when confirming or denying the existence of records would in itself cause harm cognizable under a FOIA exemption. But established precedent holds that an agency cannot make a *Glomar* response when the U.S. government had already officially acknowledged the existence of information that would otherwise be exempt from FOIA disclosure. Here ACLU argued that CIA's *Glomar* response was inappropriate because the Obama administration had publically discussed its drone strikes. The District Court disagreed, ruling in favor of CIA.

Decision: Judge Garland reversed the ruling, holding that it was already public knowledge that CIA was involved with drone strikes and that it cannot deny the existence of documents pertaining to its involvement.

Quotes: None

Scorecard: ACLU wins [FOIA petitioner].

ACLU v. Dept. of Justice, 655 F.3d 1 (2011)

Facts: The ACLU brought this action seeking to compel disclosure of documents within the control of the Department of Justice—specifically records relating to the government's use of cell phone location data in criminal prosecutions. On appeal, the parties argued as to whether the agency had properly withheld responsive documents. The District Court ruled that at least some of the requested documents were subject to disclosure, but that the agency could withhold other documents.

Decision: Judge Garland affirmed the portion of the District Court opinion that compelled the agency to release files, but reversed the portion allowing the withholding of other documents. With regard to the latter issue, Judge Garland ruled that the public interest in disclosure outweighed whatever privacy interests were at stake. He remanded the case back to the District Court for further consideration.

Quotes: None

Scorecard: FOIA petitioner wins.

Cause of Action v. Federal Trade Commn., 799 F.3d 1108 (2015)

Facts: Cause of Action, a nonprofit group, filed multiple Freedom of Information Act requests against the Federal Trade Commission, and sought a fee waiver—which is authorized for certain parties, depending on the nature of what the information sought, under the Act. FTC denied the fee waiver request with regard to all three requests. With regard to the first two, FTC argued that Cause of Action had failed to satisfy the requirements for fee waiver because it had not demonstrated that release of the requested information would lead to sufficient public dissemination. FTC argued that the request for fee waiver with regard to the third request was moot because FTC had already provided the requested information without charge. Cause of Action filed this action seeking a court order that it was entitled to these fee waivers. The District Court granted summary judgment in favor of FTC.

Decision: Judge Garland reversed the decision, rejecting FTC's contention that Cause of Action had failed to satisfy the elements for proving its entitlement to a fee waiver. In so holding, he ruled that the FOIA requester has a low bar to meet in establishing its capacity to publically disseminate the requested information—which is an essential requirement for fee waiver. He also emphasized that federal agencies are not entitled to deference on their interpretation of the Freedom of Information Act. Lastly, he ruled that Cause of Action's third request for fee waiver was not moot because the agency had not yet provided all of the requested documents.

Quotes: None

Scorecard: FOIA petitioner wins.

Davis v. Dept. of Justice, 460 F.3d 92 (2006)

Facts: A writer submitted a Freedom of Information Act request seeking recording from the Federal Bureau of Investigation. The recordings were made during the course of a major criminal investigation, and contained voices from individuals speaking who may or may not have still been alive at the time of the FOIA request. FBI denied the FOIA request, claiming several exemptions—all premised on assumptions that the individuals

in the recordings were dead at that time. The FOIA petitioner filed this action to compel disclosure.

Decision: Judge Garland ruled that FBI failed to take reasonable steps to determine whether the individuals in the records were or were not dead, and remanded the case for FBI to make those determinations.

Quotes: None

Scorecard: FOIA petitioner wins.

Edmonds v. Federal Bureau of Investigation, 417 F.3d 1319 (2005)

Facts: A former employee of the Federal Bureau of Investigation sought to obtain documents pertaining to FBI's decision to terminate her employment. When FBI failed to respond in a timely manner, she brought an action seeking to compel FBI to release responsive documents in an expedited manner. FBI then released many documents, but withheld disclosure of several hundred pages. Thereafter, the plaintiff sought attorney's fees. FBI argued that an attorney's fees award was inappropriate because she was not a prevailing party. FBI contended that she could not be considered a prevailing party because she only won on the order for expedited processing, which the agency maintained does not rise to the level of a material alteration of the legal relationship of the parties.

Decision: Judge Garland ruled that, in prevailing on the motion to expedite processing, the plaintiff was entitled to attorney's fees—emphasizing that a plaintiff may be considered a prevailing party for attorney's fees purposes if they achieve any benefit that they sought in the suit.

Quotes: None

Scorecard: FOIA petitioner wins.

Government personnel and contracting cases: Ruled six times in favor of the government –

Cone v. Caldera, 223 F.3d 789 (2000)

Facts: The Army evaluates the performance of its officers occasionally through a process that requires superior officers to rank their subordinates, with the assumption that in the aggregate the ratings will reflect a standard bell curve—with the vast majority of officers falling in the middle, and only the most outstanding officers ranking highly. In

this case an officer was assessed as being below average, notwithstanding the fact that his superior officer rated him as above average. Accordingly, he maintained that the Army's official records should be amended; however, the Army argued that it properly concluded his performance was below average because his superior officer had rated other officers higher than him—even though they were all given high marks.

Decision: Judge Garland held that the Army did not act arbitrarily nor capriciously in preparing Officer Cone's evaluation report. The decision emphasized that courts are to be especially deferential on questions concerning Army personnel records.

Quotes: None

Scorecard: Army wins.

Fort Sumter Tours, Inc. v. Babbitt, 202 F.3d 349 (2000)

***Facts*:** A private company entered into a contract with the National Park Service (NPS) to provide tours of Fort Sumter. Pursuant to the contract, the company was required to pay a fee to NPS. A dispute arose when NPS sought to raise that fee dramatically, which spurred litigation. During that action, NPS' counsel sent a letter, which the company claimed constituted an arbitrary decision against lowering the fees. NPS argued that the letter did not constitute a reviewable agency action because it was part of a settlement negotiation. Additionally, the parties disagreed as to whether NPS was authorized to raise the fees by contract, and whether the Administrative Procedures Act governed the agency's decisions on fees.

Decision: Judge Garland ruled that NPS' letter was not subject to judicial review because it was part of the agency's settlement negotiations. Garland also ruled that NPS acted within its authority under the contract.

Quotes: "An agency's refusal to reconsider a prior decision is only reviewable under limited circumstances."

Scorecard: National Park Service wins.

Fontana v. White, 334 F.3d 80 (2003)

Facts: Two lieutenant colonels in the U.S. Army brought this action seeking to compel the Army to accept their contention that they had fulfilled their twelve year obligation to the military. As background, both officers signed agreements committing themselves to military service in exchange for free undergraduate studies at West Point, and then signed a separate agreement in which they pledged additional years of service in exchange for free medical education and government subsidized medical training. After working several years in a military hospital, they sought to resign their posts; however,

the Army refused to accept their resignations—disagreeing with their calculations as to the time served. The District Court ruled that they had not fulfilled their obligations to the military.

Decision: Judge Garland affirmed, rejecting their arguments that their service began during their time in medical school, and further rejecting the suggestion that their separate service obligations (from undergrad and medical school) ran concurrently.

Quotes: None

Scorecard: Secretary of Army wins.

Mueller v. Winter, 485 F.3d 1191 (2007)

Facts: A naval officer brought this action alleging that the Navy violated the Privacy Act in failing to correct misstatements in his personal file and the Administrative Procedures Act. He specifically contested statements made during his evaluations.

Decision: Judge Garland ruled that the Privacy Act did not require the Navy to change statements of opinion, and ruled that the Navy's handling of his evaluations were reasonable—neither arbitrary nor capricious.

Quotes: None

Scorecard: Navy wins.

Musengo v. White, 286 F.3d 535 (2002)

Facts: In this action, an Army officer sought to challenge the Army's refusal to remove an officer evaluation report, which gave him poor marks. The Army refused to remove the evaluation from his record notwithstanding his contention that his reviewing officer improperly certified that he was abiding a requirement to rate his subjects on a standard bell curve, and notwithstanding his reviewing officer's statement that he intended to give a higher rating than actually given.

Decision: Judge Garland ruled that this case was controlled by another case he had decided previously, which had rejected the precise arguments offered by the petitioning officer in this case. Judge Garland held that the two cases could not be distinguished on the ground that they sought different relief because the pertinent regulations dictated the same result either way.

Quotes: None

Scorecard: Secretary of Army wins.

Rooney v. Secretary of Army, 405 F.3d 1029 (2005)

Facts: Richard Rooney brought an action seeking declaratory judgment that he has been discharged from the military, arguing that the Army could not revoke its discharge without a hearing. The District Court issued summary judgment for the Army.

Decision: Judge Garland ruled that Rooney's action was a petition for *habeas corpus* and that the federal court in the District of Columbia lacked jurisdiction to hear that claim because it should have been filed in the Western District of Texas.

Quotes: None

Scorecard: Army wins.

Other issues of administrative law: Ruled for the agency 58 times –

Advanced Communications Corp. v. FCC, 376 F.3d 1153 (2004)

Facts: The Federal Communications Commission awarded Advanced Communications Corp. (ACC) a license for direct satellite broadcast; however, FCC required the company to begin broadcasts within six years of receiving the permit. The company requested and was granted another year-extension; however, it was still not operational and requested an additional extension of four more years. FCC denied the second request for extension and ultimately cancelled the company's permit. FCC then awarded the contract to another company through a competitive auction process. ACC then appealed FCC's decision to award the license to this competitor; however, FCC refused to change its position and ultimately the ACC lost when challenging ACC's position in court. Seven years later, ACC initiated this action seeking to reopen the matter on the basis of new evidence since the company had obtained affidavits from former FCC commissioners who dissented to FCC's decision to award the license to ACC's competitor. The affidavits stated that some of the commissioners were motivated to award the license in light of the substantial revenue that would bring to the federal government—over $700 million.

Decision: Judge Garland ruled that these affidavits—even if considered new evidence—would not justify reopening a matter that has been closed for so long, especially since there was no basis for thinking it would likely have changed anything.

Quotes: None

Scorecard: FCC wins.

American Bus Assoc. v. Rogoff, 649 F.3d 734 (2011)

Facts: In this action, a trade association representing private bus companies sought a declaration that an act of Congress was unconstitutional in exempting the City of Seattle from an otherwise generally applicable statutory provision prohibiting cities from providing public bus services in communities in which private bus companies are willing or able to operate. They specifically argued that this exemption violated the Equal Protection Clause, and they succeeded on that claim in the District Court. They also succeeded in claiming a violation of the First Amendment right to petition because the challenged Act made it impossible for the association's members to petition the Federal Transit Administration for an order prohibiting Seattle from using federal subsidies to compete with private transportation companies.

Decision: Judge Garland reversed, finding no First Amendment violation because he concluded that it was within Congress' prerogative to change the law in a manner that would tie FTA's hands. Judge Garland went on to reject the associations' equal protection arguments because there was a rational basis for exempting Seattle from otherwise generally applicable regulation.

Quotes: "Private bus companies do not represent a suspect class, and their interest in providing service to baseball games without competition from subsidized public buses is not a fundamental interest."

Scorecard: Federal Transit Administration wins.

ASECTT v. FMCSA, 755 F.3d 946 (2014)

Facts: A trade association representing trucking companies initiated this lawsuit alleging that the Federal Motor Carrier Safety Administration had changed its policies in violation of the Administrative Procedures Act without allowing for notice-and-comment. The association maintained that the change in policy was made public with a PowerPoint presentation; however, the agency maintained that the PowerPoint was merely describing previously promulgated regulations. The District Court ruled that the claim was time-barred under the Hobbs Act.

Decision: Judge Garland affirmed, holding that the PowerPoint was not a change in policy.

Quotes: None

Scorecard: Federal Motor Carrier Safety Administration wins.

Blanca Telephone Co. v. FCC, 743 F.3d 860 (2014)

Facts: In 1988, Congress enacted the Hearing Aid Compatibility Act, which was intended to ensure reasonable access to telephone service by persons with impaired hearing. At the time, wireless telephones were not widely used; however, the Act provided that FCC was authorized to promulgate regulations to ensure hearing impaired individuals access to wireless telephones when the agency determines that such requirements would serve the public interest. Finally, in 2003, FCC promulgated regulations requiring digital wireless service providers to offer telephone handsets that were compatible with hearing aids. The new rule was to become effective in September of 2006; however, many small digital wireless providers were unable to comply by that time because compliant handsets were not widely available at that time. By the following January all but three carriers had come into compliance. FCC determined that it was appropriate to waive penalties against those companies that came into compliance in early 2007, but refused to waive penalties with regard to those three companies that it determined had not taken diligent steps to become compliant. In this action those three companies argued that it was unreasonable for FCC to deny them the same waiver as it gave to the other businesses that were not compliant at the time the regulation became effective. They also argued that FCC's determination as to what factors it would consider in granting waivers should have gone through notice and comment review under the Administrative Procedures Act.

Decision: Judge Garland ruled that FCC's decision to issue waivers to companies that it deemed to have taken steps to come into compliance was reasonable, and affirmed the reasonableness of FCC's judgment that the three petitioning companies had been insufficiently diligent. He also rejected the suggestion that FCC should have allowed for notice-and-comment in determining what factors it would consider for waiver.

Quotes: None

Scorecard: FCC wins.

***Boca Airport, Inc. v. Federal Aviation Admin.*, 389 F.3d 185 (2004)**

Facts: Boca Airport Inc. had a lease providing it exclusive rights to provide certain services at the Boca Raton airport. Ultimately, the Airport Authority amended its lease so as to allow a competitor to operate on an undeveloped parcel of land owned by the airport. Boca Airport Inc. then brought this action alleging that the Airport Authority had violated federal law in changing the lease—specifically, with regard to conditions on the receipt of federal grants. The FAA disagreed.

Decision: Judge Garland held that the petitioner had no federal right in maintaining an exclusive service contract with the Airport Authority and affirmed FAA's actions.

Quotes: “In sum, there was nothing arbitrary, capricious, or otherwise unlawful in the FAA’s conclusion that the Airport Authority’s lease … was in compliance with federal requirements…”

Scorecard: FAA wins.

***Braintree Electric Light Dept. v. FERC*, 667 F.3d 1284 (2012)**

Facts: Municipally owned utilities in Massachusetts petitioned for review of orders from the Federal Energy Regulatory Commission, in which the agency had denied their claims that they were being unjustly charged. FERC’s position was that the claims were barred by a previously approved settlement agreement.

Decision: Judge Garland ruled that FERC was entitled to deference in interpreting the settlement agreement and affirmed the agency’s judgment under an arbitrary and capricious standard.

Quotes: None

Scorecard: FERC wins.

***Cassell. v. FCC*, 154 F.3d 478 (1998)**

Facts: The Communications Act of 1934 authorizes the Federal Communications Commission to issue licenses for the operation of radio stations in the public interest. Since there are only a limited number of available licenses—based on the radio spectrum—the FCC developed a rule that gave applicants preference for obtaining a license if they produced evidence demonstrating that an existing license holder was out of compliance with conditions imposed on the license. In the past, FCC had revoked a license because the license holder built its radio transmitter five miles away from the GPS coordinates listed on its permit application. In light of that precedent, Kelly Communications and other businesses sought to obtain licenses from existing license holders by coming to the FCC with evidence that they too had built their transmitters away from the precise GPS coordinates listed in their permit applications; however, FCC denied their permit applications because it adopted a rule that held existing license holders to be substantially in compliance so long as their transmitters were constructed within 1.5 miles of where the GPS coordinates listed in their applications. The new applicants argued that this rule was arbitrary, did not comport with existing FCC precedent and that it was unfair to apply that rule retroactively to deny their permit applications. The applicants then sought relief in court, while the existing license holders intervened to defend FCC’s judgment.

Decision: Judge Garland ruled that FCC’s new rule was reasonable and rationally related to the purposes of the Act. In so doing, he gave deference to the agency’s

interpretation of its own precedent and regulations. He also ruled that retroactive application of this standard was fair in this case and affirmed FCC's judgment in full.

Quotes: None

Scorecard: FCC and intervening license holders win.

CF Industries, Inc. v. Surface Transp. Bd., 255 F.3d 816 (2001)

Facts: In 1996, Koch Pipeline Company, L.P. raised shipping rates on one of its pipelines. Thereafter, pipeline customers challenged the rate increase before the Surface Transportation Board, which determined that the new rates were unreasonable. Koch then petitioned for review of that decision, while the pipeline customers maintained that the Board should have lowered shipping rates even more than it did.

Decision: Judge Garland ruled that the Board had reasonably construed its own guidance and had reasonably concluded that the proposed rate increase was unacceptable. The opinion also affirmed the Board's decision not to lower rates any further.

Quotes: None

Scorecard: Surface Transportation Board wins.

Charter Communications, Inc. v. FCC, 460 F.3d 31 (2006)

Facts: Under the 1996 amendments to the Communications Act, FCC promulgated a regulation, which would forbid cable companies from utilizing cable boxes that used descrambling devises and other non-security features in a single device. FCC continuously pushed back the timeline for requiring compliance. Under the George W. Bush administration, FCC extended the time period for compliance until 2007, so as to give the cable industry time to explore the possibility of new digital features that would obviate the need for descrambling devices that have historically been used to ensure that subscribers can access only those channels in their subscription packages. The cable industry ultimately brought this suit alleging that the regulation violated the plain terms of the Communications Act, and was arbitrary and capricious.

Decision: Judge Garland ruled that the cable industry plaintiffs could not advance their statutory arguments because they were not raised initially before the Commission. He also ruled that FCC's regulation was reasonable, and the implementation date could be delayed without invalidating the rule.

Quotes: None

Scorecard: FCC wins.

Crawford v. FCC, 417 F.3d 1289 (2005)

Facts: The Federal Communications Commission allocates commercial FM radio frequencies upon receiving application from a party seeking to use a specific frequency. FCC then issues a notice of proposed rulemaking, and invites notice and comment from all interested parties. Another party may file an application proposing a different allocation of FM frequencies; however, FCC will cut-off conflicting applications if they are not made within the time for notice and comment. In this case, an applicant filed a petition, but didn't realize that he was to be cut-off by virtue of a complicated proposal that another applicant had previously submitted to FCC. He then sought to set aside FCC's final rule on the ground that he did not have adequate notice that his proposal would be cut-off.

Decision: Judge Garland ruled that some of the petitioner's claims were mooted by intervening events, and he rejected the petitioner's other claims—holding that the petitioner had adequate notice of FCC's rules and that FCC had adequately explained its decision.

Quotes: None

Scorecard: FCC wins.

Contemporary Media, Inc. v. FCC, 214 F.3d 187 (2000)

Facts: The Federal Communications Commission revoked three radio station licenses from businesses owned in whole by an individual who was convicted of a felony after the stations misrepresented to FCC the owner's ongoing involvement in their operations. FCC regulations provide that the agency will consider any conviction as relevant to the license holder's propensity to abide by the law, and therefore, reasoned that the license holders violated FCC rules in misrepresenting the owner's involvement. The license holders argued that these regulations should not apply because the owner's conviction had nothing to do with commercial conduct or matters of concern to FCC. They argued that, in any event, FCC should not have gone so far as to revoke their license and invoked the Eighth Amendment's guarantee against excessive fines.

Decision: Judge Garland ruled that the mere fact that the license holders made a misrepresentation to FCC should justify the agency's decision to revoke their licenses—and that revocation did not violate the Constitution. Garland emphasized that FCC's policy was reasonable and was reasonably applied in this case.

Quotes: None

Scorecard: FCC wins.

Devia v. Nuclear Regulatory Commission, 492 F.3d 421 (2007)

Facts: An Indian tribe challenged a decision of the Nuclear Regulatory Commission to grant a license permitting construction and operation of a spent nuclear fuel storage facility in Utah, and on land belonging to the Skull Valley Band of Goshute Indians. The Commission argued that the suit was not ripe.

Decision: Judge Garland ruled that the suit was unripe because the facility may never be built in light of the fact that the Department of Interior's Bureau of Land Management and Bureau of Indian Affairs had denied applications for rights-of-way leases, which would be necessary to carry-out the project.

Quotes: None

Scorecard: Nuclear Regulatory Commission wins.

Dickson v. National Transp. Safety Bd., 639 F.3d 539 (2011)

Facts: The Federal Aviation Administration denied an application for a first-class airman medical certificate for a pilot because he had a history of "disturbance of consciousness without satisfactory medical explanation" or "other seizure disorder, disturbance of consciousness, or neurologic condition." The pilot sought judicial review.

Decision: Judge Garland ruled that FAA's decision was justified by substantial evidence in the record.

Quotes: None

Scorecard: FAA wins.

Dynaquest Corp. v. U.S. Postal Service, 242 F.3d 1070 (2001)

Facts: In this action, an Ohio corporation sought an order to compel the U.S. Postal Service to release funds that it had collected from the company's customers, which were held in escrow as part of an action initiated by the U.S. Postal Service alleging that the company had induced consumers to send it their assets in a fraudulent scheme. The District Court affirmed a decision by an Administrative Law Judge denying the business' petition.

Decision: Judge Garland affirmed, holding that the issue had already been decided in another judicial proceeding and that the company's claims were thus barred by the doctrine of res judicata.

Quotes: None

Scorecard: U.S. Postal Service wins.

Federal Elections Commission v. Craig for U.S. Senate, 2016 WL 850823 (2016)

Facts: A United States Senator was arrested for disorderly conduct in the Minneapolis Airport. When charged, he entered a guilty plea; however, he thereafter sought to withdraw that guilty plea and spent thousands of dollars in the process. This resulted in a complaint to the Federal Election Commission, which concluded that the Senator had illegally converted campaign money for private use in seeking to withdraw the guilty plea. The FEC required the Senator to disgorge $197,535 to the U.S. Treasury, and ordered that he pay a civil penalty of $45,000.

Decision: Judge Garland deferred to FEC's interpretation of the Federal Election Campaign Act and concluded that FEC's orders were reasonable.

Quotes: None

Scorecard: FEC wins.

Financial Planning Ass'n v. SEC, 482 F.3d 481 (2007) (dissenting)

Facts: The Financial Planning Association challenged an SEC regulation exempting broker-dealers from the Investment Advisors Act, which was enacted by Congress "to provide for the registration and regulation of investment companies and investment advisers." This exempted broker-dealers from rules imposed on "investment advisors," including requirements to maintain records, limit the types of contracts they may enter, and forbidding certain transactions deemed deceptive. The Act allows for certain defined exceptions.

Decision: The majority ruled that SEC exceeded its authority in interpreting the exemption broadly. Whereas, the majority concluded that SEC's interpretation contravened the plain meaning of the Act, Garland argued in dissent that the statutory text was ambiguous. For this reason, he would have upheld the regulation as reasonable.

Quotes: None

Scorecard: Garland would have ruled for SEC.

First American Discount Corp. v. Commodity Futures Trading Com'n, 222 F.3d 1008 (2000)

Facts: Futures commission merchant petitioned for review of order of the Commodity Futures Trading Commission (CFTC) holding it jointly and severally liable for acts of a commodities broker whose liabilities it had agreed to guarantee.

Decision: Garland denied petition, holding that CFTC regulation pursuant to which the petitioner entered into a guarantee agreement was valid, CFTC's interpretation of the regulation was not plainly erroneous or inconsistent with regulation, and the petitioner was not harmed by lack of notice regarding the change to the proposed regulation.

Quotes: "The law does not require that every alteration in a proposed rule be reissued for notice and comment. If that were the case, an agency could 'learn from the comments on its proposals only at the peril of' subjecting itself to rulemaking without end."

Scorecard: CFTC wins.

Garvey v. National Transp. Safety Bd., 190 F.3d 571 (1999)

Facts: The Federal Aviation Administration brought an enforcement action against a pilot for allegedly violating FAA regulations, which forbid pilots from disobeying orders from air traffic control. In this case, the pilot maintained that he should not have been penalized because he simply misheard the directive; however, FAA insisted, in proceedings before the National Transportation Safety Board, that its regulations require pilots to accurately hear and comply with directive from air traffic control. The Board agreed with the pilot, and chose not to differ to FAA's interpretation because it was not previously set forth in a written rule or guidance—but advanced for the first time in the course of litigation.

Decision: Judge Garland held that FAA was entitled to deference on the interpretation of its regulation, regardless of the fact that it had never previously advanced this interpretation.

Quotes: None

Scorecard: FAA wins.

Global Crossing Telecommunications, Inc. v. FCC, 259 F.3d 740 (2001)

Facts: Congress enacted amendments to the Communications Act in an effort to wind-down subsidies to payphone companies. FCC promulgated regulations under the new statute requiring interexchange carriers—*i.e.* telecommunication companies carrying the calls originating on payphones—to compensate the payphone operators once they phase-out subsidies. The regulations required interexchange carriers to make payments to payphone operators once they requested payment and affirmed that they had phased

out subsidies; however, in this case an interexchange carrier withheld payment on the ground that it was not convinced that the payphone operator had fully eliminated subsidies. FCC determined that in withholding payments, the interexchange carrier had violated the regulation, and that if it wished to dispute whether the payphone operator was truly entitled to compensation it should have filed a complaint against the operator.

Decision: Judge Garland ruled that the agency had reasonably construed the statute as requiring interexchange carriers to make payments to payphone operators upon their certification of compliance with stipulated conditions. Garland ruled that FCC's determination must be affirmed also because it was consistent with previous FCC precedent. Finally, Garland rejected the interchange carrier's contention that it should have been allowed to prove the payphone operator had yet to phase-out subsidies—agreeing with FCC's conclusion that such a claim should be brought, if ever, in a separate proceeding.

Quotes: None

Scorecard: FCC wins.

Graham v. SEC, 222 F.3d 994 (2000)

Facts: Employees of an independent discount brokerage firm were sanctioned by the Securities and Exchange Commission for aiding and abetting a customer in committing violations of securities law because they facilitated his trades. They argued that they could not be held culpable because they did not have the requisite intent, and also maintained that the agency was estopped from bringing sanctions because it had investigated the issue previously and had taken no action.

Decision: Judge Garland ruled that SEC's determination was supported by substantial evidence demonstrating that the firm had aided and abetted with at least reckless abandonment—which would satisfy the scienter element of that charge. Garland rejected the estopple defense outright because he concluded that the firm had misstated the relevant facts.

Quotes: None

Scorecard: SEC wins.

Hi-Tech Furnace Systems, Inc. v. FCC, 224 F.3d 781 (2000)

Facts: A company filed a complaint challenging a decision by their long distance telephone service provider to change its terms of service. FCC ruled in favor of the telephone company, and the complainant appealed.

Decision: Judge Garland ruled that FCC's decision—although reviewable—could not be overturned. He held that FCC did not abuse its discretion and that the telephone company's change in rates was neither unjust nor unreasonable.

Quotes: None

Scorecard: FCC and telephone company win.

Holistic Candlers and Consumers Assoc. v. FDA, 664 F.3d 940 (2012)

Facts: A manufacturer and distributors of candles used to remove earwax received a letter from the Food and Drug Administration warning that the agency considered their product to be adulterated and misbranded medical devices in violation of federal law. Implicit in the warning letter was a requirement to take immediate corrective action in order to avoid the threat of an enforcement action. They sought judicial review to obtain a determination that their product was legal.

Decision: Judge Garland ruled that the businesses could not challenge FDA in court on the theory that the warning letters did not constitute "final agency action."

Quotes: None

Scorecard: FDA wins.

Horning v. Securities and Exchange Commission, 570 F.3d 337 (2009)

Facts: The former president and director of a securities and investment firm was suspended for 12 months from associating with any broker or dealer, and was permanently barred from associating with any broker or dealer in a supervisory capacity after SEC determined that he violated SEC regulations in failing to provide reasonable supervision over subordinates who violated the law.

Decision: Judge Garland ruled that substantial evidence supported SEC's findings and imposed penalties. He ruled that the agency was not required to tailor its penalties as the petitioner urged. Further, Garland held that SEC did not violate the petitioner's due process rights in changing its requested sanctions it was seeking during proceedings before the Administrative Law Judge because the petitioner was not materially prejudiced by that change in position. Finally, Judge Garland rejected a void for vagueness argument, which the petitioner raised in challenge to the statute under which he had been penalized.

Quotes: None

Scorecard: SEC wins.

Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, 796 F.3d 111 (2015)

Facts: Intercollegiate Broadcasting System (IBS) appeals a determination by Copyright Royalty Board (CRB) of $500 per station or per channel minimum fee for webcasting. Three years earlier D.C. Circuit vacated and remanded the same fee because CRB was unconstitutionally appointed. Librarian of Congress appointed a new Board, which reviewed the previous rate hearing *de novo* and upheld the same $500 fee. IBS argued CRB again violated the Appointments Clause because its decision was tainted by previous, unconstitutionally-appointed CRB.

Decision: Review by constitutionally-appointed CRB was constitutionally valid and not a violation of the Appointments Clause.

Quotes: None

Scorecard: Defers to CRB.

In re Aiken County, 725 F.3d 255 (2013)

Facts: In this action, petitioners sought a writ of mandamus to compel the Nuclear Regulatory Commission (NRC) to comply with the Nuclear Waste Policy Act, and specifically to resume processing for a pending license application for construction of nuclear waste depository. The majority ruled that the mandamus should be granted.

Decision: Judge Garland dissented, arguing that the mandamus should not be dissented because it would be useless to order the NRC to complete review of the license application because of budgetary constraints that the agency was struggling with.

Quotes: "Even if a petitioner can show that [he or she] has a 'clear and indisputable' right to the writ, issuing the writ remains 'a matter vested in the discretion of the court.'"

Scorecard: Would have sided with the agency.

In re Core Communications, Inc., 455 F.3d 267 (2006)

Facts: The Federal Communications Commission promulgated new rules governing intercarrier compensation for certain internet providers. Some of the providers requested a forbearance. FCC granted the forbearance with regard to two of the three rules, but denied with regard to the third. The petitioning company then sought a court order to force FCC to grant the third forbearance. The District Court consolidated this case with another in which a competing internet provider challenged FCC's decision to grant the first two forbearances.

Decision: Judge Garland ruled that the petitioning company could not advance arguments that it failed to raise in a petition for reconsideration before the agency. The opinion went on to hold that FCC had acted reasonably in responding to the petition for forbearance—siding with the agency on all counts, and rejecting the positions of the opposing businesses petitioners.

Quotes: None

Scorecard: FCC wins.

In re Zdravkovich, 634 F.3d 574 (2011)

Facts: An attorney was disbarred by Maryland state court for intentional misappropriation of client trust funds. The Court of Appeals issued an order directing the attorney to show cause for why imposition of identical discipline would be unwarranted.

Decision: Garland found no reason to deviate from the Maryland Court of Appeals ruling and ordered respondent disbarred.

Quotes: None

Scorecard: Defendant attorney loss.

JMM Corp. v. DC, 378 F.3d 1117 (2004)

Facts: The Supreme Court's decision in *Younger v. Harris* held that, except in extraordinary circumstances, a federal court should not enjoin a pending state proceeding that is judicial in nature and that involves important state interests. In this case, a business operating in the District of Columbia sought to challenge the constitutionality of the City's zoning regulations; however, the District Court decided to apply the *Younger* abstention doctrine because the City was in the process of administering an action to enforce the ordinance. On appeal, the business argued that the *Younger* abstention does not apply with regard to the District of Columbia because it is a federal district—not a state.

Decision: Judge Garland affirmed the judgment of the District Court—ruling that the *Younger* abstention doctrine applies to prohibit federal courts from hearing cases that might interfere with an enforcement action being carried out by the District of Columbia.

Quotes: None

Scorecard: District of Columbia wins.

Katz v. Securities and Exchange Commn., 647 F.3d 1156 (2011)

Facts: A representative of Wachovia Securities, Inc. was placed on administrative leave after her customers complained that money had been transferred from their account without their authorization. Ultimately, this resulted in an investigation in which the New York Securities Exchange determined that the employee had misappropriated funds, made inaccurate financial records, and made unsuitable investment recommendations. The Securities and Exchange Commission affirmed those findings, and the employee petitioned for judicial relief.

Decision: Judge Garland held that SEC's findings were all supported by substantial evidence.

Quotes: None

Scorecard: SEC wins.

Kappus v. Commissioner of Internal Revenue, 337 F.3d 1053 (2003)

Facts: United States citizens living in Canada brought this action challenging an Internal Revenue Code section limiting their foreign tax credit to 90% of their alternative minimum tax liability. They argued that this rule conflicted with the U.S.-Canada Tax Treaty.

Decision: Judge Garland rejected the taxpayer's argument because the statue imposing the foreign tax credit limitation was enacted after the U.S.-Canada Tax Treaty.

Quotes: None

Scorecard: IRS wins.

Klamath Water Users Assoc. v. FERC, 534 F.3d 735 (2008)

Facts: A coalition of water irrigation districts and agricultural businesses brought this action challenging an order from the Federal Energy Regulatory Commission approving renewal of an energy contract for power generated at the Link River Dam; they specifically sought to challenge FERC's decision to approve renewal without including a term that had long previously been included requiring for low-cost electric power for irrigation uses. But both the California and Oregon Public Utility Commission(s) had already decided that they have ultimate authority over the rates charged for energy produced at that dam. Accordingly, FERC maintained that they lacked standing to challenge its approval because the court was powerless to provide any relief, since both California and Oregon had decided not to require that condition for this renewal.

Decision: Judge Garland held that the coalition lacked standing because it could not redress their injuries.

Quotes: None

Scorecard: FERC wins.

Kleiman & Hochberg, Inc. v. USDA, 497 F.3d 681 (2007)

Facts: The USDA revoked the company's license under the Perishable Agricultural Commodities Act after an officer was found to have bribed an USDA official. The company argued the officer was acting on his own and that it was improper to treat his actions as those of the company, and that in any event a lesser penalty would have been more proper.

Decision: Judge Garland ruled that USDA was fully within its prerogative to revoke the company's permit for bribery. He emphasized that while he thought the penalty was harsh, it was not the place of the court to second guess the reasonable judgments of agency officials.

Quotes: "[W]hether or not we would have levied the same penalty, we cannot say that the Officer's decision … is arbitrary or unreasonable."

Scorecard: USDA wins.

Lomak Petroleum, Inc. v. F.E.R.C., 206 F.3d 1193 (2000)

Facts: Columbia Gas Transmission Corporation requested authorization from the Federal Energy Regulatory Commission (FERC) to sell certain facilities, and the buyer asked FERC to disclaim jurisdiction over the facilities following conveyance, on the ground that they would then be exempt "gathering" facilities. After FERC acceded to both requests, a competing gas producer that transports gas on the facilities petitioned for review.

Decision: Garland denied petition, holding that classification of facility as an exempt gathering facility was not arbitrary nor capricious, classification did not conflict with a settlement agreement approved by FERC in a separate proceeding, and the gas producer was not deprived of due process by failure of FERC to hold a technical conference.

Quotes: None

Scorecard: Agency wins.

Louisiana Energy & Power Auth. v. FERC, 141 F.3d 364 (1998)

Facts: An energy provider sought to challenge a Federal Energy Regulatory Commission order approving a competitor's market-based rates. FERC and the

competitor argued that Louisiana Energy & Power Authority lacked standing, whereas the petitioner maintained that it had standing because it would be placed at a competitive disadvantage by FERC's order. The petitioner also argued that FERC should not have approved the competitor's market-based rates because it would allow for predatory pricing and that FERC should have held an evidentiary hearing to be sure that market-based rates were appropriate.

Decision: Judge Garland ruled that the petitioning energy company had standing to challenge FERC's order approving its competitor's rates, but rejected the petitioner's argument on the merits—ruling that the agency acted reasonably in concluding that market-based rates were appropriate and that the agency was not required to conduct an evidentiary hearing.

Quotes: None

Scorecard: FERC and a competitor energy company win.

Minnesota Christian Broadcasters, Inc. v. FCC, 411 F.3d 283 (2005)

Facts: The Federal Communications Commission is charged with issuing licenses for radio broadcast stations. Where the Commission receives multiple applications to broadcast on the same radio frequency it must choose between the applicants—and it does so through a competitive bidding process. But in order to encourage new entrants into the market—and a diversity of voices on the air—FCC regulations allow for the grant of bidding credits for "new entrants," which give qualifying parties an advantage in the bidding process. In this case, FCC determined that Minnesota Christian Broadcasters, Inc. was not entitled to a new entrant credit because it operated other radio stations; however, the company maintained that it should qualify because those other stations are noncommercial educational stations.

Decision: Judge Garland ruled that FCC was entitled to deference on the proper interpretation of its own regulation and concluded FCC's interpretation was reasonable.

Quotes: None

Scorecard: FCC wins.

Mittleman v. Postal Regulatory Commn., 757 F.3d 300 (2014)

Facts: The U.S. Postal Service decided to close three post offices; however, citizens objected to the closures in their local communities. They initiated a lawsuit. In the interim, the Postal Service decided to keep one of those local post offices open—albeit with reduced hours of operation.

Decision: Judge Garland ruled that in deciding to keep open one of the three post offices, the Postal Service had mooted one of the claims presented in this action. He went on to rule that the Administrative Procedures Act expressly forecloses judicial review of a decision to close a post office.

Quotes: None

Scorecard: U.S. Postal Service wins.

NAM v. Taylor, 582 F.3d 1 (2009)

Facts: A trade association brought challenge to the Honest Leadership and Open Government Act of 2007, arguing that it violated the First Amendment in requiring registered lobbyists to disclose the identity of organizations that made monetary contributions, and which actively participated in the planning, supervision or control of the lobbyists' activities. The association argued that the restrictions were unconstitutionally vague.

Decision: Judge Garland ruled that, even applying heightened scrutiny, he would uphold the challenged provisions as sufficiently clear.

Quotes: "[A]lthough the statute may not be a paragon of clarity, it is not so vague as to violate the Constitution, even applying the heightened standard applicable to regulation of speech."

Scorecard: The federal government wins.

PG&E Co. v. FERC, 533 F.3d 820 (2008)

Facts: An energy company sought review of Federal Energy Regulatory Commission order requiring the California Independent System Operator—rather than participating transmission owners like PG&E—to conduct interconnection studies when a new electric generator seeks to interconnect with the grid.

Decision: Judge Garland ruled that this was an impermissible collateral attack on a prior FERC order, which should have been brought within 60 days. Judge Garland rejected PG&E's argument that the prior order failed to provide adequate notice of the contested conditions.

Quotes: None

Scorecard: FERC wins.

Phillips v. Fulwood, 616 F.3d 577 (2010)

Facts: A District of Columbia inmate brought civil rights action against United States Parole Commission (USPC) and the commissioner, alleging application of parole guidelines enacted after original conviction violated the ex post facto clause of the Constitution. After granting defendants' motion to dismiss, the District Court denied inmate's motion to reconsider.

Decision: Garland affirmed the District Court decision, holding that appellee's claim that retroactive application of parole guidelines for a prison release date was moot, and that upward departure from sentencing guidelines did not violate ex post facto clause.

Quotes: None

Scorecard: USPC wins.

Power v. Barnhart, 292 F.3d 781 (2002)

Facts: Federal law provides that an attorney who assists a person with a claim before the Social Security Administration is entitled to attorney's fees if they are successful in obtaining benefits for that individual. SSA regulations allow two ways for an attorney's fees to be set. The SSA will enforce a fee agreement under specified conditions. Alternatively, an attorney can petition SSA to determine the amount of the fee—which requires SSA to consider the amount of time expended, the level of skill required, the complexity of the case and other relevant factors. In this case, SSA told an attorney that he could not enforce a fee agreement because more than one attorney had worked on the case; accordingly, SSA directed him to petition SSA for a determination of what his fee should be. The attorney chose not to file a petition with SSA and instead brought this action in court.

Decision: Judge Garland ruled that the attorney was not entitled to an order forcing SSA to approve his fee agreement because he did not attempt to collect the fee through SSA's petitioning process that was readily available to him.

Quotes: None

Scorecard: SSA wins.

Ranger Cellular v. FCC, 348 F.3d 1044 (2003)

Facts: The Balanced Budget Act of 1997 included provisions amending the Communication Act, which required the Federal Communications Commission to award licenses through a competitive bidding process—rather than through random lotteries. In response, FCC dismissed all pending applications for licenses without prejudice and required all parties seeking licenses to submit bids in a competitive auction. Ranger Cellular objected to FCC's decision to open the auction up to all parties—including

parties that had not previously submitted applications for the license in question. The company maintained that the bidding process should have only been open to companies that had previously filed applications prior to July 1, 1997; however, FCC disagreed and proceeded with open auctions. The company chose not to participate in the auction and instead filed this action seeking to invalidate the licenses that FCC issued on the ground that the agency had violated provisions of the Balanced Budget Act. The company also sought a refund of its application fees, which had previously paid prior to the enactment of the Balanced Budget Act.

Decision: Judge Garland ruled that the company lacked standing to challenge FCC's decision to award licenses to other parties, and ruled that the agency was entitled to deference in its judgment that the company was not entitled to a refund under its regulations.

Quotes: None

Scorecard: FCC wins.

Rempfer v. Sharfstein, 583 F.3d 860 (2009)

Facts: In this action, several service members brought suit alleging that the Food and Drug Administration should not have approved a vaccine for anthrax on the ground that FDA had not adequately studied the vaccine's effectiveness when anthrax is inhaled and because FDA had relied on a study that evaluated the vaccine's effectiveness with regard to an earlier generation of anthrax. Additionally, they sought to enjoin the Department of Defense from requiring service members from getting this vaccine.

Decision: Judge Garland ruled that the service members lacked standing to challenge the Department of Defense's policy because there was no evidence in the record that any of the plaintiffs had received the vaccine or that they were imminently going to be forced to do so. Additionally, he ruled that FDA's approval must be affirmed because the agency is entitled to great deference on questions of science since the agency has special expertise on such issues.

Quotes: None

Scorecard: FDA and Department of Defense win.

Schoenbohm v. FCC, 204 F.3d 243 (2000)

Facts: An amateur radio station operator brought this action seeking to overturn a decision by the Federal Communications Commission to deny renewal of his license and challenging the agency's decision to deny reconsideration. FCC argued that it had no obligation to reconsider its licensing decision, and maintained that the denial was

justified on the ground that the applicant had misrepresented the nature of a past criminal conviction.

Decision: Judge Garland ruled that FCC's determination that the past criminal record was relevant and reasonable and that the agency was reasonable in determining that the applicant misrepresented the conviction. Garland concluded that the Court lacked jurisdiction to review FCC's decision to deny reconsideration.

Quotes: None

Scorecard: FCC wins.

SEC v. Bilzerian, 378 F.3d 1100 (2004)

Facts: The Securities and Exchange Commission initiated an enforcement proceeding against Bilzerian, and ordered it to disgorge over $33 million in profits made in unlawful transactions. Thereafter Bilzerian was held in contempt for nonpayment and the court assigned a receiver to pursue claims against any party holding assets for Bilzerian. Under that authority, the appointed receiver initiated an action to collect on a debt owed by a party that had taken a loan from Bilzerian. The debtor argued that the federal District Court in the District of Columbia lacked personal jurisdiction because the debtor was in Florida. The debtor also disputed whether it was obliged to repay the debt.

Decision: Judge Garland ruled that the Court had jurisdiction over the debtor and that under Florida law the debtor was required to repay its loan from Bilzerian.

Quotes: None

Scorecard: SEC wins.

Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313 (1998)

Facts: Serono Laboratories, Inc. developed a pioneer drug to address infertility problems, which the Food and Drug Administration approved in 1969. Decades later, in 1990, a competitor filed an application seeking FDA's approval for a generic drug. Serono opposed that application and ultimately filed this action to prevent FDA from giving its final approval. Serono argued among other things that FDA unreasonably interpreted governing statutes and should have denied the application because the generic drug's inactive ingredients differed from those of the pioneer drug, and that FDA should not have certified that the inactive ingredients were safe. The District Court granted Serono's motion for a preliminary injunction, and FDA appealed.

Decision: Judge Garland reversed the decision, holding that Serono had not demonstrated a likelihood of success on the merits. In so concluding, he emphasized

that FDA was entitled to deference in its interpretation of the governing statute, and that the agency properly applied regulations concerning inactive ingredients in effect at the time the application was submitted—as opposed to newly promulgated regulations that were finalized after the application was submitted. Further, Judge Garland ruled that FDA acted reasonably in concluding that the inactive ingredient in the generic drug was safe, and in relying on animal studies.

Quotes: None

Scorecard: FDA wins.

***Sloan v. U.S. Dept. of Housing and Urban Development*, 236 F.3d 756 (2001)**

Facts: A firm contracting for work demolishing the interior of publically-owned housing projects was investigated after another contractor alleged that the company had failed to comply with lead-based paint abatement requirements. Ultimately, the Department of Housing and Urban Development suspended the business from working on HUD-related projects. The company then brought suit against HUD under the Federal Tort Claims Act; however, HUD argued that it was immune from suit under the Act because the Act expressly denies the court jurisdiction to hear claims concerning an agency's exercise of discretionary authority.

Decision: Judge Garland ruled that the Court lacked jurisdiction to hear the business' claim because it sought to challenge a discretionary decision.

Quotes: None

Scorecard: HUD wins.

***Skinner v. U.S. Dept. of Justice and Bureau of* Prisons, 584 F.3d 1093 (2009)**

Facts: Prison officials found contraband in a prisoner's locker, which prompted the prison to revoke the prisoner's visitor's privilege and to take other corrective action. The prisoner maintained that this was inappropriate—disputing whether in fact the substance found in his locker was cocaine. Ultimately, he brought a lawsuit alleging violations of the Privacy Act, which requires agencies to keep proper records.

Decision: Judge Garland affirmed dismissal of his claims, and ruled that he could not begin to pursue monetary damages without first bringing a *habeas corpus* action.

Quotes: None

Scorecard: Department of Justice and Bureau of Prison win.

***Taylor v. Huerta*, 723 F.3d 210 (2013)**

Facts: The Federal Aviation Administration revoked Huerta's pilot and medical certificates because he falsely stated that he had never been arrested for driving while intoxicated. When challenged, that decision was upheld by the National Transportation Safety Board (NTSB); however, the pilot petitioned for judicial review—arguing that these revocations were arbitrary and capricious, and violated his due process rights.

Decision: Judge Garland affirmed, holding that the NTSB acted properly in rejecting the pilot's testimony that he had misstated his record because he misunderstood the question. Additionally, he dismissed the pilot's due process claim—ruling that he had been afforded due process in that he was afforded a full opportunity to respond to the charge that he had made a false certification.

Quotes: None

Scorecard: FAA wins.

Telecom USA, Inc. v. United States, 192 F.3d 1068 (1999)

Facts: A business filed this action seeking a refund from the Internal Revenue Service. The company claimed it was entitled to credits for depreciation of assets; however, the IRS argued that it denied the refund because the taxpayer's basis in depreciable property was reduced by the amount of investment when the tax credit was first available. The District Court ruled for IRS.

Decision: Judge Garland affirmed.

Quotes: None

Scorecard: IRS wins.

Tourus Records, Inc. v. DEA, 259 F.3d 731 (2001)

Facts: In October 1999, officers of the Richmond Hill, Georgia police department pulled over a van for swerving, and ultimately searched the vehicle to discover a large amount of cash. The cash was confiscated and thereafter transferred to the federal Drug Enforcement Agency. Thereafter, Tourus Records, Inc. brought an action challenging the asset forfeiture—claiming that the money was the company's property and that it was unlawfully taken. Because at the time, federal law required anyone contesting an asset forfeiture to pay a $5,000 bond in order to proceed with their challenge, the company submitted a request for a waiver of that requirement on the ground that it was indigent. In support of that request the company submitted that it had no income; however, DEA perfunctorily dismissed the request for a waiver simply by concluding that the company was ineligible. On appeal, the company argued that the denial of its

request for a waiver was arbitrary because DEA did not adequately set out a basis for its denial.

Decision: Judge Garland ruled that DEA's initial denial failed to properly spell out the reasons for which the waiver was denied; however, he concluded that a subsequent DEA memorandum sufficiently explained the basis for the denial.

Quotes: None

Scorecard: Drug Enforcement Agency wins.

Transportation Intelligence, Inc. v. FCC, 336 F.3d 1058 (2003)

Facts: Manufacturers of highway advisory radio systems must attain approval for their products from the Federal Communications Commission. In this case, one licensed manufacturer filed a complaint against a manufacturer for allegedly changing the design of its system after having obtained FCC approval—which would amount to a violation of FCC regulations. The company initially asked FCC to commence an enforcement action, but also asked that FCC revoke its competitor's certification; however, FCC chose not to revoke certification for the competitor without allowing an evidentiary hearing on the matter. The manufacturer then brought this action alleging that FCC's decision, to deny its challenge without a hearing, was arbitrary and capricious.

Decision: Judge Garland ruled that the Court had jurisdiction to consider the manufacturer's challenge to FCC's decision not to revoke its competitor's certification, but ruled that FCC's decision was reasonable because the complainant offered no evidence giving rise to a material issue that would have warranted revocation.

Quotes: None

Scorecard: FCC wins.

Trudeau v. Federal Trade Commission, 456 F.3d 178 (2006)

Facts: An infomercial producer of obesity and hair loss challenged the FTC press release that reported the settlement of a case the agency brought for misleading advertising. The plaintiff alleged the release was a violation of his First Amendment rights and that the agency exceeded its statutory authority in issuing such releases. The District Court dismissed for failure to state a claim.

Decision: Judge Garland affirmed dismissal of the complaint finding that the agency could be sued for such releases, but dismissing this suit because the release did not contain false information or mischaracterize the settlement with the agency.

Quotes: None

Scorecard: Agency wins.

Trunkline LNG Co. v. FERC, 194 F.3d 68 (1999)

Facts: An energy company obtained authorization from the Federal Energy Regulatory Commission to operate a liquefied natural gas processing plant in 1977; however, the company later stopped operations in the mid-1980s because of the high cost of obtaining liquefied natural gas. In 1996, the company re-applied for FERC authorization to process liquefied natural gas, proposing to charge customers a rate the company thought appropriate, which would have included charges enough to recoup depreciation losses suffered by the company during its earlier operations in the 1980s. FCC gave approval on two conditions: (1) the company could not include charges to recoup past losses, and (2) the company was required to perform a study to justify the rates it was charging. The company argued that these conditions were unreasonable, and appears to have argued more strenuously against the second—on the ground that FERC has no authority to force an energy company to periodically refile its rates.

Decision: Judge Garland ruled that FCC had essentially unfettered discretion to impose these conditions—and concluded that they were entirely reasonable. He rejected the suggestion that a requirement to perform a study justifying current rates could be deemed equivalent to an order to refile rates; he accepted FERC's argument that the agency maintained the authority to require such reports, as the agency may then use those reports to determine whether it will impose a different rate schedule.

Quotes: None

Scorecard: FCC wins.

United States v. Bombardier Corp., 380 F.3d 488 (2004)

Facts: An individual brought a lawsuit, acting on behalf of the United States under the False Claims Act, alleging that a company submitted false claims for reimbursement to Amtrak. The majority held that the False Claims Act does not cover Amtrak because Amtrak is not an entity of the federal government, but merely a recipient of federal grants.

Decision: Judge Garland dissented. He would have sided with the government so as to extend application of the False Claims Act to cover contractors presenting claims for payment to a federal grantee.

Quotes: None

Scorecard: Would have sided with government.

U.S. Telecom Assoc. v. FCC, 295 F.3d 1326 (2002)

Facts: A trade association representing private local exchange carriers challenged an order from the Federal Communications Commission finding that the Iowa Communications Network (ICN) qualified as a common carrier—which therein made ICN eligible to receive federal subsidies for providing discounted telecommunications services under the Telecommunications Act of 1996. The trade association maintained that it had standing to challenge the order because it made it harder for its members to sell services. On the merits, the association maintained that ICN did not qualify as a common carrier because ICN does not provide services indiscriminately to all potential users, and because ICN includes a service restriction providing that all communications must be consistent with the written mission of the authorized user and cannot be used for a profit-making venture. ICN argued that the association lacked standing because its members were not injured. And on the merits ICN maintained that it qualified as a common carrier because it did not discriminate among potential service recipients within the class of entities qualifying for ICN service under Iowa law. Additionally, ICN maintained that its policies did not amount to regulation of content, which would otherwise disqualify ICN from being certified as a common carrier.

Decision: Judge Garland ruled that the association had standing because FCC's order would put its members at a competitive disadvantage, but ruled that the agency was entitled to deference in its interpretation of the governing statute, its precedent and regulations. Accordingly, the opinion affirmed FCC's judgment in full.

Quotes: None

Scorecard: Trade association wins on standing; FCC wins on substantive issue.

Village of Barrington, IL v. Surface Transp. Bd., 758 F.3d 326 (2014)

Facts: The Surface Transportation Board approved Canadian National Railway Company's (CN) acquisition of a Chicago area railway company for the purpose of redirecting rail traffic around the city. Since this would result in traffic delays in some communities, the Commission conditioned approval on a requirement that CN pay for mitigation, which required it to construct some overpasses. But the Village of Barrington, Illinois was unsatisfied, and insisted that more mitigation was necessary to address vehicular traffic congestion caused by increased train traffic through the community. The Board ultimately concluded that no further mitigation was necessary, notwithstanding studies from the Village that suggested higher traffic impacts than the Board had initially calculated. This resulted in litigation, but the court ultimately ruled in favor of the Board. Thereafter the Village commissioned a new study and sought to reopen the matter before the Board; however, the Board decided that it would not change its prior determination. The Village then went to court for a second time.

Decision: Judge Garland ruled that the court was jurisdictionally barred from hearing a second claim to the extent it was based on a theory that the Board had erred in its determinations. The only ground for reconsideration would be based on new evidence; however, Judge Garland ruled that the new study was insufficient to compel a different result, and emphasized that the Board's judgment would only be overturned for abuse of discretion.

Quotes: None

Scorecard: Surface Transportation Board wins.

***Wagner v. Federal Election Commission*, 793 F.3d 1 (2015)**

Facts: Government contractors sought to challenge a Federal Elections Commission regulation that prohibits individuals or firms from making campaign contributions while performing or soliciting federal contracts. They argued that the prohibition violates the First Amendment.

Decision: Judge Garland rejected the petitioners' argument that FEC's regulation should be reviewed under strict scrutiny, but instead ruled that it could be upheld under an intermediate level of scrutiny because he believed it was carefully tailored to protect the cited governmental interest.

Quotes: None

Scorecard: FEC wins.

***Waters v. Rumsfeld*, 320 F.3d 265 (2003)**

Facts: Employees of military commissaries brought this class action against the Secretary of the Department of Defense, claiming that they should have been paid a minimum wage under the Fair Labor Standards Act, and arguing that a provision excluding certain commissary workers from minimum wage protections should be held unconstitutional.

Decision: Judge Garland upheld the challenged provision, accepting the Secretary's posited justification of the provision as rational. Additionally, the opinion concludes that the case should have been brought in the Federal Court of Claims under the Little Tucker Act because the plaintiffs claim was for over $10,000.

Quotes: "Because the plaintiffs do not assert that commissary baggers constitute a suspect class, or that Public Law 05-485 infringes upon fundamental constitutional rights, we must uphold the statute if it has any rational basis."

Scorecard: Department of Defense wins.

Eight split decisions –

Alpharma, Inc. v. Leavitt, 460 F.3d 1 (2006)

Facts: FDA approved a new drug for animals, which was a generic version of an existing drug on the market—which FDA had previously approved. The manufacturers of a similar product then sought to challenge FDA approval of the generic version of the drug. Initially the Court remanded the case, ordering FDA to explain how its standard for reviewing equivalent drugs is justified under the law. FDA responded with further explanation of its position, which the petitioning company argued was still insufficient to justify its approval of the new generic drug.

Decision: Judge Garland reviewed FDA's analysis and concluded that it was reasonable, and held that the agency was entitled to deference in its interpretation of the governing statute, while another judge on the panel dissented from that judgment. But Garland also gave a partial win to the petitioning company, ruling that FDA still needed to submit further clarification to fully justify its decision in this case.

Quotes: None

Scorecard: Substantial win for FDA. Partial win for the petitioning business.

Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120 (2002)

Facts: Congress has directed the Secretary of Transportation with prescribing safety regulations for commercial vehicles, and the Secretary has charged the Federal Motor Carrier Safety Administration with the responsibility for promulgating and enforcing those regulations. One such regulation requires motor carriers to maintain documentation necessary to prove that drivers have not been on the road too long in any given day. The agency cited a business for failing to keep toll receipts segregated for each individual driver, on the view that this was a document that should have been maintained in a separate file for each driver under the regulation. The company argued that the agency had misconstrued the regulation, and that even if the regulation required the company to maintain toll receipts it did not require the company to segregate the receipts in separate files for each driver. The company also argued that the agency had changed its interpretation of the regulation without fair notice, and that any such change must also be approved by the Office of Management Budget (OMB) under the Paperwork Reduction Act. Finally, the company argued that it should have had an opportunity to challenge the agency's rationale in so far as the receipts may be unreliable indicators as to how long drivers have been on the road.

Decision: Judge Garland ruled that the agency was entitled to deference on its interpretation of the regulation, and rejected the company's arguments that the agency had changed its interpretation without fair notice or in a manner that would require a new approval from OMB. But Garland did rule in the company's favor on one issue—holding that the agency must justify its rationale for the rule in a manner that would justify its conclusion that toll receipts may be helpful in demonstrating compliance with its regulations.

Quotes: None

Scorecard: Substantial win for the Federal Motor Carrier Safety Administration, partial win for the petitioning business.

***Entergy Services, Inc. v. FERC*, 568 F.3d 978 (2009)**

Facts: A dispute arose between an energy service provider and an electric cooperative corporation over billing under the terms of their service contract. The service provider maintained that the contract permitted it to take into account transmission system operating constraints when issuing bills; however, the cooperative disagreed. Ultimately, the service provider filed a complaint requesting the Federal Energy Regulatory Commission to resolve the dispute. FERC determined that the contract was ambiguous, but that the best interpretation would bar the billing practice in question.

Decision: Judge Garland ruled that FERC's interpretation of the contract was reasonable and entitled to deference.

Quotes: None

Scorecard: Electric cooperative and FERC win.

***National Automobile Dealers Assoc. v. FTC*, 670 F. 3d 268 (2012)**

Facts: NADA filed a petition to review an FTC rule on the Fair Credit Reporting Act dealing with risk-based pricing notices that the FTC determined must be provided to car buyers. NADA challenged the rule and simultaneously filed petitions in the U.S. District Court and the federal appellate court admitting it was unsure of which court should hear the APA challenge.

Decision: Case dismissed without prejudice for lack of jurisdiction – statute did not provide for direct review and the District Court was the proper venue to hear the APA challenge.

Quotes: None

Scorecard: Draw. NADA did not dispute that the appellate court lacked jurisdiction and agreed to the District Court hearing case.

Owner-Operator Independent Drivers Assoc., Inc. v. FMCSA, 494 F.3d 188 (2007)

Facts: The Federal Motor Carrier Safety Administration promulgated revised regulations governing how long drivers may be on the road and how long they may work—including mandating when rest periods must occur, how long an employee must remain off-work, and so forth. A public interest group representing the public at large filed suit challenging certain provisions of the new regulations extending the daily driving limit from 10 to 11 hours, and provisions which would have allowed a driver to resume weekly duties after 34 consecutive hours of rest. Meanwhile, industry groups representing truck drivers challenged other aspects of the regulation that they contended would have imposed burdens on the industry.

Decision: Judge Garland accepted the arguments offered by the public interest group, and vacated portions of the rule because the agency had failed to make public its methodology for its cost-benefit analysis during the comment period. But Garland rejected the arguments advanced by the industry groups against other aspects of the regulation, holding that the regulations were consistent with statutory mandates, that the agency had taken into account relevant considerations, that the regulations were sufficiently specific and that those challenged provisions were not arbitrary nor capricious.

Quotes: None

Scorecard: Substantial win for the Federal Motor Carrier Safety Administration, partial win a public interest group.

PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194 (2005)

Facts: An energy company sought judicial review of an order by the Federal Energy Regulatory Commission rejecting service agreements. FERC took issue with the manner at which rates would be charged; however, the energy company argued that FERC's decision was arbitrary and capricious.

Decision: Judge Garland held that the business lacked jurisdiction to contest FERC's decisions with regard to contracts that it was not a party to; however, he went on to rule that—with regard to the company's contracts—the business had standing to challenge FERC's order. Further, Judge Garland agreed with the petitioning energy company that FERC had failed to adequately respond to the company's arguments, and that the

burden rested on the agency to justify any order requiring the company to provide energy at a specific rate.

Quotes: None

Scorecard: FERC wins on one claim and the energy company wins on another.

Public Citizen, Inc. v. Rubber Manufacturers Assoc., 533 F.3d 810 (2008)

Facts: The federal Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act limits disclosure of "early warning" reporting data collected by the Department of Transportation under the National Traffic and Motor Vehicle Safety Act. The Department of Transportation promulgated a rule in this case dictating early warning data will be released and when it will not. Accordingly, an industry association challenged the portions of the regulation requiring disclosures that they argued were foreclosed under the TREAD Act, while a consumer group argued that the Department of Transportation should release all collected data. The issue on appeal was whether the TREAD Act prohibits disclosure so as to preclude release of collected information under the Freedom of Information Act.

Decision: Judge Garland rejected the industry group's argument that the TREAD Act prohibits disclosure of early warning data.

Quotes: None

Scorecard: Secretary of Transportation and consumer group win.

U.S. Telecom Ass'n. v. FCC, 400 F.3d 29 (2005)

Facts: The U.S. Telecom Association (USTA) petitioned the D.C. Circuit for review of the Intermodal Order that FCC issued in November 2003 arguing that it was: (1) a legislative rule that required notice-and-comment rulemaking under the Administrative Procedures Act (APA) and (2) issued in violation of the Regulatory Flexibility Act since the FCC failed to perform a Regulatory Flexibility Analysis.

Decision: The Order was a legislative rule requiring APA notice-and-comment. However, because the FCC essentially performed notice-and-comment on the Cellular Technology Industry Association's petition for rulemaking (which ultimately became the Intermodal Order), failure to follow APA notice-and-comment procedures was a harmless error. FCC did affirmatively violate the RFA. Such a violation was not harmless and, as a result, the rule was remanded to FCC to conduct a regulatory flexibility analysis and enforcement against small entities was stayed until such analysis was prepared and published.

Quotes: "[I]t is impossible to determine whether a final regulatory flexibility analysis – which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities … would have affected the final order when it was never prepared in the first place."

Scorecard: FCC wins on APA; Regulated industry wins on RFA.

Ruled against the agency thirteen times –

Columbia Gas Transmission Corp. v. FERC, 404 F.3d 459 (2005)

Facts: A company engaged in the sale and transmission of natural gas sought to challenge an order from the Federal Energy Regulatory Commission requiring it to install and pay for meters on natural gas wells. The business objected on the ground that FERC has jurisdiction only to regulate the sale and interstate transmission of energy, but lacks jurisdiction to regulate production or gathering of natural gas. FERC maintained that, although the agency could not regulate production or gathering of natural gas outright, it has authority to regulate anything that contracting energy companies agree will be subject to consideration in agreed upon tariffs.

Decision: Judge Garland ruled that FERC lacked jurisdiction to require a company to pay for installation of meters at natural gas wells because its jurisdiction did not extend to cover the production or gathering of natural gas.

Quotes: None

Scorecard: Energy company wins.

Consumer Federation of America v. Department of Agriculture, 455 F.3d 283 (2006)

Facts: The Consumer Federation of America filed FOIA for the electronic appointment calendars of six USDA officials in an effort to determine whether agency officials had ex parte meetings with industry reps during a food-safety rulemaking on ready-to-eat meat and poultry. The District Court granted USDA's motion for summary judgment

Decision: Garland reversed the trial court and ordered the calendars to be produced.

Quotes: "We must nonetheless be careful to ensure that '[t]he term 'agency records' . . . not be manipulated to avoid the basic structure of the FOIA: records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies.

Scorecard: Government loss – however disclosure aided consumer groups not industry.

Initiative and Referendum Institute v. U.S. Postal Service, 417 F. 3d 1299 (2005)

Facts: Several individuals and organizations that collect signatures to place initiatives on state ballots sued the U.S. Postal Service for violating the First Amendment. The plaintiffs alleged that a U.S. Postal Service regulation unconstitutionally prevented them from soliciting and collecting signatures on certain sidewalks and areas around U.S. Postal Service locations.

Decision: Garland found that the U.S. Postal Service regulation violated the First Amendment in several respects. Among other things, it was not reasonable, overly-broad and not narrowly-tailored to achieve the government's goals.

Quotes: None

Scorecard: U.S. Postal Service loss.

In re CORE Communications, Inc., 531 F.3d 849 (2008)

Facts: For a third time, a communications company sought to invalidate a rule that the Federal Communications Commission had promulgated without adequate explanation.

Decision: Judge Garland ruled that the FCC was required to provide an adequate explanation within six months from the date of oral argument or the rule would be vacated at the behest of the petitioning company.

Quotes: None

Scorecard: Communications company wins.

IHS, Inc. v. Defense Automated Printing Serv., 338 F.3d 1024 (2003)

Facts: A private company brought this suit alleging that the Defense Department should have allowed for private bidding for development and maintenance of an internet accessible database for dissemination of government documents. The District Court dismissed the claim for lack of standing.

Decision: Judge Garland reversed the decision, holding that the business had standing to allege statutory or regulatory violation since it was denied an opportunity to bid.

Quotes: None

Scorecard: Business wins.

Kirby Produce Co. v. Inc. v. USDA, 256 F.3d 830 (2001)

Facts: USDA revoked a merchant's license for failing to make prompt payments for fruit and vegetable shipments in violation of the Perishable Agricultural Commodities Act. USDA did not allow the business a hearing before revoking its permit.

Decision: Judge Garland ruled that the business should have been afforded a hearing, and ruled that USDA's decision to revoke the permit was arbitrary and capricious.

Quotes: None.

Scorecard: Business wins.

Missouri Public Service Commn. v. FERC, 337 F.3d 1066 (2003)

Facts: The Natural Gas Act grants the Federal Energy Regulatory Commission jurisdiction over the transportation and sale of natural gas. Under Section 7 of the Act, FERC must issue a certificate of public convenience and necessity authorizing sale of energy through a gas pipeline only after a determination that the rate to be charged is in the public interest for newly constructed pipelines—and will thereafter review rates charged under a more stringent "just and reasonable" standard. In this case, the Missouri Public Service Commission challenged FERC's approval of rates the Kansas Pipeline Company was charging because the Commission said that those rates were necessary in order for the company to continue payments on outstanding loans, and because it comported with rates that contracting shipping companies had agreed to.

Decision: Judge Garland ruled that FERC's approval was arbitrary and capricious because it was predicated upon attenuated and unsupported assumptions that the company might default on its loans, which might lead to foreclosure, and because the loan in question was actually paid in full by the time FERC issued its decision. Further, Garland ruled that FERC could not have justified its approval on the ground that the company's shippers had entered into contracts agreeing to those rates because FERC had an independent duty to determine that the rates charged were ultimately appropriate for the end-user.

Quotes: None

Scorecard: State utilities commission wins over FERC.

National Ass'n of Mfrs v. Department of Labor, 159 F.3d 597 (1998)

Facts: National Association of Manufacturers applied for attorneys' fees under the Equal Access to Justice Act (EAJA) after successfully challenging a Department of Labor visa rule that was issued without the required notice-and-public comment under

the Administrative Procedures Act. DOL challenged the EAJA award arguing that NAM was ineligible to receive it since, among other things, not all of its members met EAJA's net worth and employment ceilings for parties eligible for EAJA awards. The District Court held that NAM met the eligibility requirements, which are to be based on whether the association meets the criteria and not whether or not individual members do.

Decision: Garland affirmed the District Court ruling, finding that EAJA does not bar NAM from receiving attorneys' fees merely because it has members who would not be eligible to receive them.

Quotes: None

Scorecard: Department of Labor loss.

Panhandle Eastern Pipe Line Co. v. FERC, 196 F.3d 1273 (1999)

Facts: Petitioner, a company that transports natural gas through its interstate pipeline system, filed a proposed tariff with the Federal Energy Regulatory Commission (FERC) to memorialize the criteria under which Panhandle would be willing to construct interconnects for other entities wanting access to its pipeline. FERC struck certain provisions of the proposed tariff and mandated that Panhandle offer interconnects to any party willing to pay reasonable fees. Panhandle argued that FERC's suggested language reversed previous agency policy that only required interconnects for "similarly situated parties."

Decision: Judge Garland ruled for petitioner and case remanded to the commission.

Quotes: None

Scorecard: Business wins.

PSEG Energy Resources & Trade LLC v. FERC, 665 F.3d 203 (2011)

Facts: An energy company brought this action to contest an order of the Federal Energy Regulatory Commission accepting the results of an auction for electric generation capacity, conducted by ISO New England, Inc. That determination was based on FERC's interpretation of tariff provisions in the agreement that the Commission thought were clear, but which it later conceded were ambiguous. The petitioning company also argued that this required remand and also raised other issues which it argued the Commission should have at least addressed.

Decision: Judge Garland remanded the case for further consideration before the Commission—ruling that the Commission's initial judgment cannot be affirmed since it was based on an errant premise that the tariff provisions were clear. The opinion also

held that the Commission must respond to other arguments raised by the petitioning company.

Quotes: None

Scorecard: Petitioning energy company wins.

Southern Co. Services, Inc. v. FERC, 416 F.3d 39 (2005)

Facts: In 1996, the Federal Energy Regulatory Commission issued an official order imposing rules prohibiting certain forms of contracts for energy providers—specifically prohibiting them from limiting the ability of customers to roll over their service agreements. FERC argued in this case that it was justified in invalidating two energy service contacts under this order; however, the service provider challenged FERC's decision on the ground FERC had changed its policy since the 1996 order and that the agency did not give fair notice of the change. The dispute boiled down to a question as to whether the 1996 order gave reasonable notice that specific terms had to be included in an original service agreement as FERC argued, or whether FERC's "clarification" on that point constituted a substantive change in policy.

Decision: Judge Garland ruled that one of the petitioner's claims was moot because the contract in question had already expired. With regard to the second contract, Garland ruled that FERC had changed its position and that the 1996 order did not provide fair notice. Accordingly, he held that FERC's decision to invalidate this contract was arbitrary and capricious.

Quotes: None

Scorecard: Energy provider wins.

Schnitzler v. United States, 761 F.3d 33 (2014)

Facts: A prisoner brought this suit because the United States refused to allow him to renounce his citizenship, allegedly in violation of his constitutional rights as a United States citizen. The United States maintained that it could not process his request because he needed to attend an in-person interview, which could not happen because he was incarcerated. The District Court dismissed the case on standing grounds.

Decision: Judge Garland reversed, holding that the prisoner has standing because he had suffered an injury in the government's failure to process his request.

Quotes: None

Scorecard: Prisoner wins.

TNA Merchant Projects, Inc. v. FERC, 616 F.3d 588 (2010)

Facts: The Federal Energy Regulatory Commission issued an order holding that a rate schedule proposed by an energy company constituted a "changed rate," which would be subject to suspension or refund under the Federal Power Act. But, the company argued that it could not be considered a changed rate because it had never previously charged for the service in question. FERC took the position that it was a change in rates because the company had previously provided the service at no cost to the service recipient.

Decision: Judge Garland ruled that FERC failed to adequately respond to one of the company's primary arguments—and specifically rebuffed the agency for seeking to justify its decision through post hoc rationalization during oral arguments.

Quotes: "[A]lthough we will defer to a reasonable definition by the Commission, we cannot defer to one that is unexplained."

Scorecard: Petitioning energy company wins.

OTHER CASES

Business on business suits –

Conseil Alain Aboudaram v. Groote, 460 F.3d 46 (2006)

Facts: A company brought an action seeking to collect on loans that it claimed a Belgium national owed. The defendant counter-sued, claiming that the company owed him for work he had performed as a consultant. In the District Court, the jury ruled in favor of the company on both counts. The contractor then filed a motion for judgment as a matter of law, which the judge granted. The contractor then sought sanctions against the company for alleged discovery abuses; however the judge refused to impose sanctions. Both parties appealed.

Decision: Judge Garland affirmed in full—ruling that the District Court had properly resolved the contractual issues under New York law, and that the judge did not abuse its discretion in refusing to impose sanctions.

Quotes: None

Scorecard: Contractor wins contractual dispute, but loses in motion for sanctions.

Burke v. Air Serv Intern., Inc., 685 F.3d 1102 (2012)

Facts: A private contractor suffered injuries in an ambush when undertaking work in Afghanistan. He brought an action alleging negligence against the firm that had been contracted to provide security, as well as the company that flew him into the worksite. But his claim was dismissed on summary judgment because he had failed to offer expert testimony as to the applicable standard of review. On appeal, he argued that he didn't need to provide expert testimony because the proper standard of review would be intuitive for anyone who had ever watched a western movie.

Decision: Judge Garland affirmed the District Court ruling, holding that the laws of the District of Columbia governed the case and that it was therefore necessary for the plaintiff to offer expert testimony as to the proper standard of review.

Quotes: None

Scorecard: Defendant companies win.

Cambridge Holdings Group, Inc.. v. Federal Insurance Co., 489 F.3d 1356 (2007)

Facts: In this case, a lender sought to make the case that a law firm had unlawfully refused to repay funds deposited in escrow, but the case was dismissed.

Decision: Judge Garland affirmed, holding that the court lacks jurisdiction to hear claims against an improperly served defendant and, therefore, ruling that the plaintiff could not appeal a judgment dismissing the action.

Quotes: None

Scorecard: Defendant wins.

Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (2002)

Facts: A Virginia real estate broker sued Ameritrade, the securities broker licensed in the District of Columbia with its principal place of business in Nebraska, for Ameritrade's failure to provide a link on its webpage to the realtor. The District Court granted Ameritrade's motion to dismiss for lack of personal jurisdiction. The realtor appealed arguing that Ameritrade's conduct of electronic transactions within the District through the use of an Internet website were sufficient for the District to have jurisdiction and that regular and consistent Internet transactions constituted "doing business" in the District.

Decision: Ameritrade's site allows it to engage in real-time transactions with District residents 24-hours a day and this business practice is "continuous and systemic"

thereby establishing sufficient contacts for the Court to assert personal jurisdiction. (Although the plaintiff in this case still lost as he failed to properly effect service of process).

Quotes: "Ameritrade is quite wrong in treating 'cyberspace' as if it were a kingdom floating in the mysterious ether, immune from the jurisdiction of earthly courts."

Scorecard: Plaintiff wins.

Soc. of Lloyd's v. Siemon-Netto, 457 F.3d 94 (2006)

Facts: The Society of Lloyds sued an insurance agency for nonpayment of reinsurance premiums, and the English High Court of Justice entered a judgment requiring payment. In this action, Lloyds sued to enforce those judgments from the English Courts in the United States District Court for the District of Columbia. The District Court rendered judgment in favor of the plaintiff.

Decision: Judge Garland affirmed, ruling that the decision of the English courts must be respected because it was not at all repugnant to public policy in the District of Columbia. He likewise dismissed other arguments raised by the defendants which sought to call into question the validity of state action in the United Kingdom, which he held American courts are foreclosed from reviewing. Finally, he ruled that the defendant had not been denied an impartial forum when he was sued initially in England.

Quotes: None

Scorecard: Plaintiff wins.

World Wide Minerals, Ltd. v. Rep. of Kazakhstan, 296 F.3d 1154 (2002)

Facts: A Canadian corporation entered into a series of agreements with the Republic of Kazakhstan to manage uranium complexes. In this action, the Canadian corporation alleged that Kazakhstan and her instrumentalities breached those agreements when Kazakhstan refused to issue a necessary license to export uranium and because its assets were seized. The lawsuit also alleged various other claims including fraudulent inducement, tortious interference, conversion, conspiracy and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Further, the complaint alleged that a New York company conspired with Kazakhstan in committing these wrongful acts. The District Court granted a motion to dismiss all these claims.

Decision: Judge Garland affirmed dismissal with regard to the claims against Kazakhstan and her instrumentalities—ruling that Kazakhstan did not waive sovereign immunity with regard to some of the claims. With regard to the other claims against Kazakhstan and her instrumentalities, Garland ruled that the state action doctrine

applied—which prohibits courts from inquiring into the validity of public acts that a foreign sovereign power commits within its own territory. But Garland reversed and remanded the case with regard to the claims brought against the New York company,, concluding that the District Court needed to resolve an important factual question in order to determine whether it has personal jurisdiction over the defendant company.

Quotes: None

Scorecard: Foreign nation wins, domestic company loses.

Voting rights case –

LaRouche v. Fowler, 152 F. 3d 974 (1998)

Facts: Lyndon LaRouche and his supporters sued the Democratic National Party and certain state Democratic Party officials arguing that party voting procedure changes effectively prohibited him from being considered as a potential presidential nominee at the Democratic National Convention and were not pre-cleared as required under the Voting Rights Act. He also alleged that a number of his constitutional rights were infringed.

Decision: Garland held claims are neither moot nor political questions and, therefore, justiciable. Certain VRA claims remanded because they were not properly considered by a three-judge panel. The defendants did not violate LaRouche's constitutional rights and analysis of party's actions was not subject to strict scrutiny.

Quotes: None

Scorecard: Plaintiff wins.

Contracts and union pensions –

Aliron International Inc. v. Cherokee Nation Industries, 531 F.3d 863 (2008)

Facts: The parties disagreed as to whether their dispute was governed by an arbitration agreement. The District Court ruled that the arbitration agreement governed.

Decision: Judge Garland affirmed.

Quotes: None

Scorecard: Cherokee Nation wins.

Francis v. Rodman Local Union 201 Pension Fund, 367 F.3d 937 (2004)

Facts: An employee alleged that he was denied union membership because of his race. He sued the union alleging that he should recover benefits entitled to him under the pension plan. The District Court ruled that he was not entitled to the benefits he sought.

Decision: Judge Garland affirmed the judgment of the District Court.

Quotes: None

Scorecard: Union wins.

Holland v. Williams Mountain Coal Co., 496 F.3d 670 (2007)

Facts: Trustees for a union benefit plan brought an action against coal companies that were deemed successors in interest of a company that went bankrupt—seeking to collect health benefit premiums for several retired miners. The companies won and then sought attorney's fees. The District Court awarded attorney's fees.

Decision: Judge Garland reversed the decision, ruling that the union did not act in bad faith because this was a case of first impression.

Quotes: None

Scorecard: Union wins.

Republican National Committee v. Taylor, 299 F.3d 887 (2002)

Facts: The Republican National Committee published an ad in USA Today and Roll Call which said that the RNC would pay one million dollars to anyone who could disprove the following: "In November 1995, the U.S. House and Senate passed a balanced budget bill. It increased total federal spending on Medicare by more than 50% from 1995 to 2002, pursuant to Congressional Budget Office standards." Numerous parties responded claiming to disprove that statement and claiming that the RNC must pay-out on the contract. The District Court ruled that the ad constituted an offer for contract to anyone who could disprove the contested statement, but ruled that none of the parties had disproven the statement. On appeal, the only question was whether the statement was accurate or not.

Decision: Judge Garland ruled that none of the parties had disproven the statement. He first rejected the contention that the statement had falsely insinuated that the Balanced Budget Act would balance the budget in 1996—concluding that the RNC made no assertion that the budget would be balanced until 2002. Finally, he rejected a

contention that the RNC's statement was false in so far as it claimed that it would increase Medicare spending in light of President Clinton's veto—which prevented the bill from going into effect. Garland concluded that the statement should properly be construed as saying that the Balanced Budget Act would have increased Medicare spending if enacted into law.

Quotes: None

Scorecard: RNC wins.

Cases governed by treaty, concerning foreign nations or acts abroad–

Bucheit v. Palestine Liberation Organization, 388 F.3d 346 (2004)

Facts: A company operating in both the United States and United Kingdom began a development project in Gaza, in which it imported materials for a precast concrete plant, including construction equipment. After a discontinuing its employment relationship with a Gaza resident, the firm nonetheless continued to work with him on a contract basis, wherein he was using the equipment for projects carried out by the Palestinian Authority (PA). Ultimately, the PA continued to use the equipment against the wishes of the company and in the end the company brought this action seeking compensation for the conversion of its property. The District Court ruled that it had jurisdiction to hear the case under the Sovereign Immunities Act, and that the PA had converted the company's property and was entitled to recovery of its fair market value; however, the District Court refused to award pre-judgment interest.

Decision: Judge Garland affirmed in full—rejecting both the PA's argument that the District Court improperly relied on offers to purchase in determining the value of the converted property and the company's contention that the burden rested on the PA to prove that it was not entitled to pre-judgment interest.

Quotes: None

Scorecard: Business challenging appropriation wins in part; government wins in part.

Curtin v. United Airlines, Inc, 275 F.3d 88 (2001)

Facts: Airline passengers brought this action, alleging that they were improperly compensated when their bags were lost during international flights; however, they had already accepted checks that the airline had sent them. Accordingly, the airline sought summary judgment under the Warsaw Convention, on the ground that their claims were

barred by accord and satisfaction of their claims with deposit of those checks. The District Court agreed, dismissing the case without considering the plaintiff's request for a decision on class certification, and calls for more discovery.

Decision: Judge Garland affirmed, holding that the District Court did not abuse its discretion in refusing to allow further discovery and that it is acceptable for a judge to rule on the merits—if the merits present an easy case—if it avoids the necessity of making a more difficult judgment on class certification.

Quotes: None

Scorecard: Airline wins.

El-Hadad v. United Arab Emirates, 216 F.3d 29 (2000)

Facts: An Egyptian national brought suit against the United Arab Emirates for whom he had previously worked at UAE's embassy in Washington D.C. He alleged breach of contract and defamation; however, UAE claimed immunity under the Foreign Sovereign Immunities Act. The former employee argued that the Act allowed exception from the general rule of immunity when a foreign nation engages in commercial activity; however, employment of personnel by a foreign state is not per se commercial activity under the Act. But the District Court held that UAE was not entitled to assert immunity under the Act on the assumption that it may presume that the "economic activity" exception applies when a foreign entity employs the national of another country. Accordingly, since the plaintiff in this case was not a national of the UAE, the District Court reasoned that he could sue.

Decision: Judge Garland reversed the ruling, reasoning that Congressional intent does not clearly speak to the issue and that it was, therefore, inappropriate for the District Court to infer a per se rule that the nationality of the employee matters in determining whether the "economic activity" exception applies.

Quotes: None

Scorecard: United Arab Emirates wins.

Fund for Animals, Inc. v. Norton, 322 F.3d 728 (2003)

Facts: An environmentalist organization sought to challenge a decision by the U.S. Fish & Wildlife Service to list a species of goat—found in Mongolia—as "threatened" rather than "endangered." Accordingly, Mongolia sought to intervene in the proceedings. The District Court denied the motion to intervene.

Decision: Judge Garland reversed the decision, holding that Mongolia satisfied the D.C. Circuit's standard for intervention.

Quotes: None

Scorecard: Intervenor (Mongolia) wins.

Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (2004)

Facts: The estate of an American citizen kidnapped and murdered by a terrorist group with ties to Libya brought tort action against Libya. The defendant moved to dismiss based on sovereign immunity. The District Court denied motion on terrorism exception to Foreign Sovereign Immunities Act (FSIA).

Decision: Garland affirmed the District Court judgment on grounds that the plaintiff only had to prove that the defendant was generally involved in incident rather than prove "but for" causation or that funding to the terrorist group was directly used in incident.

Quotes: None

Scorecard: Litigation win (interpretation favorable for litigation but circumstances are not relevant to small business).

Mwani v. bin Laden, 417 F.3d 1 (2005)

Facts: Victims of the American embassy bombing in Kenya sued Osama bin Laden and al Qaeda under the Federal Tort Claims Act for the bombing and Afghanistan for providing logistical support to the terrorist and terrorist organization under the Foreign Sovereign Immunities Act (FSIA). The District Court dismissed both claims for lack of jurisdiction.

Decision: The District Court erred in not finding personal jurisdiction over Bin Laden and al Qaeda in the American embassy bombing in Kenya. Service of process by publication was valid. The District Court correctly found no subject matter jurisdiction over Afghanistan under the FSIA.

Quotes: None

Scorecard: Plaintiffs win.

Ned Chartering & Trading, Inc. v. Republic of Pakistan, 294 F.3d 148 (2002)

Facts: A shipbroking company brought suit against Pakistan to collect money owed for services. After denying defendant's motion for discovery extension, the District Court entered summary judgment for the plaintiff.

Decision: Judge Garland affirmed the District Court judgment, holding that the District Court did not abuse its discretion in ruling without extending the discovery period.

Quotes: None

Scorecard: Employer wins.

Novecon LTD v. Bulgarian-American Enterprise Fund, 190 F.3d 556 (1999)

Facts: A development company brought this lawsuit against a federally run fund that finances projects in Eastern Europe. The development company claimed breach of contract, and that even in the absence of a valid contract it should have been compensated for a theory of estoppel or quantum meruit. After the suit was initiated a Wall Street Journal editorial ran discussing the dispute, which prompted the fund's administrators to publically respond. The developer then amended its complaint to allege defamation.

Decision: Judge Garland held that despite four letters exchanged between the parties discussing the contemplated project in Bulgaria, there was no binding contract, and ruled that the company was not entitled to recover under its estoppel or quantum meruit theories. Finally, the opinion affirmed the lower court's judgment that the alleged defamatory comments were protected by a special privilege, which allows a party to defend itself against allegations of wrongdoing.

Quotes: None

Scorecard: Defendant Bulgarian-American Enterprise Fund wins.

Saleh v. Titan Corp., 580 F.3d 1 (2009)

Facts: Iraqi nationals brought suit against federal contractors who allegedly engaged in abusive conduct, including torture while they and their decedents were detained by U.S. military forces in an Iraqi prison. The District Court granted summary judgment for the defendants, and on appeal the majority affirmed—holding that some of their claims were preempted by federal law and others were not actionable under the Alien Tort Statute.

Decision: Judge Garland dissented.

Quotes: None

Scorecard: Would have sided with the plaintiffs.

Oveissi v. Islamic Republic of Iran, 573 F.3d 835 (2009)

Facts: Plaintiff brought action against the Islamic Republic of Iran under the Foreign Sovereign Immunities Act, alleging wrongful death and intentional infliction of emotional distress because his grandfather was assassinated by a terrorist organization allegedly funded by Iran. The District Court held that it had jurisdiction to hear the case and that Iran was responsible for the grandfather's murder; however, it ruled that he had not stated a valid claim for wrongful death or intentional infliction of emotional distress. The plaintiff appealed, arguing that the court should have applied French law, under which he claimed he would prevail.

Decision: Judge Garland ruled that French law applied.

Quotes: None

Scorecard: Plaintiff wins.

***Robertson v. American Airlines, Inc.*, 401 F.3d 499 (2005)**

Facts: An airline passenger initiated suit against an airline carrier nearly three years after an incident in which she alleged she suffered severe burns as a result of a negligent conduct on the part of a stewardess who gave her dry-ice when she had requested regular ice. The airline maintained that the suit was barred by the two-year statute of limitations under the Warsaw Convention—governing international travel. The passenger argued that the Warsaw Convention was inapplicable because the incident occurred on a flight between Chicago and Denver.

Decision: Judge Garland ruled that the Warsaw Convention's two-year statute of limitations applied because the injury occurred during a leg of a trip originating in London.

Quotes: None

Scorecard: Defendant airline wins.

Methodology

Scope of Review

The National Federation of Independent Business prepared this scorecard through a comprehensive analysis of 235 opinions authored by Judge Garland.[i] This includes 11

dissenting opinions.[ii] We exclude all criminal and *habeas corpus* cases from review because NFIB does not typically engage on such issues.[iii]

Scoring and Weighting

Of the 235 cases reviewed, NFIB scored those opinions in consideration of who ultimately won on the essential issues raised on appeal. Thus for example, in cases concerning a challenge to regulatory conduct, we asked whether the agency won or lost on the essential issues presented. In many cases the scoring reflects a total win or loss for one party or the next; however, in some cases Judge Garland issued split decisions—ruling in favor of different parties on different issues. Accordingly, NFIB's scorecard pronounces each decision either to be a win, a loss or a split-decision for the agency in question, or the trial bar.[iv]

Breaking-Down the Scorecard

NFIB's scorecard breaks-down Judge Garland's opinions by subject-matter. Accordingly, all of labor, environmental and civil justice reform cases are reported as a block in accordance with the ordering of those subjects on the scorecard.[v] However, we did not break-out the summaries for our "federalism scorecard" separately. Nor did we break-out the summaries separately for our scorecard for regulatory agencies against commercial actors.[vi] Those summaries are interpolated within the "labor," "environmental" and "other regulatory" categories.[vii]

Cases Excluded from Scoring

Although NFIB offers summaries of 235 Garland opinions in this report, some of those decisions were excluded from the scoring.[viii] As an initial matter, we excluded business-on-business disputes because NFIB generally refrains from filing in cases in which the small business community may be divided. Likewise, we excluded voting rights cases, and those concerning contracts or pensions because NFIB does not usually engage on such issues. For the same reason, we excluded cases governed by foreign treaties, and or cases concerning foreign nations or acts abroad.

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[i] A search of Garland opinions in Westlaw populates 331 results. However, these figures include one opinion, *Elred v. Ashcroft*, 255 F.3d 849 (2001), that is errantly attributed to Judge Garland. Excluding that opinion, NFIB's analysis began with an initial assessment of these 330 opinions. But because NFIB does not generally engage on questions of criminal law or in *habeas corpus* proceedings, 105 of these cases were excluded from our review—meaning that, in developing this scorecard, NFIB reviewed 224 of these cases. In addition, NFIB reviewed 11 Garland dissents, excluding from review six additional criminal and *habeas corpus* cases.

[ii] Our review includes dissents authored by Garland, in the same manner as it includes majority opinions that he authored; however, we exclude cases in which Garland merely joined an opinion authored by another, as well as his concurring opinions. Of the 36 opinions that populate in a Westlaw search of Garland dissents, 25 were excluded from review. Of those, six were excluded on the basis of subject matter, as explained in the previous endnote. Five were excluded because Judge Garland was merely signing on to opinions authored by another judge. An additional 14 opinions were excluded from review because Judge Garland was not involved in any capacity. Most of those cases populated as false positives because the name "Garland" appeared within the text of the opinion—typically in a case citation.

[iii] In total 111 opinions were excluded as either criminal or *habeas corpus* cases.

[iv] For the purpose of calculating an agency or trial bar's winning percentage, split decisions are weighted as half-a-win. Thus for example if an agency won one case and had a split decision in another, it would be scored as having a 75% win-rate.

[v] For our purposes we included tort, consumer and employment law cases in the "civil justice reform" category; however, we've broken down employment cases separately from tort and consumer lawsuits.

[vi] We concluded that federal agencies have a 90% win-rate against commercial actors, counting 86 wins, 6 losses and 7 split decisions for the agencies in cases concerning private commercial actors. We excluded from this analysis cases brought by public utilities since we consider them quasi-governmental entities.

[vii] NFIB found only two cases squarely contesting the federal government's power to regulate private conduct under the Commerce Clause. In both of those cases, *Rancho v. Viejo LLC v. Norton*, 323 F.3d 1062 (2003), and *Allied Local Regional and Manufacturers Caucus, et. al. v. EPA*, 215 F.3d 61 (2000), Judge Garland ruled for an expansive interpretation of the federal commerce power. This gives reason to believe that "Justice Garland" would have ruled against NFIB in our challenge to the Affordable Care Act's "mandate" to buy health insurance, which would mean that the federal government really could pass a law requiring you to "eat your broccoli."

[viii] Of the 235 opinions reviewed, 20 were excluded from Judge Garland's scorecard.