Obama high court pick Merrick Garland: A record of support for police powers

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In the roughly two weeks since President Obama nominated Merrick Garland to the US Supreme Court, a picture has emerged of a former prosecutor who consistently upholds the police powers of the state.

Appointed to the bench by President Bill Clinton in 1995, the 63-year-old Garland has earned a reputation as a judicial "centrist," a term that in the contemporary context signifies an accommodation to corporate interests and the curtailment of democratic rights.

Obama's nominee is by most accounts the most conservative of the judges said to have been on his "short list" of possible nominees. Near-term political considerations in advance of the November elections clearly played a significant role in Obama's pick to succeed the long-time leader of the right-wing bloc on the Supreme Court, Antonin Scalia, who died suddenly last month. With the Republican leadership in Congress vowing to block a vote on Scalia's replacement until after the election, Obama chose a federal appeals court judge who had been broadly backed and even praised by prominent Republicans.

Garland's judicial career parallels the rightward trajectory of the American judiciary over the past two decades, and especially since the launch of the so-called "war on terror" in 2001. He has endorsed the authoritarian theory of "deference" to the executive, according to which executive agencies are presumed to be acting reasonably and lawfully.

As a judge on the US Court of Appeals for the District of Columbia Circuit, Garland joined an antidemocratic decision that deferred to the Bush administration regarding the rights of detainees at the Guantanamo Bay prison camp. The *New York Times*' Adam Liptak admitted, "He has been notably deferential to executive agencies and is seen as reluctant to second-guess experts."

Before becoming a judge, Garland worked for the Justice Department as an associate deputy attorney general (a federal prosecutor), a fact touted by Obama in his nomination speech. On that occasion, Obama emphasized Garland's law-and-order background as a prosecutor who would "take no chances that someone who murdered innocent Americans might go free on a technicality." Here the term "technicality" is a code word for violation of constitutional due process.

In 2003, while some of the most egregious forms of torture were being employed at Guantanamo Bay, Garland voted to throw out a lawsuit by prisoners at the camp challenging their detention without trial, effectively making Garland an accomplice in their illegal detention and torture from that point forward. In that case, *Al Odah v. United States,* Garland sided with the Bush administration and ruled that the judiciary had no jurisdiction over the case and no authority to challenge the executive.

After the Supreme Court's infamous *Citizens United* decision in 2010 lifting restrictions on corporate donations in elections, Garland joined in a unanimous appeals court decision expanding the doctrines announced in that decision and facilitating the rise of "super PACs."

In that case, *SpeechNow v. Federal Election Commission* (2010), the DC Circuit reasoned that since the Supreme Court decided that corporate political spending in elections could not be corrupt, donations to fund spending by so-called "political action committees" (PACs) could not be corrupt either. The *SpeechNow* decision cited the *Citizens United* decision 26 times.

In *Hatim v. Obama* (2014), Garland sided with the Obama administration in a case involving allegations that Guantanamo detainees were subjected to

humiliating and vindictive genital probing before being allowed to meet with their lawyers, discouraging detainees from getting legal advice. Garland ruled that the genital searches were "reasonable security precautions."

In *Judicial Watch v. United States Department of Defense* (2013), Garland rejected a request for the Obama administration to release images of Osama bin Laden's reported burial at sea. This ruling asserted that the purpose of censoring the images was "to prevent the killing of Americans and violence against American interests."

One exception is a 2013 decision authored by Garland rejecting the Central Intelligence Agency's refusal to "confirm or deny" the existence of records pertaining to its drone assassination program. The CIA had claimed that acknowledging the mere fact of the existence or nonexistence of the records would jeopardize national security.

The CIA's legal position in that case was exceptionally spurious, even by the standards of 21st century American jurisprudence. "No reasonable person," Garland wrote, could make the CIA's argument "with a straight face."

On the question of the criminal justice system, *Washington Post* journalist Radley Balko noted, "Garland may actually move SCOTUS [Supreme Court of the United States] to the right on criminal justice." In 2010, the *New York Times* commented that "his rulings suggest that he could be more of a center-right justice in matters of criminal law."

In 2008, for example, Garland sided with a cop who had allegedly performed an illegal search by unzipping a person's jacket without permission and without probable cause. In 2007, he justified a police search of a car as a "search incident to arrest," when the arrest had actually come *after* the search. In 1999, he supported a prosecutor who had misrepresented critical evidence in closing arguments in a jury trial.

With respect to the death penalty, Garland has claimed that the constitutionality of capital punishment is "settled law." While he worked as a prosecutor, he personally "recommended that the government seek the death penalty," according to the *Times*.

In the upcoming elections, the American people will be told once again that to defend democratic rights it is necessary to vote for Democrats who will appoint supposedly liberal judges. In that regard, it is instructive to consider the Supreme Court decision in *Plumhoff v. Rickard* (2014). In that ruling, the court overrode the democratic rights of the family of a victim of police brutality and granted immunity to the police. The unanimous decision was authored by Bush appointee Samuel Alito and joined by both of Obama's Supreme Court appointees, Elena Kagan and Sonia Sotomayor.

The administration's March 16 announcement of the nomination of Garland has touched off back-and-forth posturing by prominent figures in the political establishment and the media. Obama and his fellow Democrats have denounced the Republicans as "obstructionists" for blocking consideration of Garland, calling it a violation of the Senate's constitutional responsibility to confirm or deny executive appointments. Far from claiming that the accession of Garland would end the generally reactionary trend on the high court, they are promoting him as a "moderate" and "consensus" pick and seeking to use his conservative credentials to embarrass prominent Republicans who previously backed him.

The Republican position, no less cynical, is that Scalia's replacement will so decisively shift the balance on the Supreme Court that the American people should be given the opportunity to weigh in on the choice in the November elections before the Senate takes action.