

Native American Rights Fund

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MEMORANDUM

TO: Tribal Leaders and Tribal Attorneys
National Congress of American Indians – Project on the Judiciary

FROM: Joel West Williams, Staff Attorney, Native American Rights Fund

RE: The Nomination of Merrick Garland to the Supreme Court of the United States

On March 16, 2016, President Obama announced the nomination of Chief Judge Merrick Garland of the United States Court of Appeals for the D.C. Circuit to fill a vacancy on the Supreme Court of the United States created by the sudden death of Justice Antonin Scalia. At this time, the Republican leadership in the United States Senate has indicated that no hearings will be scheduled in the Judiciary Committee to consider his nomination. President Obama has expressed a desire to have the Judiciary Committee schedule hearings and for the full Senate to vote to confirm Chief Judge Garland to the Court before the start of its October Term 2016. Presently, only 16 Republican Senators have indicated a willingness to meet with Chief Judge Garland.

A Brief Biography

Merrick Garland was born in 1952 and raised outside of Chicago where his mother was the volunteer coordinator for Chicago's Council for Jewish Elderly and his father ran a small advertising business out of their home. He was valedictorian of the public high school he attended and received an academic scholarship to Harvard University, where he graduated *summa cum laude* and was awarded a scholarship to Harvard Law School, where he was a member of the Harvard Law Review and graduated in 1977 *magna cum laude*. Following law school, Garland clerked for Judge Henry Friendly on the U.S. Court of Appeals for the Second Circuit and for Justice William Brennan at the Supreme Court. Following his clerkships, he served as a special assistant to Attorney General Benjamin Civiletti from 1979-81. Garland then joined the law firm of Arnold & Porter as an associate in their

Washington, D.C. office and was quickly elevated to partner at the firm. During this time his practice focused on corporate litigation and he lectured at Harvard Law School where he taught antitrust law. In 1989, he accepted a position in the United States Attorney's office in D.C., where he investigated and prosecuted cases involving public corruption, drug trafficking and fraud.

Shortly after he returned to private practice at Arnold & Porter in 1992, Garland accepted an appointment in the Department of Justice under the Clinton administration, first as Deputy Assistant Attorney General for the Criminal Division and then as Principal Associate Deputy Attorney General. He oversaw some of the Department's most high-profile prosecutions, including coordinating the government's response to the Oklahoma City bombing, the Unabomber, the Atlanta Olympics bombing and the Montana Freeman. In September 1995, President Clinton nominated Garland for a vacant seat on the D.C. Circuit and although the Senate Judiciary Committee held hearings on his nomination, a dispute arose over whether the seat needed to be filled at all. Consequently, the nomination expired at the end of 1996. President Clinton renominated Garland and he was quickly confirmed in March 1997 by the full Senate with a vote of 76-23. Merrick Garland has served as Chief Judge of the D.C. Circuit since 2013.

Garland's Federal Indian Law Experience

The U.S. Court of Appeals for the D.C. Circuit is often referred to as "the second highest court in the land," and several former and current justices served on the D.C. Circuit before being elevated to the Supreme Court. The D.C. Circuit's docket consists primarily of cases involving suits against the United States in which federal agency decisions or actions are being challenged. As a sitting judge on the D.C. Circuit for 19 years, Garland has served as a judge longer than any other nominee to the Supreme Court in recent decades. Accordingly, NARF will continue to research his judicial opinions, decisions and other background materials bearing on his views of Indian law and the inherent sovereign authority of Indian tribes. Our initial research indicates that Garland has a very limited record on issues effecting Indian tribes, having only participated in five Indian law cases during his tenure on the D.C. Circuit—authoring two unanimous decisions:

***Ramapough Mountain Indians v. Norton* (No. 00-5464) (2001).** Garland joined a four-paragraph, per curiam opinion (an opinion issued by the entire three-judge panel without attributing authorship to a particular judge), which acknowledged possible errors by the Secretary but ultimately affirmed the Department of Interior's decision not to acknowledge the Ramapough Mountain Indians, concluding that they failed to provide sufficient evidence demonstrating descendancy from a historic Indian tribe. The Ramapough live on the New York-New Jersey border and filed their petition for federal recognition in 1979. The Bureau of Indian Affairs issued a Final Determination in 1996 and a revised Final Determination in 1998, both denying federal recognition. Ramapough challenged the Secretary's denial in District Court, which issued a summary judgement in favor of the Secretary. The D.C. Circuit held that federal recognition regulations require proof that the Petitioners "descended from any known historical tribe of North American Indians" and that Ramapough produced no evidence on this point.

***United States Air Tour Association. v. FAA* (Nos. 00-1201 and 00-1212) (2001).** Garland wrote the unanimous opinion holding that FAA regulations giving unique treatment to an Indian tribe did not violate the Constitution. Petitioners challenged FAA rules limiting commercial air tours in the

Grand Canyon, claiming, among other arguments, that the FAA violated the Fifth Amendment's Equal Protection Clause by exempting flights originating on the Hualapai Indian Reservation from the flight limitations. Garland relied on *Morton v. Mancari* for the rule that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," such treatment must be upheld. He went on to conclude that the "Hualapai exception is at least rationally related to the government's interest in fulfilling its trust obligation to the Tribe." Although the D.C. Circuit found other actions by the FAA in the rulemaking process were arbitrary and capricious, it did not disturb the agency's exemption on flights from the Hualapai Reservation.

San Manuel v. National Labor Relations Board (05-1392) (2007). Garland joined a unanimous decision, written by Judge Janice Rogers Brown (a very conservative judge), holding that the National Labor Relations Act (NLRA) applies to tribally-owned businesses located on Indian reservations. Departing from its previous rulings, the National Labor Relations Board had found that San Manuel's tribally-owned casino was subject to provisions of the NLRA. On appeal, the D.C. Circuit focused on whether application of the NLRA would unlawfully impinge on tribal sovereignty. The court viewed tribal sovereignty as existing on a continuum: strongest when it is "explicitly established by treaty," or when the tribe is governing matters concerning only tribal members; and at its weakest when the tribe enters into business transactions with non-Indians. Using this conception of tribal sovereignty, the court concluded that the NLRA's application did not impinge on tribal sovereignty enough to exclude San Manuel because casino operation is not a traditional attribute of self-government and the casino's employees and patrons were primarily non-Indian. Additionally, the court held that the tribe was an "employer" under the NLRA and was not included within the statute's governmental exception.

Klamath Water Users Assn. v. FERC (06-1212) (2008). Garland wrote a unanimous opinion denying an irrigator's petition to intervene in a FERC proceeding where tribal interests were involved. The Klamath Water Users Association (KWUA) sought to intervene in the relicensing proceedings for a PacifiCorp dam in the Klamath River basin. The KWUA argued that the FERC relicensing proceeding could negatively impact power rates for irrigators. Garland disagreed and pointed to the fact that the states of California and Oregon set those rates and that the FERC proceeding would have no bearing on those state determinations. Therefore, the court concluded that KWUA lacked standing to intervene in the proceeding. Although tribal interests opposed the KWUA's intervention, Garland's opinion did not discuss the tribes' role in the case and utilized principles of Constitutional law to reach its conclusion.

Vann v. Kempthorne (07-5024) (2008). Garland joined a unanimous opinion, which held that tribal officials may be sued for alleged violations of federal law despite the tribe's sovereign immunity. The case was brought by descendants of "Cherokee Freedmen," African-Americans living in the Cherokee Nation at the end of the U.S. Civil War, some of whom were former slaves. An 1866 treaty with the U.S. established the descendants' tribal citizenship, but a 2007 tribal constitutional amendment extinguished it. The D.C. Circuit reversed the trial court's holding that the Thirteenth Amendment and provisions of the 1866 treaty abrogated the tribe's sovereign immunity, reasoning that Congress had not explicitly and unequivocally abrogated it. However, the court held that tribal officials are subject to such suits because of the *Ex Parte Young* Doctrine—an exception to Eleventh Amendment *state* government immunity which allows lawsuits against state officials to prevent them from acting in violation of federal law. While the D.C. Circuit said the doctrine's principle is equally

applicable to tribal and state officials, it did not explain its rationale as to why tribes, who are not parties to the U.S. Constitution, should be subject to the doctrine.

The Confirmation Process

A path forward to Garland's confirmation is unclear. Chuck Grassley (R-IA), Chairman of the Senate Judiciary Committee, has publicly stated the committee will not hold confirmation hearings prior to the November 2016 election. However, a large coalition of interest groups are also putting public pressure on the Republican leadership, organizing campaigns around the theme "#DoYourJob." Whether or not hearings and a full Senate vote on the confirmation will occur after the election likely hinges on the outcome of the presidential race and which party will control the Senate beginning in January 2017.

NARF will continue to research Garland's record and share its findings with Tribal Leaders in order to inform their decision on whether to support or oppose Garland's confirmation for a life-time appointment as a Justice on the Supreme Court of the United States.