

## Supreme Court Nominee Merrick Garland on Guns

**Sarah Trumble**

Former Deputy Director,  
Social Policy & Politics

President Obama has announced his pick to fill the Supreme Court vacancy created by the passing of Justice Scalia, and within the hour of Merrick Garland's nomination, folks on the right including the [National Rifle Association](#) (NRA), [National Review](#), [Gun Owners of America](#), and the [Drudge Report](#) voiced opposition to his confirmation. But instead of adhering to the party line—that no nominee should get a hearing because it is an election year—they've gone one step further, [mischaracterizing](#) the Chief Judge of the D.C. Circuit Court of Appeals as "[very liberal on guns](#)." In reality, there are only two ways to accurately describe Chief Judge Garland's record on guns: mainstream and short.

In the nineteen years that Merrick Garland has served on the bench (including the last three as Chief Judge), he's only faced two major gun cases—one in 2000 and the other in 2007. He did not author either of those opinions. In fact, in the 2007 case, he wasn't even ruling on the case on its merits—all he did was vote on whether the full court should rehear it after the case was originally heard by a panel of just three of the judges.

In the 2000 case, the NRA sued the federal government over the National Instant Criminal Background Check System (NICS), claiming that because it temporarily stored records for audit purposes, it constituted a national gun registry. The *Brady Act*, which established the background check system, had also banned the federal government from creating a gun registry, as did a 1968 law already on the books. Chief Judge Garland joined the majority opinion finding that NICS neither violated the *Brady Act* nor created a national gun registry. This ruling affirmed the decision that had already been issued by the District Court, and when the NRA appealed to the Supreme Court, the Justices declined to hear their appeal. That means not even four Justices on the conservative Rehnquist Court believed the ruling to which Chief Judge Garland had signed on was worth reviewing, much less reversing, as it takes only four of the nine votes to decide to take a case.

Seven years later, a panel of three judges on the D.C. Circuit heard a challenge to the District of Columbia's strict gun laws banning handgun ownership. Chief Judge Garland was not one of those judges. When the Court struck down the law, the city asked all ten judges on the Circuit to vote on whether the case should be reheard "en banc"—that is, by all of them. Under D.C. Circuit rules, an appellate court may rehear a case en banc if doing so is required to maintain uniformity of the Circuit's decisions or if the proceeding "involves a question of exceptional importance." There were no conflicting cases at the time within the D.C. Circuit, so presumably when Chief Judge Garland voted to hear the case en banc it was because he believed it to be of exceptional importance—a characterization with which few could argue. The three-judge panel decision marked the very first time any appeals court (of 13) had ever overturned a gun law based on the Second Amendment. In fact, this was the case that would later be appealed up to the Supreme Court, where the Justices would for the first time rule that the Second Amendment was not just a group right (the right to bear arms in a militia) but an individual one (each person has a right to bear arms

individually). Chief Judge Garland was one of four judges to vote for an en banc hearing in that case—including Judge A. Raymond Randolph, a George H. W. Bush appointee who has been described as "one of the most outspoken and agenda-driven conservatives on the entire federal bench." Clearly, a vote to ask the full court to consider this important case did not indicate hostility to the Second Amendment.

In the end, six judges voted against en banc review, and so the city's appeal went directly up to the Supreme Court, where the case was renamed *D.C. v. Heller* and became arguably the most influential gun precedent in modern times. To date, Chief Judge Garland has never taken a side or offered his opinion either way on the substance of that case.

It's clear that nothing in Merrick Garland's gun record demonstrates anything but the deeply thoughtful decision-making that we should expect of someone nominated to serve on the highest court in the land. But those who would like the opportunity to ask Chief Judge Garland more about his thinking around the Second Amendment and other crucial constitutional issues decided by the Supreme Court need only put their efforts toward calling for a hearing on his nomination to do just that.

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