

Judge Garland Could Bring New Consensus To High Court

By **Natalie Rodriguez**

Law360, New York (March 16, 2016, 9:15 PM ET) -- Should D.C. Circuit Chief Judge Merrick B. Garland manage to get through the highly contentious U.S. Supreme Court nomination process before him, the "judges' judge" would bring a calming voice and a penchant for inquisitive questioning that could build new consensus among the high court, despite his slightly left-of-center bent on some issues, several experts contend.

Those who have known Judge Garland throughout the various stages of his legal careers often echo each other in remembering him: He was "the law students' law student," the "lawyers' lawyer" and the "judges' judge." Many also noted his "brilliant mind" and "wonderful temperament," which some contend could help him build coalitions among the other Supreme Court justices should he join them after having been nominated by President Barack Obama.

"He is the most judicious person you can imagine. It is almost as if when he was born, he already had his judicial robes on," said Abner Greene, a Fordham University School of Law professor who has known Judge Garland personally and professionally for many years.

If he replaces the late Justice Antonin Scalia, Judge Garland's presence on the bench would undoubtedly change the court's balance, given that he is not a strong conservative. There is debate, however, over just how left he would swing the court, and several experts contend he would essentially bring to the high court the same bridge-building skills he has displayed in the D.C. Circuit.

"I think he would be a stabilizing force. He would bring things toward the center," said Arthur Miller, a New York University professor who taught at Harvard Law School while Judge Garland was a student and who has come to know him throughout the years at various events.

Miller added that there is evidence in Judge Garland's past opinions that he would "play within the foul lines" of a case instead of trying to write opinions that had broader impacts. And that point could be key for a future Supreme Court bench.

"He may well be the kind of justice who could have some influence on the court, not so much by writing path-breaking opinions ... but maybe [by] crafting some accommodations, maybe they would find it easier to resolve some cases on narrower technical ground," said Jonathan Entin, a professor at Case Western Reserve University School of Law who has been acquainted with Judge Garland and has seen his career develop.

Judge Garland is more centrist than Justices Ruth Bader Ginsburg and Elena Kagan, several sources agreed, though there was debate over whether he is more centrist than Justice Anthony Kennedy. Generally, though, there is a sentiment that Judge Garland likely be able to build coalitions with Justices Ginsburg, Kennedy and Stephen Breyer as well as Chief Justice John G. Roberts on certain matters.

Additionally, he would bring with him viewpoints that have been molded by a diverse career, which has included clerking for Judge Henry J. Friendly on the Second Circuit and Justice William J. Brennan on the Supreme Court and working through several stints at both the U.S. Department of Justice and Arnold & Porter LLP. He also served as an assistant U.S. attorney and associate deputy attorney general before putting on his judicial robes.

"He's not someone who has been in the ivory tower of practice ... he also was a prosecutor, so I feel that gives him a fairly broad perspective on law and legal issues that he would bring to the seat," said Rodger D. Citron, associate dean for academic affairs and professor at Touro College's Jacob D. Fuchsberg Law Center, who has argued before Judge Garland in the past. He added Judge Garland would bring substantial expertise in administrative law to the Supreme Court, given his service on the D.C. Circuit.

The diverse experience also would mean that he would likely swing slightly from the center in different ways on different issues. While he is more liberal on issues such as environmental or human rights matters, he is firm on law and order, which is probably an influence from his days as a prosecutor, according to Miller.

Several sources, however, contended that Judge Garland is often very careful to leave politics out of legal issues. This may hark back to the education he received during his time clerking for the Republican-appointed Judge Friendly, noted Theodore Mirvis, a Wachtell Lipton Rosen & Katz partner who also clerked for the judge and went to Harvard Law around the same time as Judge Garland.

"Anybody trained by Judge Friendly as I was or Merrick would never view legal issues through a political lens. That's not how he operated," Mirvis said.

The perception Judge Garland often gives off is that he doesn't have an agenda "other than to follow the laws and get the cases right," said Kenneth S. Geller, managing partner of Mayer Brown LLP, who worked alongside Judge Garland from 1979 to 1981. At the time, Geller was deputy solicitor general at the U.S. Department of Justice, and Judge Garland was a special assistant to the attorney general.

Indeed, several sources said they have often gotten the impression that Judge Garland is very practical-minded and focused on coming up with solutions while following the letter of the law as thoroughly as possible. Some pointed to his time leading the investigation into the 1995 Oklahoma City bombing.

"Merrick Garland was the people's lawyer when every American was watching," said Larry Mackey, a Barnes & Thornburg LLP partner who was part of the prosecution in the bombing case. "Within hours of the explosion, which took 168 lives, Merrick was on the ground in Oklahoma City, taking charge of an investigation which would lead to the arrests of Tim McVeigh and Terry Nichols two days later. Hundreds of others served in the subsequent process which led to the conviction of McVeigh and Nichols, but Merrick Garland was the leader when courage, strength and clear minds were most needed."

Vicki Zemp Behenna, a Crowe & Dunlevy attorney who also worked on the Oklahoma City bombing case, remembers Judge Garland "being kind and reflective" and "wanting us to do things correctly to insure

that the people responsible for the bombing were held accountable and that the evidence was properly obtained and preserved."

This temperament of being respectful, kind and calm while trying to find a solution may help Judge Garland build bridges should he make it to the Supreme Court.

Several experts noted that they could not imagine Judge Garland using the kind of vitriolic language that Justice Scalia was known for using in certain opinions, and some said it is unlikely that he would use as language as strong as Justices Kagan and Sonia Sotomayor have used.

Still, several sources noted that Judge Garland asks tough questions.

"He's highly efficient. He will want lawyers presenting before him to be on the mark with respect to what he's asking," said Scott Mendeloff, a Greenberg Traurig LLP litigator who was part of the Oklahoma City bombing prosecution with Judge Garland.

Part of this is driven by curiosity. Whenever he approaches a case, he deep-dives into factual issues and works to understand the case on a number of levels, from the broader theoretical issues to the more detailed minutiae, according to Clare Huntington, a professor at Fordham School of Law who clerked for the judge during his first year on the D.C. Circuit.

In court, he often peppers counsel from both sides with tough questions, according to several attorneys that have appeared before him.

He doesn't give the impression, however, that he is asking questions to score points or to hear himself talk, said Joseph Palmore, co-chair of Morrison & Foerster LLP's appellate and Supreme Court practice group.

"He asks good, hardball questions that go to the heart of the case," Palmore said, adding that the questions often demonstrate "impeccable preparation" on Judge Garland's part.

And Judge Garland is not unnecessarily combative in his questioning. "He will ask a question about the weakest part of your argument in such a way that it doesn't hurt," said Vince McKnight, a partner at Sanford Heisler Kimpel LLP who has appeared before Judge Garland.

Several attorneys remarked that Judge Garland is respected by them and the legal community at large because of how he approaches everyone in a genteel manner, and that temperament continues behind the scenes.

"He's the same person in every setting, which is to say a remarkable human being. ... The same way he treats cases with a similar temperament, he does that with people as well," Huntington said, noting that he has developed a deeply loyal circle of former clerks.

Experts contend that should Judge Garland make it onto the Supreme Court, he will likely be able to go to both camps and discuss issues — and be heard on those issues — while maintaining the other justices' respect even when they may disagree. And this could help build new bridges on the high court.

"He represents the prototype of what a judge should be," McKnight said. "He's very interested to solve the problem, and he's fair."

--Editing by Katherine Rautenberg and Brian Baresch.

Correction: An earlier story incorrectly identified how Scott Mendeloff and Judge Merrick Garland knew each other.

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