

MARCH 16, 2016 | KEY OSHA CASES EXPLAINED

Pres. Obama Announces Nominee to S.Ct. – A Moderate on Labor and Worker Safety

By [Kara M. Maciel](#) and [Eric J. Conn](#)

President Obama has tapped a moderate in [Judge Merrick Garland](#), the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, for the U.S. Supreme Court vacancy left by the late Antonin Scalia. Here is a link to a [video about Judge Garland posted on the White House website](#). Presidential politics may, however, stand in Garland's way, as Senate Republicans have threatened to block any nominee, even from getting a hearing or vote.



Because the D.C. Circuit is often referred to as the second-highest court in the land, Judge Garland's court opinions have been closely watched. Garland, nominated to the federal court of appeals by President Bill Clinton, has been viewed as a moderate left-of-center jurist, and has taken the side of business in quite a few high profile cases.

One example is [Volks Constructors](#), an Occupational Safety and Health Administration case in which Judge

Garland overturned the decision of the OSH Review Commission and concurred with the employer's argument that OSHA's six-month statute of limitations applies to injury and illness recordkeeping violations (making an inaccurate or incomplete OSHA log). OSHA had tried to impose a legal theory that inaccurate logs were a "continuing violation" that tolled the statute of limitations period for every day the log remained inaccurate. Judge Garland ruled that a recordkeeping violation occurs at a point in time when the recordkeeping entry was due to be perfected, it does not continue beyond that date, and OSHA may not cite beyond six months from that date. Judge Garland cautioned not to override his opinion, emphasizing:

"This does not mean, however, that the statute could not admit of a continuing violation theory under other circumstances."

OSHA is working on a rulemaking to undo that decision.

President Obama selected Judge Garland as a moderate in what appears to be an effort to surmount what is expected to be a highly contentious Senate confirmation process. President Obama in the Rose Garden ceremony introducing Judge Garland as his nominee said:

"Judge Garland is widely recognized not only as one of America's sharpest legal minds, but someone who brings to his work a spirit of decency, modesty, integrity, even-handedness and excellence. These qualities and his long commitment to public service have earned him the respect and admiration from leaders from both sides of the aisle."

Because Judge Garland was confirmed to his earlier D.C. Circuit seat with a good deal of Republican support, it may prove more difficult for the current Senate leadership to block his confirmation to the High Court. However, because of Senate Majority Leader Mitch McConnell's insistence after Scalia's sudden death that an Obama nominee will not get a hearing, it may be months before we see a full Court. Sen. McConnell doubled down on that position in a Senate speech Wednesday:

"It seems clear that President Obama made this nomination not with the intent of seeing the nominee confirmed but in order to politicize it for purposes of the election."

McConnell referred to the so-called "Biden Rule" against consideration of the nominee during the political season:

"The Biden Rule underlines that what the President has done with this nomination would be unfair to any nominee, and more importantly the rule warns of the great costs the President's action could carry for our nation."

It will be interesting to track what happens with this nomination; whether Judge Garland gets a hearing, gets a vote, gets seated on the High Court. If not, and if a Democrat wins the Presidential Election this Fall, it will be interesting to see if this nomination of a moderate jurist is pulled back by Pres. Obama, and the seat left open for a more progressive nominee by the next President.

