

Legal Sidebar

What, If Anything, Has Judge Garland Said About the Second Amendment and Guns?

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When President Obama nominated D.C. Circuit Judge Merrick Garland to the Supreme Court, there was [speculation](#) on his views of the Second Amendment. Judge Garland's views in this area of law are of interest, particularly because the Supreme Court declared that the Second Amendment protects an individual's right to keep and bear arms in the 2008 case of [District of Columbia v. Heller](#), which reviewed a D.C. Circuit decision in which Judge Garland was not on the reviewing panel. While the Court in 2010 [held](#) that the Amendment "is fully applicable to the States," it [has not taken](#) up any new Second Amendment cases since then. Although the Senate confirms the President's nominee to the Supreme Court, there is a [House Resolution](#) expressing the sense that the "Senate should not confirm a nominee to the United States Supreme Court whose professional record or statements display opposition to the Second Amendment freedoms of law-abiding gun owners, including the fundamental, individual right to keep and bear arms" as affirmed by the Court.

As Second Amendment jurisprudence is [arguably at its infancy](#), some have [argued](#) that Judge Garland could be a voice on the Court who would be "anti-gun rights" or whose vote would be hostile toward an expansive interpretation of the Amendment. Others have [expressed](#) that there is little to no evidence available to understand his views on the issue. To date, none of Judge Garland's [writings outside the court](#) nor any of his judicial opinions appear to directly touch upon the Second Amendment. There is at least one action taken by Judge Garland that has been [viewed](#) by some to indicate that he would have disagreed with the Supreme Court's opinion in *Heller*. When *Heller* was heard by the D.C. Circuit, the case, then known as [Parker v. District of Columbia](#), was the second time that a federal appellate court determined that the Second Amendment provides an individual rather than collective right to keep and bear arms. Judge Garland was not a part of the three-judge panel that struck down the District's laws, which had effectively prevented ownership of handguns. He was, however, among a minority of judges who voted in favor of rehearing the *Parker* case en banc. Ultimately, the D.C. Circuit voted 6-4 to deny en banc review, meaning that *Parker* was not reconsidered by all the active judges sitting on the D.C. Circuit. The Supreme Court ultimately sustained the ruling in *Parker*. In 2005, Judge Garland had been among a majority of judges who voted against en banc review of *Seegars v. Ashcroft*, a case that had been dismissed because the plaintiffs lacked standing to bring a pre-enforcement challenge to the same D.C. gun restrictions that were ultimately upheld by the Supreme Court in *Heller*.

Some have [opined](#) that Judge Garland's vote to grant en banc review in *Parker* is a potential signal that he would have reversed the panel decision that was later upheld by the Supreme Court. However, [others](#) have stated that a vote to rehear a decision en banc is not necessarily an indication of a judge's views on the merits of a case. Under the [Federal Rules of Appellate Procedure](#), a case might warrant en banc review if "the proceeding involves a question of exceptional importance" otherwise "an en banc hearing or rehearing is not favored and ordinarily will not be ordered." At the time, *Parker* was the second decision, after [United States v. Emerson](#), decided by the Fifth Circuit, to conclude that the Second Amendment protects an individual right. But, the D.C. Circuit was the first to strike down the firearms laws at issue for being unconstitutional under the Amendment, whereas the Fifth Circuit in *Emerson* upheld the challenged firearms law. It is possible that one or more of the four judges of the D.C. Circuit voted favorably for en banc review due to the novel nature of the case. However, the order denying en banc review contained no accompanying opinions from any of the judges as to their beliefs on why an en banc panel of the D.C. Circuit should or should not reconsider the *Parker* decision.

Judge Garland's agreement with the majority opinion in the 2000 case [NRA v. Reno](#) has also been [highlighted](#) as possibly shedding light regarding his views on firearms regulations, albeit, in a case that did not address the Second Amendment. *Reno*, authored by Judge David Tatel, involved interpreting whether Brady Act provisions, which required the Attorney General to establish the [National Instant Criminal Background Check System](#) (NICS), permitted her to promulgate a regulation that allowed the government to retain, for not more than six months, records of all approved firearms background checks for purposes of maintaining an Audit Log. The court examined the validity of the regulation under the [Chevron doctrine](#), a two-part test providing: (1) if Congress has directly spoken on an issue, then the express commands of the statute must be followed; (2) if the statute is ambiguous or silent, however, the court will defer to the agency's construction of the statute if it is reasonable.

Applying the *Chevron* doctrine, the majority opinion in *Reno*, with which Judge Garland agreed, determined that "Congress [in the Brady Act] has not unambiguously required immediate destruction of NICS records." The majority found support in the Brady Act's legislative history, where the House bill, which was not adopted, would have required NICS records to be "immediately destroyed." The majority also concluded that federal prohibitions on creating a registry of firearm owners did not clearly prevent the temporary retention of NICS records for Audit Log purposes. Finding that Congress did not directly speak on the issue, the majority then examined the Attorney General's argument that she promulgated the Audit Log regulation pursuant to other Brady Act provisions, which required her to establish NICS and prescribe regulations to protect the system's security and privacy. The majority concluded that the Audit Log regulation "represents a 'permissible construction'" of these provisions, as Congress would have "expect[ed] the Attorney General to ensure that [NICS] produces accurate information and guards against misuse." The dissent found the regulation invalid on grounds that the Brady Act "simply does not grant [the Attorney General] that power" to maintain the Audit Log, and that Congress clearly prohibited the Attorney General from promulgating this type of rule. Notably, this Audit Log regulation is no longer in effect because Congress later [passed a law](#) requiring next-day destruction of NICS records for approved firearms transferees.

Based on the circumstances surrounding his vote to rehear the *Parker* decision en banc and his agreement with the majority opinion in *Reno*, it seems difficult to pinpoint with certainty what views Judge Garland may have towards the Second Amendment and the regulation of firearms.

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