

Where do Some of the Most Talked-About Potential U.S. Supreme Court Nominees Stand on Money in Politics and Corporate Personhood?

1. **Jane Kelly**, Circuit Judge, U.S. Court of Appeals for the Eighth Circuit. (*Received commission January 2013.*)

Campaign finance: Thus far, we have not found any cases in which Judge Kelly confronted these issues.

Corporate speech claims: In 2014, Judge Kelly joined a three-judge panel decision rejecting a chiropractor, medical, and law firm referral business's First Amendment challenge to an automobile insurance law's disclosure requirements.¹ The court found that the disclosure requirements were "'reasonably related' to Minnesota's interest in protecting consumers from misleading information because, [without these] disclosures, consumers know nothing about the type of care they may receive if they call [the referral business]."²

2. **Ketanji Brown Jackson**, District Judge, U.S. District Court for the District of Columbia. (*Received commission March 2013.*)

Campaign finance: Thus far, we have not found any cases in which Judge Brown Jackson confronted these issues.

Corporate speech claims: Judge Brown Jackson authored the district court decision in *American Meat Institute* that rejected the meat industry's First Amendment challenge to the U.S. Department of Agriculture's country-of-origin labeling regulation.³ On appeal, her decision was upheld by panels that included Judge Srinivasan and Judge Garland.⁴

3. **Srikanth (Sri) Srinivasan**, Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. (*Received commission May 2013.*)

Campaign finance: Judge Srinivasan has not written any opinions on campaign finance reform. However, he joined the D.C. Circuit's en banc (full court) decision in *Wagner v.*

¹ *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014).

² *Id.*

³ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 83 (D.D.C. 2013) *aff'd*, 746 F.3d 1065 (D.C. Cir. 2014) *reh'g en banc granted*, opinion vacated, 35 ITRD 2763 (D.C. Cir. 2014) and judgment reinstated, 760 F.3d 18 (D.C. Cir. 2014).

⁴ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014) *reh'g en banc granted*, opinion vacated, 35 ITRD 2763 (D.C. Cir. 2014) and judgment reinstated, 760 F.3d 18 (D.C. Cir. 2014).

Federal Election Commission.⁵ In *Wagner*, federal contractors challenged a provision of the Federal Election Campaign Act barring individuals and companies from making federal campaign contributions while they negotiated or performed federal contracts. Judge Srinivasan joined a unanimous decision that rejected the contractors' First Amendment and equal protection claims, holding that the ban was closely drawn to the federal government's interests of protecting against *quid pro quo* corruption and its appearance, and of preventing interference with merit-based public administration.

Corporate speech claims: In 2014, Judge Srinivasan was part of a three-judge panel that affirmed the lower court decision from Judge Brown Jackson that rejected the meat industry's First Amendment challenge to the USDA's country-of-origin labeling regulation.⁶ After the industry appealed the decision to the full D.C. Circuit, Judge Srinivasan joined the en banc majority opinion that upheld the rule again, holding that the disclosure of purely factual commercial information could be required based on a range of government interests, not just the limited purpose of "correcting deception."⁷

The following year, Judge Srinivasan wrote the dissent in a 2-1 decision that struck down the "conflict minerals" rule. The two-judge majority held that the First Amendment prohibited a Securities and Exchange Commission rule that required publicly traded corporations to disclose whether their products used conflict minerals from the Democratic Republic of the Congo.⁸ In his dissent, Judge Srinivasan wrote that "there should be no viable First Amendment objection to a requirement for [a publicly traded corporation] to disclose the country of origin of a product's materials."⁹ Finally, writing for the court in 2015, Judge Srinivasan held that a Federal Trade Commission rule that required a corporation to gain the support of at least one randomized controlled trial before it could claim a causal relationship between consumption of its products and treatment or prevention of a disease did not violate the First Amendment.¹⁰

⁵ *Wagner v. Fed. Election Comm'n*, 793 F.3d 1 (D.C. Cir. 2015) *cert. denied sub nom, Miller v. F.E.C.*, No. 15-428, 2016 WL 207263 (U.S. Jan. 19, 2016).

⁶ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014) reh'g en banc granted, opinion vacated, 35 ITRD 2763 (D.C. Cir. 2014) and judgment reinstated, 760 F.3d 18 (D.C. Cir. 2014).

⁷ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

⁸ *Nat'l Ass'n of Manufacturers v. S.E.C.*, 800 F.3d 518 (D.C. Cir. 2015). *See* <http://www.nationallawjournal.com/id=1202735033781/DC-Circuit-Strikes-Second-Blow-Against-Conflict-Minerals-Rule?slreturn=20160116120536>.

⁹ *Nat'l Ass'n of Manufacturers*, 800 F.3d at 531 (Srinivasan, J., dissenting). Judge Srinivasan believed that while the more permissive standard established in *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985) provided the appropriate framework for evaluating the Conflict Minerals Rule, the Rule was nevertheless able to satisfy the even more demanding standard established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Id.* at 541 (Srinivasan, J., dissenting).

¹⁰ *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478 (D.C. Cir. 2015).

NOTE: While Judge Srinivasan’s judicial opinions on corporate constitutional claims have not given any cause for concern, his earlier private sector work may give pause. When he was first nominated for the Court of Appeals, EarthRights International, a nonprofit environmental and human rights advocacy organization, sent a letter to the U.S. Senate Judiciary Committee urging senators to ask Judge Srinivasan about his work defending Exxon Mobile over allegations of murder and torture committed by the company’s security forces in Indonesia. EarthRights wrote that “[Srinivasan] has been one of the principal architects of a legal strategy intended to secure special exemptions for corporations from liability for serious abuses,”¹¹ and claimed that Srinivasan had worked to undermine legal accountability for corporate wrongdoing as a litigator at O’Melveny & Myers LLP, as he argued against corporate liability for human rights abuses.¹²

4. **Jacqueline Nguyen**, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit. (*Received commission May 2012*).

Campaign finance: Judge Nguyen was part of a three-judge panel that held that the First Amendment rights of contributors were not burdened by a state law that required nonprofits to disclose their contributors’ identifying information for law enforcement use.¹³ Without a showing of actual harm, the panel concluded, it could not enjoin the Attorney General from enforcing the disclosure requirement.

Corporate speech claims: Thus far, we have not found any cases in which Judge Nguyen confronted these issues.

5. **Merrick Garland**, Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit. (*Received commission March 1997*).

Campaign finance: Judge Garland has been involved in a number of notable campaign finance cases. He was part of the unanimous en banc decision that greenlighted the creation of “super PACs” via *SpeechNow.org v. Federal Election Commission*,¹⁴ and he authored the court’s en banc decision in *Wagner v. Federal Election Commission*¹⁵ that rejected First Amendment and equal protection challenges to the Federal Election Campaign Act’s ban on federal campaign

¹¹ See <https://www.documentcloud.org/documents/682485-letter-re-nomination-of-sri-srinivasan-4-5-2013.html>.

¹² See, e.g., Answering Brief of Defendants-Appellees/Cross-Appellants, *John Doe VIII v. Exxon Mobil Corp.*, No. 09-7125, at 27, 31 (D.C. Cir. 2010); Brief of Appellants and Special Appendix, *Balintulo v. Daimler AG*, No. 09-2778-cv, at 57-59 (2d Cir. 2009).

¹³ *Americans for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015).

¹⁴ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

¹⁵ *Wagner v. Fed. Election Comm’n*, 793 F.3d 1 (D.C. Cir. 2015) *cert. denied sub nom, Miller v. F.E.C.*, No. 15-428, 2016 WL 207263 (U.S. Jan. 19, 2016).

contributions from individuals and companies that are negotiating or performing federal contracts.

Judge Garland also authored a decision that upheld a lobbying disclosure statute against a First Amendment challenge,¹⁶ and joined a unanimous decision invalidating Federal Election Commission regulations as insufficiently stringent for implementing the Bipartisan Campaign Reform Act (also known as McCain-Feingold).¹⁷ Most recently, he joined a decision affirming the Federal Election Commission's action against former Senator Larry Craig for unlawfully converting campaign funds to pay for personal legal expenses.¹⁸

Corporate speech claims: Judge Garland has also been involved in a handful of significant decisions involving corporate speech. He was part of both the panel and en banc decisions in *American Meat Institute v. United States Department of Agriculture* (alongside Judge Srinivasan) which rejected the meat industry's First Amendment challenge to the USDA's country-of-origin labeling regulation,¹⁹ and he also joined Judge Srinivasan in a panel decision holding that a Federal Trade Commission rule requiring a corporation to gain the support of at least one randomized controlled trial before it could claim a causal relationship between consumption of its products and the treatment or prevention of any disease did not violate the First Amendment.²⁰ He also sat on a three-judge panel that found that the commercial speech doctrine required the Federal Drug Administration to consider whether disclaimers on dietary supplements would negate potentially misleading health claims,²¹ as well as on a panel that upheld federal regulations implementing privacy provisions against a First Amendment challenge from a credit rating agency.²²

6. Patricia Millett, Circuit Judge, U.S. Court of Appeals for the District of Columbia Circuit. (Received commission December 2013.)

¹⁶ *NAM v. Taylor*, 582 F.3d 1 (2009).

¹⁷ *Shays v. FEC*, 528 F.3d 914 (2008).

¹⁸ *Fed. Election Comm'n v. Craig for U.S. Senate*, No. 14-5297, 2016 WL 850823 (D.C. Cir. Mar. 4, 2016). Judge Garland was also part of a panel decision that held that the National Commission on Economic Growth and Tax Reform, an organization formed by then-Senate Majority Leader, Robert Dole, and then-Speaker of the House of Representatives, Newt Gingrich, was an "action organization" that did not qualify for tax exempt status. *Fund for the Study of Econ. Growth & Tax Reform v. I.R.S.*, 161 F.3d 755, 756 (D.C. Cir. 1998).

¹⁹ *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065 (D.C. Cir.) reh'g en banc granted, opinion vacated, 35 ITRD 2763 (D.C. Cir. 2014) and judgment reinstated, 760 F.3d 18 (D.C. Cir. 2014).

²⁰ *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478 (D.C. Cir. 2015).

²¹ *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999).

²² *Trans Union LLC v. F.T.C.*, 295 F.3d 42 (D.C. Cir. 2002).

Campaign finance: Judge Millett, alongside Judge Srinivasan and Judge Garland, joined the unanimous en banc decision in *Wagner v. Federal Election Commission* that upheld the FEC’s ban on federal campaign contributions from government contractors.²³

Corporate speech claims: Thus far, we have not found any cases in which Judge Millett confronted these issues.²⁴

7. **Paul Watford**, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit. (*Received commission May 2012.*)

Campaign finance: In 2015, Judge Watford was part of a three-judge panel that rejected a First Amendment and due process challenge to four provisions of Hawaii’s campaign finance laws²⁵ under *Citizens United v. Federal Election Commission*.²⁶ Judge Watford was also part of a three-judge panel that held that individual contribution limits and a prohibition on “conduit contributions” (wherein the defendant charged with a campaign finance violation has given supposedly unconditional gifts to friends and relatives who then contribute to a political campaign) did not violate the First Amendment.²⁷

Corporate speech claims: Thus far, we have not found any cases in which Judge Watford confronted these issues.

²³ *Wagner v. Fed. Election Comm’n*, 793 F.3d 1 (D.C. Cir. 2015) *cert. denied sub nom, Miller v. F.E.C.*, No. 15-428, 2016 WL 207263 (U.S. Jan. 19, 2016).

²⁴ For unspecified reasons, Judge Millett did not participate in the D.C. Circuit’s decision on the petition for rehearing en banc in the conflict minerals case. *See Nat’l Ass’n of Mfrs.*, No. 13-5252 (D.C. Cir. Nov. 9, 2015) (order denying petitions for rehearing en banc).

²⁵ *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015) *cert. denied sub nom. Yamada v. Shoda*, 136 S. Ct. 569 (2015).

²⁶ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁷ *U.S. v. Whittemore*, 776 F.3d 1074 (9th Cir. 2015) *cert. denied*, 136 S. Ct. 89 (2015).