Report on the Nomination of

JUDGE KETANJI BROWN JACKSON

As an Associate Justice of the Supreme Court of the United States

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

JUDGE KETANJI BROWN JACKSON

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
NOMINATED FEBRUARY 25, 2022 BY PRESIDENT JOSEPH R. BIDEN JR.
TO THE SUPREME COURT OF THE UNITED STATES

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

ABOUT THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. Since its inception nearly 60 years ago, the Lawyers' Committee has been committed to vigorous civil rights enforcement, the pursuit of equal justice under law, and fidelity to the rule of law. Among its major areas of work are Educational Opportunities, Fair Housing & Community Development, Voting Rights, Criminal Justice, Economic Justice, and Digital Justice.

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I. EXECUTIVE SUMMARY

On February 25, 2022, President Joseph R. Biden Jr. nominated Judge Ketanji Brown Jackson of the United States Court of Appeals for the District of Columbia Circuit to the Supreme Court of the United States, to replace retiring Justice Stephen G. Breyer.

If confirmed, Judge Jackson will bring a wealth of qualifications and a breadth of experience to the bench. A graduate of public high school, Judge Jackson attended Harvard College and Harvard Law School. She has nine years of judicial experience as a judge on the United States District Court for the District of Columbia and the Court of Appeals, which is more years of judicial experience than four sitting Justices had when they were nominated to the Court. She would join Justice Sonia Sotomayor as the second sitting Justice to have served as a trial court judge. Judge Jackson would be the first Justice to have served as a federal public defender and the first since Justice Thurgood Marshall to bring significant criminal defense experience to the Court. She shares a distinction with Justice Breyer as having served as a member of the United States Sentencing Commission. Judge Jackson has three prior Presidential nominations and has been confirmed by the Senate each time.

If confirmed, Judge Jackson will bring a wealth of qualifications and a breadth of experience to the bench.

Judge Jackson's remarkable career demonstrates a measured judicial temperament, keen intellect, and dedication to the rule of law. She is known to promote consensus and understanding of the law. There is no question that, in her adjudication of cases, she respects precedent and follows the laws and the Constitution when applying the law equally to all. Her record reflects that she does indeed have, in the words of President Biden, a "pragmatic understanding that the law must work for the American people" and that she would "bring extraordinary qualifications, deep experience and intellect, and a rigorous judicial record to the Court."[1]

Judge Jackson's remarkable career demonstrates a measured judicial temperament, keen intellect, and dedication to the rule of law.

Judge Jackson would, moreover, be the first Black woman Justice, third Black Justice, and sixth woman Justice to have served on the Court in its 232-year history. For too long, the Court did not reflect the makeup of the society its opinions govern. Justice Thurgood Marshall, the first Black Justice, was appointed in 1967. Justice Clarence Thomas, the second Black Justice, was not appointed until 1991. Justice Sandra Day O'Connor became the first woman Justice in 1981, and Justice Ruth Bader Ginsburg became the second in 1993, followed by Justice Sonia Sotomayor in 2009, Justice Elena Kagan in 2010, and Justice Amy Coney Barrett in 2020. Diversity on the Supreme Court—be it race, gender or professional background—is valuable in itself. A mix of backgrounds, perspectives, and professional expertise lends credibility to the Court's deliberations on important legal questions and inspires confidence in the American people.

This report examines Judge Jackson's record on issues central to the Lawyers' Committee's mission of promoting equal justice for all through the rule of law. The Lawyers' Committee believes the best evidence of Judge Jackson's qualifications as a nominee are her judicial experience and record, her private practice and public defender experience, her work while serving as a member of the Sentencing Commission, and her other writings as a scholar.

Judge Jackson would be the first Black woman Justice, third Black Justice, and sixth woman Justice to have served on the Court in its 232-year history.

Her jurisprudence reflects a jurist who is meticulous, thoughtful, and rigorous in upholding the Constitution, laws of the United States and existing precedent.

JURISPRUDENCE

As a trial and appellate judge, Judge Jackson has written nearly 600 opinions. These opinions include rulings in areas of law that the Lawyers' Committee considers core civil rights issues, including: employment discrimination, criminal justice and law enforcement, environmental law and justice, education, and disability rights. Judge Jackson's rulings also address other important areas of law, such as the constitutional balance of powers among the three branches of government, a plaintiff's standing to seek redress in federal court, and challenges to federal agency action. Judge Jackson has not yet ruled on other civil rights issues, including housing, voting rights, digital justice, reproductive rights, and affirmative action. Her jurisprudence reflects a jurist who is meticulous, thoughtful, and rigorous in upholding the Constitution, laws of the United States and existing precedent.

PUBLIC SERVICE AND ADVOCACY

Before taking the federal bench, Judge Jackson served for six years on the Sentencing Commission, including one term as Vice Chair. While on the Sentencing Commission, Judge Jackson insisted that the United States Sentencing Guidelines should reduce sentencing disparities and reflect fair punishments for people convicted of drug offenses. She actively contributed to the Commission's decision to make Congress's reduction of the crack versus powder cocaine sentencing disparity retroactive to all who had been sentenced under the prior sentencing regime. When the Commission considered whether to make a drug trafficking base-level offense amendment retroactive, Judge Jackson built consensus by consulting with the Department of Justice and individual sentencing judges to ensure that those being resentenced received careful evaluation of whether their sentence should be reduced in light of the dangerousness of the offense. Judge Jackson's time on the Commission was characterized by her core belief that the sentencing of defendants in criminal matters should result from equal application of the law and fundamental fairness—taking into account the nature of the offense and the degree of culpability, among other factors—and that this would ultimately protect the liberties of all Americans.

Judge Jackson practiced law in both private practice and as an Assistant Federal Public Defender. As a public defender litigating appeals, Judge Jackson worked to protect the rights all Americans enjoy, including the right to counsel, and aptly analogized or distinguished the facts of her clients' cases from prior precedent, leading the D.C. Circuit to adopt her reasoning and grant relief to her clients on a number of occasions. She was also tasked with representing detainees at Guantanamo Bay, on whose behalf she filed habeas petitions challenging the constitutionality of their detainment. While in private practice, Judge Jackson wrote amicus curiae briefs on behalf of organizations and groups that advocated for access to justice and robust civil liberty protections.

Her record demonstrates not only the exceptional competence necessary to serve on the Court, but that she also approaches legal questions with a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

Judge Jackson's commitment to constitutional protections and punishment reform for people accused or convicted of crimes was evident even before the start of her professional career. As an undergraduate, she wrote a thesis on the coercive practices in plea bargaining based, in part, on her firsthand experience as an intern at a criminal defense law office in New York City. As a law student, she advocated for a more consistent and principled approach to determining whether sex offender registration laws were punitive or preventive. Throughout her career, Judge Jackson has recognized that a democratic society functions best when the criminal justice system, and the legal system as a whole, is as fair as possible for everyone.

RECOMMENDATION

Judge Jackson possesses extraordinary academic and professional credentials. Her record demonstrates not only the exceptional competence necessary to serve on the Court, but that she also approaches legal questions with a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. For these reasons, the Lawyers' Committee for Civil Rights Under Law unequivocally supports the nomination of Judge Jackson to the Supreme Court of the United States.

II. THE LAWYERS' COMMITTEE'S POLICY REGARDING NOMINATIONS TO THE SUPREME COURT

Since its creation in 1963, at the urging of President John F. Kennedy, the Lawyers' Committee has been devoted to the enforcement and advancement of civil rights in the United States. Over the course of nearly six decades, our nation has been transformed as we have taken important strides in confronting discrimination and injustice. Yet the challenges of unlawful discrimination remain, with inequities and disparities throughout our society and legal system, and they continue to obstruct and undermine the principle of equal justice for all.

Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Supreme Court to determine whether the nominee possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

III. BIOGRAPHY

Judge Ketanji Brown Jackson was born just miles from the Supreme Court in Washington, D.C., in 1970, a year she has identified as "a time of hope" for Black Americans because "the hard work of the previous decade—the marches, the boycotts, the sit-ins, the arrests—had finally borne fruit."[2] Today, more than 50 years later, Judge Jackson's nomination as the first Black woman to serve on the Supreme Court symbolizes the fruit of those whose sacrifices, hard work, and perseverance made her nomination possible—including the pathmarking career of Judge Constance Baker Motley, this nation's first Black woman federal judge, upon whose shoulders Judge Jackson acknowledges she stands.[3] The nomination is a reminder that while this nation has continued to witness progress in the half-century since Judge Jackson's birth, there is still much to be done. This nomination also serves as a looking glass into the Supreme Court's own history and its constantly shifting progression and regression—from displaying indifference to, or sanctioning the oppressions of, Black people, women, and other marginalized groups in the days of *Dred Scott*, *Plessy*, and *Bradwell*, to affirming the rights of minorities and recognizing the federal government's power to enforce those rights in the pivotal age of *Brown* and *Heart of Atlanta Motel*, among others.[4] Her impending confirmation by the United States Senate not only embodies the hope of the era in which she was born, but it also serves as "a time of hope" for eras to come.

Viewed through this lens, the confirmation of Judge Jackson as a Supreme Court Justice would demonstrate a remarkable and profound transformation in the Court's legacy. Just as important, the fullness of Judge Jackson's life experiences and credentials—as a Black woman, a working mother, a public defender, a member of the Sentencing Commission, and a judge on the court of appeals and the district court—would bring underrepresented perspectives to the Court. That diverse representation, both professional and personal, is as important today as ever, as the Court continues to face complex issues of justice and equality.

A. EARLY LIFE AND FAMILY

Judge Jackson's family has been instrumental to her development as a leader and public servant. Both of her parents attended historically Black colleges and universities (HBCUs) and began their careers as public school teachers. They were part of a community of "young Black professionals" who, as Judge Jackson has explained, "were finally on the verge of getting to enjoy the full freedom and equality that is promised to citizens of the United States."[5] When Judge Jackson was a child, the family moved to Miami, Florida, so that her father could attend law school. Judge Jackson has recounted that one of her earliest memories is sitting next to her father while he studied his law books, as she worked on her coloring books. He became her "first professional role model."[6] Her father eventually took a role as the lead attorney for the Miami-Dade County School Board, and her mother became the principal of a magnet public high school.

Judge Jackson will be the first Black woman Justice and only the third Black Justice, if confirmed, marking a significant moment in the Court's history. Her confirmation would also reflect a groundbreaking achievement in her own family history. Judge Jackson is almost certain she is a descendant of enslaved people, on both sides of her family. Growing up in the 1970s, she was attuned to civil rights issues and the struggles of Black Americans from an early age and often engaged in conversation with her parents about how to succeed even when confronted with prejudice. She attributes her success in part to the values they instilled in her to maintain a strong sense of self-worth. To challenge preconceptions that others may have had from the fact that, in her words, she was a "young Black woman with a funny name," she focused on working hard and developing her "brand within each organization" with which she became involved.[7]

Like many families in this country, Judge Jackson's extended family has complex ties to both law enforcement and the criminal justice system. Judge Jackson's brother was a police officer and detective in Baltimore, Maryland, before enlisting in the Army and serving tours of duty in the Middle East. Two of Judge Jackson's uncles served for decades as police officers—one rising to the position of Miami's police chief, and the other serving as a sex crimes detective. Another uncle, however, got "caught up in the drug trade," as Judge Jackson described it during her nomination acceptance speech, and he received a severe penalty of life imprisonment for a nonviolent drug crime.[8] With the help of pro bono legal counsel, he petitioned for clemency in 2014, and his sentence was commuted by President Barack Obama in 2016.[9] Being in a family with this duality of lived experience may offer a nuanced perspective unique among jurists, but is very much in line with the everyday realities of the communities whose lives are directly affected by judicial opinions.

Judge Jackson is married to Patrick Jackson, a surgeon in Washington D.C., and they have two daughters, Talia and Leila. With one child 17 years old at the time of the confirmation hearing, Judge Jackson, if confirmed, would join the ranks of Justices who have served on the Court while parenting minor children.

B. EDUCATION

Judge Jackson has impressive academic credentials, having attended both public and private educational institutions. She graduated from a public high school, Miami Palmetto Senior High, where she was student body president. She was involved in competitive speech and debate and won the national oratory title at one of the country's largest high school debate tournaments. Despite her successes, when she decided to apply to Harvard for college, she was warned not to set her sights too high. She has credited that caution as part of her motivation to excel.

Judge Jackson attended Harvard College for her undergraduate studies and graduated magna cum laude in 1992. While there, she was involved in a range of activities reflecting a diversity of interests. She organized a study group on Black women writers and became involved in campus theater groups. Her senior thesis, *"The Hand of Oppression:" Plea Bargaining Processes and the Coercion of Criminal Defendants*, focused on the perils and practicalities of plea bargains and reflected the first of many writings on the practical impact of law and policy.[10] After college, she spent a year in New York City as a reporter and researcher for TIME magazine, focusing on

stories about economic policy and rising prescription drug prices.

In 1993, Judge Jackson began her legal studies at Harvard Law School. Like Justice Elena Kagan, Judge Jackson served as a supervising editor on the Harvard Law Review. In that role, she published a student note about the post-release regulation of sex offenders, entitled *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*.[11] If confirmed, Judge Jackson will be the fourth Justice on the current Court to have received a law degree from Harvard Law School and the eighth Justice on the current Court to hold a law degree from an Ivy League school. Historically, Harvard Law School has the largest number of Supreme Court Justice alumni, with 21 Justices who attended the Law School.

C. EXPERIENCE AS A LAWYER

Judge Jackson's deep professional experience prior to taking the bench, as a private attorney, a federal public defender, and Vice Chair of the Sentencing Commission, reveals a steadfast commitment to public service and to the fair administration of justice. If confirmed, she would bring important perspective to the Court, particularly on issues relating to criminal justice. She would be the first Justice since Justice Thurgood Marshall to bring significant criminal defense experience to the Court, and she would replace Justice Breyer as the only Justice on the Court with experience as a member of the bipartisan Sentencing Commission.

At the outset of her career, Judge Jackson clerked at each level of the federal judiciary. She first served as a law clerk to the Honorable Patti Saris on the U.S. District Court for the District of Massachusetts, followed by a year with the Honorable Bruce Selya on the U.S. Court of Appeals for the First Circuit. After a year in private practice, she then clerked for Justice Breyer on the Supreme Court from 1999 to 2000. Six current Justices similarly served as a law clerk to a Supreme Court Justice before becoming Justices themselves, and, if confirmed, Judge Jackson would become the 10th Justice in the Court's history to have served as a law clerk before becoming a Justice on the Court. She would also be the third Justice to replace the Justice for whom she clerked.

Following her clerkship with Justice Breyer, and in between her other public service positions, Judge Jackson spent approximately six years working in private practice at three law firms. During those times, she maintained an active practice drafting amicus curiae briefs, often on issues relating to criminal justice and in support of incarcerated individuals.

Judge Jackson's deep professional experience prior to taking the bench, as a private attorney, a federal public defender, and Vice Chair of the Sentencing Commission, reveals a steadfast commitment to public service and to the fair administration of justice.

From 2005 to 2007, Judge Jackson worked as an Assistant Federal Public Defender in Washington, D.C. If confirmed, she will be the first Justice to have served as a public defender. Judge Jackson was drawn to public defense—in her words, "public service is a core value in my family," and she believes that "in order to guarantee liberty and justice for all, the government has to provide due process to the individuals it accuses of criminal behavior."[12] Although this work was difficult, Judge Jackson recognized the importance of the service because, "in the aggregate, [it] reduces the threat of arbitrary or unfounded deprivations of individual liberty."[13] In her time in the Office of the Federal Public Defender, Judge Jackson focused on appellate work representing individuals charged with federal crimes and also defended detainees held at Guantanamo Bay. She sought to vindicate her clients' constitutional rights and advocated for just sentences—always holding the government to its burden and ensuring the court remained within the bounds of its authority. In doing so, Judge Jackson fulfilled the critical role defense counsel play in our criminal justice system, which is to serve as their client's advocate, to "render effective, high-quality legal representation with integrity," and, ultimately, to protect the constitutional and legal rights of all Americans.[14]

In 2010, President Barack Obama nominated Judge Jackson to serve as the Vice Chair of the Sentencing Commission, and she was confirmed by unanimous consent of the Senate. Judge Jackson had already spent two years at the Sentencing Commission as an assistant special counsel before she was a public defender, during which time she learned the ropes of the Commission, drafted proposed amendments to the Sentencing Guidelines, and analyzed federal law and sentencing policies. When she returned as Vice Chair, she regularly met with stakeholders across the federal criminal justice system to gather information and develop recommendations on federal sentencing. As one of her most significant accomplishments in that role, she oversaw an amendment to the Sentencing Guidelines with bipartisan support that reduced the recommended sentencing ranges for people convicted on federal drug trafficking charges. The Sentencing Commission subsequently voted to apply the amendment retroactively, resulting in the early release of thousands of individuals serving sentences for crack cocaine convictions.

D. COMMUNITY ENGAGEMENT

Judge Jackson has served on the Harvard University Board of Overseers since 2016. According to the university, "the Board probes the quality of Harvard's programs and assures that the University remains true to its charter as a place of learning." It also "provides counsel to the University's leadership on priorities, plans, and strategic initiatives."[15] While some outlets have reported that the Board historically participated in the university's administration of admissions policies, the extent of the Board's involvement in those issues today is not clear. As a result of her role on the Board, Judge Jackson recused herself from two cases during her time as a district court judge. One involved the Environmental Protection Agency's failure to respond to a request for information submitted by a Harvard research librarian. The other involved a lawsuit challenging the Department of Education's sexual assault guidelines for colleges and universities, and Judge Jackson stated in her Senate Judiciary Questionnaire that she recused because she "was serving on the board of a university that was evaluating its own potential response to those guidelines."[16]

Judge Jackson is also an active member of the legal community. She has taught a trial advocacy workshop (Harvard Law School) and a federal sentencing seminar (George Washington University Law School). She serves on the board of trustees of the Georgetown Day School. She is a commissioner on the Supreme Court Fellows Commission; she is on the council of the American Law Institute; and she serves as vice president of the Edward Bennett Williams Inn of Court.

E. JUDICIAL EXPERIENCE

President Obama nominated Judge Jackson for a seat on the U.S. District Court for the District of Columbia in 2012, and she was confirmed with bipartisan support in the Senate by a voice vote in March 2013. Eight years later, President Biden nominated Judge Jackson to the U.S. Court of Appeals for the D.C. Circuit, and she was confirmed in June 2021 by a vote of 53-44.

In total, Judge Jackson would bring nine years of judicial experience to her position on the Supreme Court. In comparison, that is more years of experience on the bench than four sitting Justices had before their nominations: Chief Justice Roberts (2 years); Justice Thomas (1.5 years); Justice Kagan (0 years); and Justice Barrett (3 years). Justices Alito, Sotomayor, Gorsuch, and Kavanaugh each served more than a decade before their confirmation to the Supreme Court.

Moreover, in the Court's 232-year history, Judge Jackson would not only become the first Black woman and the third Black Justice to serve, joining Justice Thurgood Marshall and Justice Clarence Thomas; she will also become the sixth woman Justice, with Justice Sandra Day O'Connor, Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, Justice Elena Kagan, and Justice Amy Coney Barrett—making her the eighth of 116 Justices to bring racial or gender diversity to the Court. She would also join Justice Sotomayor as the second sitting Justice with district court experience.

* * *

Dr. Martin Luther King Jr. proclaimed that "the arc of the moral universe is long, but it bends toward justice."[17] With her historic nomination to the Supreme Court—bringing with her a breadth of experiences, sterling credentials, and commitment to the rule of law—Judge Jackson is leading us further along the path toward justice. Her intellect, professional experience, and compelling personal story, framed against the backdrop of this country's civil rights history, are appropriate for the President and Senate to consider. Such consideration is consistent with centuries of practice respecting Supreme Court nominations, including whether a nominee brings a perspective to the Court that is missing or underrepresented.

As the first Black woman Justice, the first Justice with significant experience as a public defender, and years of experience as both a trial judge and an appellate judge, Judge Jackson has a richness of lived experiences that will undoubtedly influence and enhance—as all judges' lived experiences do—her adjudication of some of the most important legal questions in our time.

Presidential consideration of factors relating to the personal background of a nominee is not new or unusual.[18] George Washington took geographic balance into account in making his appointments to the Court and avoided having two Justices from the same state. William Howard Taft chose a nominee from Wyoming to account for the westward expansion of the United States population. Herbert Hoover was concerned about having too many Justices from New York. Explicit discussion of race, gender, or ethnicity as a factor in the Presidential nomination is a relatively modern development, however, that reflects the unfortunate reality that it is only recently that Presidents considered anyone other than white men as nominees.[19] Indeed, in our nation's history, 94% of Justices—all but seven—have been white males, and 97% have been white (including four white women Justices).

The Lawyers' Committee endorses the proposition that a diverse Supreme Court is a better Supreme Court. As in other areas of American life, including our political institutions, our universities and our communities, diversity can bring enormous benefits by increasing understanding among different groups and promoting a healthy exchange of perspectives. We expect judges will do their best to be faithful to the governing law in a case and fair to the parties who appear before them. But no two judges are the same, and we should embrace the richness that comes from their differences. As the first Black woman Justice, the first Justice with significant experience as a public defender, and years of experience as both a trial judge and an appellate judge, Judge Jackson has a richness of lived experiences that will undoubtedly influence and enhance—as all judges' lived experiences do—her adjudication of some of the most important legal questions in our time.

IV. TESTIMONY FROM PRIOR CONFIRMATION HEARINGS

During Judge Jackson's three prior Senate confirmation hearings, she fielded questions on a variety of topics relevant to the Lawyers' Committee's core issues, including: her judicial philosophy, her public defender work, sentencing, racial inequality, and constitutional and statutory civil rights. Her testimony reveals a strong focus on judicial impartiality, adhering to precedent and methodical decision-making—principles she has applied to all legal issues, including civil rights. Her interactions with Senate Judiciary Committee members during these hearings, as well as statements from those who spoke on her behalf, show that she is a highly respected and accomplished jurist.

A. BACKGROUND ON THE THREE CONFIRMATION HEARINGS

Judge Jackson has been confirmed by the Senate on three occasions. The first was her nomination by President Obama to serve as Vice Chair of the Sentencing Commission in 2010, which is a bipartisan, independent agency within the judicial branch created to reduce sentencing disparities and promote transparency and proportionality in sentencing. She was confirmed for that position with unanimous, bipartisan support.

The second was after President Obama nominated her to the U.S. District Court for the District of Columbia. At her December 2012 confirmation hearing, Judge Jackson was introduced by Republican Congressman Paul Ryan, a relative through marriage, who said "our politics may differ, but my praise for Ketanji's intellect, for her character, for her integrity, it is unequivocal."[20] According to Democratic Congresswoman Eleanor Holmes Norton, who also spoke on Judge Jackson's behalf at the hearing, Justice Breyer told the nominating commission: "Hire her … She is great, she is brilliant. She is a mix of common sense, thoughtfulness. She is decent. She is very smart and has the mix of skills and experience we need on the bench."[21] After providing both live testimony and written responses to Senators' questions, Judge Jackson was confirmed by a voice vote March 22, 2013.

Judge Jackson received her third Senate confirmation in 2021, after President Biden nominated her to serve on the U.S. Court of Appeals for the D.C. Circuit. In support of her nomination, the Judiciary Committee received a letter signed by 23 individuals who clerked alongside Judge Jackson on the Supreme Court in 1999 for both Republican- and Democratic-appointed Justices.[22] The Judiciary Committee also received a letter from D.C. Circuit Judge Thomas Griffith, an appointee of President George W. Bush, stating: "Although [Judge Jackson] and I have sometimes differed on the best outcome of a case, I have always respected her careful approach and agreeable manner, two indispensable traits for success in a collegial body."[23] Judge Jackson again provided both live testimony and written responses to Senators' questions. She was confirmed on June 14, 2021, by a 53-44 vote, with three Republican Senators—Lisa Murkowski of Alaska, Susan Collins of Maine, and Lindsay Graham of South Carolina—joining the Democrats. Upon voting to advance her nomination, Senator Graham stated, "I think she's qualified for the job … she has a different philosophy than I do, but it's been that way the whole time."[24]

B. TESTIMONY CONCERNING JUDICIAL PHILOSOPHY

During both judicial confirmation hearings, Judge Jackson was asked to define her judicial philosophy. Her answers at both hearings were consistent, and are best summed up by a written response she provided for her circuit court confirmation hearing:

> I do not have a judicial philosophy per se, other than to apply the same method of thorough analysis to every case, regardless of the parties. Specifically, in every case that I have handled as a district judge, I have considered only the parties' arguments, the relevant facts, and the law as I understand it, including the text of any applicable statutes and the binding precedents of the Supreme Court and the D.C. Circuit. And I have consistently applied the same level of analytical rigor to my evaluation of the parties' arguments, no matter who or what is involved in the legal action. Moreover, in my work as a district judge, I have not had occasion to evaluate broader legal principles or develop a substantive judicial philosophy. Given the very different functions of a trial court judge and a Supreme Court Justice, I am not able to draw an analogy between any particular Justice's judicial philosophy and the approach that I have employed as a district court judge or would employ as a D.C. Circuit Judge, if I am confirmed.[25]

Judge Jackson also received multiple questions on judicial activism. In her circuit court hearing, she defined "judicial activism" as "when a judge ... is unwilling or unable to rule as the law requires and instead resolves cases consistent with his or her personal views" and noted that "[j]udicial activism, so defined, is not appropriate."[26] She reiterated this point several times throughout her testimony, emphasizing that a judge should never substitute her policy preferences for those of the legislature to reach a desired outcome.

Judge Jackson testified regarding the framework she used for statutory construction as a district court judge. She starts "with a comprehensive evaluation of the statute's text" and "give[s] the statute's text controlling weight."[27] If, after "examining the structure of the statute as a whole," there is an ambiguity, she then "look[s] to Supreme Court precedent for guidance as to the tools of interpretation to apply next in

light of the particular circumstances of the case (e.g., the rule of lenity in the criminal context, *Chevron* deference, etc.)."[28] She has "also consulted the legislative history of a statute, as the Supreme Court permits, but [has] never resolved an ambiguity based solely on the legislative history of the statute."[29]

With respect to her position on stare decisis, Judge Jackson stated that "[s]tare decisis is a bedrock legal principle that ensures consistency and impartiality of judgments. All judges are obligated to follow stare decisis, and the doctrine is particularly strong as applied to federal district court judges, who are bound to follow the precedents of the Supreme Court and the respective Courts of Appeals."[30]

The confirmation proceedings also illuminated Judge Jackson's approach to constitutional interpretation. In a written response for her circuit court hearing, Judge Jackson stated that she would interpret the Constitution in a manner that is consistent with the methods used by the Supreme Court, noting that "while the Supreme Court has primarily evaluated the original public meaning of the text of the constitutional provision at issue … its binding precedents also sometimes refer to the original intent of the Framers."[31] She stated that, because she is bound by those precedents, she has not "develop[ed] [her] own theory of constitutional interpretation."[32]

When asked whether the Constitution "changes over time," Judge Jackson responded that she has "a duty to avoid commenting on, or providing any personal views about, matters that are in the Supreme Court's province to decide, such as how best to discern the meaning of the Constitution's provisions and whether its meaning has changed over time."[33] This response differed somewhat from her response to a similar question during her district court confirmation hearing, in which she stated that "[t]he Constitution embodies fundamental principles of limited government authority that originated with the Founders and do not 'evolve,'" and that the Constitution does not "incorporate new understandings resulting from social movements, legislation, or historical practices."[34] In response to a question about that difference, Judge Jackson explained that, as a sitting judge, she has a duty to avoid commenting or providing personal views on disputed legal matters such as the most appropriate method for interpreting the Constitution and noted that she was not a sitting federal judge when she answered the question for her district court hearing.

C. TESTIMONY CONCERNING SENTENCING

Each of Judge Jackson's confirmation hearings also covered the topic of sentencing. One key issue was the exercise of judicial discretion in sentencing. At her Sentencing Commission confirmation hearing, she suggested that one of the goals of the Sentencing Guidelines was to "avoid ... unwarranted sentencing disparities among defendants." But, she continued, "the current advisory sentencing structure makes achievement of that statutory goal more difficult than the mandatory sentencing system that Congress originally envisioned."[35] At her circuit court confirmation hearing, Judge Jackson suggested that the way to reduce such disparities was not to remove judicial discretion, but to give judges more information about sentences in their district. During her hearings, Judge Jackson was also questioned about her time on the Sentencing Commission; in particular, the Commission's decision to make the Fair Sentencing Act guidelines amendments retroactive. She explained that the decision to make the amendments retroactive followed careful deliberation on multiple factors and was necessary to ensure equal application of criminal laws. *See infra* Part 6.

D. TESTIMONY CONCERNING PRIOR PUBLIC DEFENDER WORK

At her circuit court confirmation hearing, Judge Jackson described how her work as a federal public defender shaped her judicial approach. When she worked on criminal appeals, she was struck by how little her clients understood about the criminal process. Thus, she explained that, as a judge, she took extra care to communicate with the defendants who came before her in the courtroom. She spoke directly to them, explained every stage of the proceedings, and discussed the rationale behind the sentence in terms of impact on victims and society.

Judge Jackson was also questioned about the individuals she represented as a public defender, including her work defending Guantanamo detainees, and as the author of amicus curiae briefs in support of criminal defendants or detainees during her time in private practice. *See infra* Part 6. When asked whether she was "ever concerned that" her work as a public defender "would result in more violent criminals" being "put back on the streets," she reiterated the importance of the Sixth Amendment's right to counsel and explained that:

> [h]aving lawyers who can set aside their own personal beliefs about their client's alleged behavior or their client's propensity to commit crimes benefits *all* persons in the United States, because it incentivizes the government to investigate accusations thoroughly and to protect the rights of the accused during the criminal justice process, which, in the aggregate, reduces the threat of arbitrary or unfounded deprivations of individual liberty.[36]

D. TESTIMONY CONCERNING RACE AND THE LAW

Race was also a key topic of discussion at Judge Jackson's confirmation hearings. When asked during her circuit court hearing about systemic racism within the United States, she responded:

> As a judge, I am not looking at systemic effects. I'm not thinking about or focusing on or forming opinions about the research or the circumstances in the abstract like that. I am looking at each case. A person might make a claim that they've been discriminated against in a particular context, and I am applying the law to determine whether or not the law sustains that claim. So, I don't really have a frame of reference to answer a question about systemic racism.[37]

Many of the questions on race focused on racial disparities in sentencing, given her prior work on the Sentencing Commission. In response to these questions, Judge Jackson stated that, as a sitting federal judge, "it would be inappropriate for me to express a belief about whether there are racial disparities in federal criminal sentencing, or whether unconscious bias of judicial officers causes any such disparities;" she did note, however, that she is "aware of social science research" on implicit bias.[38]

When asked about the role race might play generally in her deliberations, Judge Jackson responded, "I don't think that race plays a role in the kind of judge that I have been and that I would be," and that "race would be the kind of thing that would be inappropriate to inject in my evaluation of a case."[39] She did observe, "I've experienced life in perhaps a different way than some of my colleagues because of who I am, and that might be valuable."[40]

F. TESTIMONY CONCERNING CONSTITUTIONAL AND STATUTORY RIGHTS

Judge Jackson was also asked about her views on a variety of specific legal issues, such as the 10th Amendment, equal protection, abortion buffer zones, religious liberty, qualified immunity and hate speech. In her responses to these lines of questions, Judge Jackson tended to respond by quoting from the leading Supreme Court cases on the issue and stating that she would adhere to binding precedent. She emphasized, as have prior nominees, that it would be inappropriate to provide her personal or policy views on these issues. For example, on affirmative action, she stated that she would apply Supreme Court precedent and noted, "I have no particular insight into the future need for, or ramifications of, the continued use of race in admissions."[41] And with respect to specific cases on various issues, she largely declined to say whether they were wrongly decided, citing the judicial ethics code. She made three exceptions, expressly stating that *Marbury v. Madison*, *Brown v. Board of Education*, and *Loving v. Virginia* were correctly decided.

She offered more context on her approach to evaluating constitutional rights. When asked during her district court hearing what rights are "fundamental," she responded that "among the 'fundamental' rights that the Supreme Court has

recognized are the rights of family autonomy, custody, travel, access to courts and voting."[42] At her circuit court hearing, she stated that "the Free Exercise Clause" and "free speech" are also fundamental rights.[43] Additionally, in response to a question from Senator Tom Cotton on whether "civil rights [are] guaranteed to all Americans, or only specific sub-sets of Americans," she responded that "[a]ll Americans have the rights that are guaranteed by our Constitution," but that federal civil rights statutes "protect the constitutional rights of the categories of persons that are specifically identified in the statutes" based on "extensive findings by Congress pertaining to the prior discriminatory treatment of th[ose] groups."[44] She was also asked whether the Constitution protects rights that are not expressly enumerated in the Constitution, to which she responded by citing cases relating to rights to privacy, contraception, marriage, child-rearing, travel, abortion and refusal of life-saving treatment. She explained that the Supreme Court has determined that the Due Process Clauses of the Fifth and 14th Amendments, as well as the Ninth Amendment and the Privileges and Immunity Clause of Article IV, Section 2, are the sources for these rights.

G. TESTIMONY CONCERNING PRESIDENTIAL AUTHORITY

Finally, Judge Jackson was questioned about various issues respecting Presidential authority, and in particular her decision in *Committee on the Judiciary v. McGahn*, in which she held that former White House Counsel Don McGahn was not entitled to absolute immunity from complying with a House Committee subpoena.[45] *See infra* Part 5. Quoting from her opinion that "Presidents are not kings" and do not "have subjects, bound by loyalty or blood," Senator Chuck Grassley asked whether the Department of Justice claimed monarchical powers for the President or blood loyalty on the part of Mr. McGahn, and asked her to apply the decision to hypothetical facts—for example, if Congress were to subpoena one of her former law clerks to better understand her thinking behind the decision.[46] In response, she reiterated the facts of the case and stated that, as a sitting federal judge, it would be inappropriate to apply the decision to other hypothetical facts.

During live questioning at her circuit court confirmation hearing, Senator Thom Tillis suggested that Judge Jackson wrote the *McGahn* opinion "with a broad audience in mind."[47] He noted that Demand Justice—what he called a "dark money liberal group whose first priority is getting [confirmed] left wing judges who follow a liberal agenda instead of the Constitution"—originally did not list Judge Jackson on its Supreme Court short list but later added her after the *McGahn* opinion.[48] Judge Jackson responded that she has "always been an independent judge" and has "no control over what outside groups say about [her] rulings."[49]

V. OPINION ANALYSIS

The Lawyers' Committee reviewed Judge Jackson's nearly 600 written opinions from her time as a judge on the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit and analyzed the cases involving core civil rights issues and other areas of law that are important to the Lawyers' Committee's mission. Judge Jackson's opinions reveal a deep understanding of what it takes to secure equal justice under the law, in all manner of scenarios. She meticulously reviews the texts of statutes and interprets laws in a manner that affords meaningful protection from discrimination and environmental harms, and she has explained that civil rights do not evaporate if you are convicted of a crime. When called upon to apply civil rights protections, she carefully weighs the facts and the law, instilling confidence that parties will have the opportunity to have their day in court.

Overall, Judge Jackson's opinions are thorough, measured, thoughtful, and display a strong command of the facts and law. It is clear she is guided by the Constitution, the laws of Congress, and existing precedent, and not by a desire to reach any particular outcome. An important feature of her judicial writing style is her care in making her opinions accessible to the public who are not trained attorneys. This approach requires Judge Jackson to explain governing legal principles in great detail, to give pragmatic examples of how laws affect all people, and to show the reader what facts are important to the ultimate conclusion.

While serving as a district court judge, Judge Jackson had a number of high-profile, politically charged cases on her docket. Judge Jackson wrote lengthy opinions on complex issues, including the separation of powers. In some of these complex cases she was reversed, as may be expected in cases without clear guidance from the Supreme Court or the Court of Appeals. Reversal rates are an incomplete picture of a judge's tenure on the court and do not take account of subsequent procedural history or whether there was clear precedent at the time a judge was required to make a legal ruling. In one of the most high-profile cases, as described below, her opinion was reversed by a Circuit panel and then affirmed by the entire Circuit. In all cases, she explained her reasoning and the precedents that supported her decision. The Lawyers' Committee does not view any of these reversals as undermining Judge Jackson's commitment to interpret and follow the law. Of her cases that were appealed, Judge Jackson's reversal rate is average for district court judges in the D.C. Circuit.

A. LAWYERS' COMMITTEE'S CORE CIVIL RIGHTS ISSUES

In areas that the Lawyers' Committee considers core civil rights issues, including employment discrimination, criminal justice and law enforcement, environmental law and justice, education and disability discrimination, Judge Jackson has shown a willingness to carefully review the merits of claims, as well as to interpret laws in a way that carries out the congressional intent to protect the civil rights of all Americans.

1. Employment Discrimination

While on the district court, Judge Jackson considered dozens of cases involving claims of workplace discrimination on the basis of race, gender, age and disability. Judge Jackson has resolved a substantial number of these cases, in whole or in part, in favor of the defendant-employer. This result is not necessarily unexpected given the relatively high burden the law places on employment discrimination plaintiffs to prove their case. The totality of her cases reveals that Judge Jackson offers plaintiffs every reasonable opportunity to obtain review of the merits of their claims based on the standards established by the Supreme Court and the D.C. Circuit. Her opinions reflect a meticulous and balanced approach to the facts and the law, as well as pragmatic consideration of the real-world impact her decisions have on both plaintiff-employees and defendant-employers.

Judge Jackson's decision in *Von Drasek v. Burwell* exemplifies her evenhanded approach to ensuring review of claims wherever possible.[50] Plaintiff Susan Von Drasek was a chemist for the Food and Drug Administration (FDA) with diagnosed bipolar disorder that she had not disclosed to her employer. After receiving notice that she would be terminated for performance issues, Von Drasek disclosed her diagnosis and requested an accommodation, which the FDA rejected. The FDA terminated Von Drasek shortly thereafter. Judge Jackson dismissed Von Drasek's intentional discrimination and retaliation claims because the FDA had already made the decision to terminate Von Drasek before she disclosed her diagnosis, which "fail[ed] to satisfy the Rehabilitation Act's stringent but-for causation requirement."[51] But Judge Jackson allowed Von Drasek to proceed on her failure-to-accommodate claim. Following an extensive review of D.C. Circuit caselaw and administrative guidance, Judge Jackson held that the FDA had a duty to respond to an employee's accommodation request submitted before an employee's official termination—even where, as there, that request came "literally on the eve of her proposed dismissal."[52]

Judge Jackson's discrimination opinions show that she properly construes the standard for deciding a motion to dismiss in the context of a pro se plaintiff seeking relief, even if the facts or the law might ultimately foreclose relief. In *Tyson v. Brenna*n, for example, Judge Jackson considered the religious discrimination claim of a pro se plaintiff and found that the complaint alleged sufficient facts to survive a motion to dismiss. The plaintiff alleged that he was discriminated against on the basis of his Christian faith when his employer, the United States Postal Service (USPS), denied his transfer request to a different USPS facility.[53] In support of his claim, the plaintiff alleged that his manager repeatedly confronted him about playing gospel music too loudly, but did not confront other employees playing secular music at work.

Noting her obligation under Supreme Court precedent to liberally construe pro se pleadings, Judge Jackson held that these allegations were sufficient to state a claim and allowed the plaintiff to proceed with obtaining discovery. Similarly, in *Lawson v. Session*s, Judge Jackson declined to dismiss a pro se complaint alleging age, race, and sex discrimination, finding that although the pleading lacked clarity, it was sufficient to state a plausible claim.[54]

In one ruling that received significant public attention, *Ross v. Lockheed Martin Corp*., Judge Jackson ruled that employee plaintiffs had not satisfied the commonality requirement for preliminary class certification under Federal Rule of Civil Procedure 23.[55] In reaching this decision, Judge Jackson noted that she was bound to apply the Supreme Court's decision in *Wal-Mart v. Dukes*.[56] She explained, however, that she did so "reluctantly," recognizing that her ultimate ruling could impact plaintiffs' ability in this case to combat potential employment discrimination.[57] In *Ross*, putative class plaintiffs sued their employer, Lockheed Martin, for allegedly engaging in race-based discrimination through its performance appraisal system, which plaintiffs claimed relied on subjective indicators and failed to adequately guard against racial bias. Faithfully applying *Wal-Mart*, Judge Jackson held that "in order to establish the requisite commonality with respect to a discrimination challenge to an employee-review system that permits various managers to exercise discretion, Plaintiffs needed to demonstrate that all managers would exercise their discretion in a common way."[58] Judge Jackson held that plaintiffs failed to make that showing.

In addition to denying preliminary class certification, Judge Jackson refused to preliminarily approve a proposed class settlement agreement because, in her judgment, it did not adequately protect those harmed by Lockheed's policies. In particular, Judge Jackson was troubled by what she saw as an "egregious imbalance" between the claims at issue in the litigation, and the nearly unlimited scope of racial-discrimination claims that participating class members were required to forgo by accepting settlement.[59] Judge Jackson noted the proposed settlement agreement's "draconian" consequences for failing to respond to the class-wide notice: forfeiture of all race-discrimination claims contemplated by the release and inability to recover any compensation from the settlement fund.[60] Taken together, Judge Jackson found that these provisions "effectively allow[] Lockheed to inoculate itself against any and all race discrimination and race-related benefits claims by a huge swath of its African-American employees for a price that hardly seems 'adequate.'"[61]

2. Disability Discrimination

Judge Jackson decided several cases presenting disability rights issues while she was on the district court, including cases in the context of criminal justice and education. In each case, Judge Jackson explained that the rights of individuals with disabilities are fully protected under the law.

Judge Jackson clearly recognizes that convicted defendants do not lose their dignity and civil rights the moment they are jailed: "Incarceration inherently involves the relinquishment of many privileges; however, prisoners still retain certain civil rights."[62] In *Pierce v. District of Columbia*, Judge Jackson held that a D.C. correctional facility acted with "deliberate indifference" by refusing to grant a deaf inmate accommodations that would ensure that he could communicate effectively and by forcing him to communicate with staff and other inmates only through lip-reading and written notes, in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.[63] The facility maintained it had no obligation to accommodate the inmate because he had not made a request for an accommodation—an argument Judge Jackson found "truly baffling as a matter of law and logic" in a situation involving an individual with communications-related difficulties.[64] And, in any event, she determined that no reasonable jury could conclude that he did not request such an accommodation.

Judge Jackson's only opinions that touch on education involve the Individuals with Disabilities Education Act (IDEA).[65] These IDEA opinions generally show that she is protective of a student's right to an adequate education. In *W.S. v. District of Columbia*, for example, Judge Jackson considered a claim for tuition reimbursement brought by the parents of a child diagnosed with multiple learning disabilities.[66] The child was placed on an individualized education program (IEP) calling

for "full-time special education placement."[67] The Office of the State Superintendent of Education (OSSE) rejected the parent's preferred placement, and the parents deemed the program selected by the OSSE to be inadequate. The parents enrolled their child in their preferred program and filed an administrative complaint seeking reimbursement of their child's tuition. Judge Jackson concluded that the hearing officer in the administrative proceedings did not adequately address whether the program selected by OSSE could manage the student's aggressive behaviors—a major element of the student's IEP. Accordingly, she remanded the matter to the hearing officer to consider whether OSSE's program was sufficient, and if not, whether the parent's preferred program was a proper placement.

3. Criminal Justice and Law Enforcement

Judge Jackson's time as a federal public defender and service as Vice Chair of the Sentencing Commission clearly inform her approach to cases touching on the criminal justice system, which she views as working best when the parties have every reasonable opportunity to present their cases at every stage of the proceedings. She approaches cases with an informed evenhandedness that upholds the integrity of the system, demonstrating a willingness to grapple with both difficult legal questions and the practical implications of rulings.

(a) Constitutional Protections for Defendants

In the context of evaluating government conduct in the course of investigating and prosecuting crimes, Judge Jackson's opinions require officers and prosecutors to respect constitutional protections.

In *United States v. Richardson,* Judge Jackson considered whether to grant a motion to suppress a defendant's incriminating statements that she was the owner of a gun found during the execution of a search warrant.[68] As part of that inquiry, Judge Jackson needed to determine whether the defendant was in custody when she made the first of the incriminating statements (it was undisputed she was in custody at the time of later statements). Ruling against the government on that point, Judge Jackson held that the custody inquiry was "abundantly clear" even if the officers never said the magic words "you're under arrest."[69] No reasonable person would have felt free to leave after "a number of armed officers had forcibly entered [the defendant's] apartment in the early morning hours with weapons showing, handcuffed her behind her back, and placed her in the living room while they executed the search warrant" and "were ever present" during the course of the search.[70] Judge Jackson nevertheless denied the motion to suppress after a careful review of the facts. Judge Jackson concluded that because the focus of the officers' investigation was on another person and the officers repeatedly told the defendant not to take ownership of the gun if it really belonged to the target of the investigation, she was not subject to police interrogation when she made the incriminating statements. Therefore, the statements did not implicate the Fifth Amendment right against self-incrimination and were admissible.

In another case, *Patterson v. United States*, Judge Jackson rejected an attempt by the government to use protected speech as justification for an arrest.[71] The police had arrested an Occupy Wall Street protester for using profanity in a public park and charged him with disorderly conduct. There was no crime, according to Judge Jackson, because "[h]aving a constitutional right of free speech means that a person cannot be arrested and prosecuted in retaliation for engaging in protected speech."[72] The police officers were not entitled to qualified immunity from the arrestee's claims that his rights had been violated, she explained, because no reasonable officer could conclude under those circumstances the arrestee's use of profanity posed any threat of violence. This opinion is representative of the qualified immunity cases Judge Jackson has ruled on, consisting of a detailed, fact-based analysis under existing precedent to determine whether the circumstances warrant a grant of qualified immunity.

Judge Jackson also holds the government to pleading standards required by the Supreme Court and the D.C. Circuit. In *United States v. Hillie*, on a challenge to the sufficiency of an indictment for production and possession of child pornography, Judge Jackson found that the indictment failed to provide even minimally required factual information.[73] Specifically, the indictment was "barren of factual averments regarding the what, where, or how of [the defendant's] conduct."[74] Without these essential

elements, Judge Jackson concluded that "a non-clairvoyant reader" could not have "ascertained the substance of the government's accusations from" the indictment's face.[75] She also noted that the "charges lack[ed] sufficient specificity to enable Hillie to plead convictions or acquittals as a bar to a future prosecution."[76] In dismissing the indictment without prejudice, Judge Jackson reiterated that a valid indictment "preserves the Fifth Amendment's protections against abusive criminal charging practices," including the "right to be free from the risk of double jeopardy."[77]

(b) Sentencing and Compassionate Release

In a case involving prosecutorial overreach, *United States v. Young*, Judge Jackson denied the government's request as part of the defendant's sentence to seize both "forfeitable property" (the drugs involved in the offense) and the value of that property (i.e., the money used to purchase the drugs).[78] Such an outcome, according to Judge Jackson, would implicate concerns of "impermissible double counting" and "raise the specter of an impermissible extension of the court's authority to sentence under our constitutional scheme."[79]

Judge Jackson's decisions place great weight on the Sentencing Guidelines recommendations. In *United States v. Welch*, for example, Judge Jackson sentenced a North Carolina man who fired an AR-15 rifle inside a D.C. pizza restaurant while "investigating" the conspiracy theory known as "Pizzagate."[80] In alignment with the applicable federal and D.C. guidelines, Judge Jackson sentenced Welch to 24 months in prison for his federal offense and 48 months for his D.C. offense. In her Senate Judiciary Questionnaire, Judge Jackson explained that she based the sentence "primarily on the psychological and financial impact of the offenses on the victims and the need to deter others from committing similar crimes."[81]

During the height of the COVID-19 pandemic, Judge Jackson applied a measured approach in determining whether to exercise discretion and grant compassionate release to people convicted of nonviolent crimes. As a general matter, Judge Jackson noted in one case: "The obvious increased risk of harm that the COVID-19 pandemic poses to individuals who have been detained in the District's correctional facilities reasonably suggests that each and every criminal defendant … who … cannot take independent measures to control their own hygiene and distance themselves from others—should be released."[82] But, she adhered to "the constraints on judicial authority" to order compassionate release, which in her view "derive both from the fact that existing statutes mandate an individualized assessment of a detained person's flight risk and dangerousness" and from a "recognition that the act of releasing dangerous and/or potentially non-compliant criminal defendants into the community itself poses substantial risks."[83] On a case-by-case basis, Judge Jackson used her discretion to grant compassionate release to some people convicted of nonviolent crimes, such as individuals with health conditions, but not with respect to those convicted of violent crimes.[84]

4. Environmental Law and Environmental Justice

Judge Jackson issued multiple rulings on environmental issues as a district court judge. On the D.C. Circuit, Judge Jackson has joined, but not yet authored, opinions in many energy regulation cases. During her time on the bench, she has ruled in favor of environmental causes about as often as she has ruled against them, and this line of cases exemplifies the broader trend that Judge Jackson's decisions are not outcome oriented. Her rulings illustrate that she takes each case as it comes and rules based on the record and the law.

In one of her most significant cases on the district court, *Government of Guam v. United States*, Judge Jackson ruled in favor of the government of Guam in its $160 million lawsuit against the U.S. Navy for failing to clean up and close a landfill where the Navy disposed of Agent Orange and other munitions for decades.[85] The Environmental Protection Agency (EPA) had previously sued Guam for violating the Clean Water Act, claiming that untreated waste from the dump had entered into the waters of the United States. Guam and the EPA entered into a consent decree wherein the EPA required Guam to close the dump, pay a civil penalty, and design and install a dump cover system. Years later, Guam filed a complaint against the U.S. government under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which allows parties to pursue

a private right of action for direct cost recovery or a right of contribution if parties have settled their liability. The U.S. government argued that the prior consent decree eliminated Guam's right to direct cost recovery and its contribution claim was time-barred. Judge Jackson was tasked with determining whether Guam had "resolved its liability" such that it could not pursue direct cost recovery.[86]

In determining the meaning of the phrase "resolved its liability," which CERCLA does not define, Judge Jackson surveyed the case law, including a circuit split between the Sixth and Seventh Circuits on the one hand and the Ninth Circuit on the other.[87] In a thorough analysis, Judge Jackson agreed with the Sixth and Seventh Circuits and concluded that contracts containing non-admissions of liability, broad reservations of rights, and conditional covenants not to sue do not resolve liability for purposes of CERCLA's contribution mechanism. Judge Jackson found that the Ninth Circuit's contrary position "results in a situation in which parties who have clearly opted to set aside the resolution of the [potentially responsible party's] liability … are nevertheless deemed to have 'resolved its liability.'"[88] Consequently, because Guam had not resolved its CERCLA liability in the prior consent decree (meaning that it had not accepted responsibility for the presence of hazardous substances at the site), Judge Jackson determined that Guam should be allowed to pursue its claim against the U.S. Navy for direct cleanup costs. The D.C. Circuit reversed and left Guam with no CERCLA remedy, but the Supreme Court later reversed and issued a unanimous opinion aligning with Judge Jackson's original ruling.[89]

Judge Jackson has required agencies to abide by statutory duties to regulate emissions standards in reasonable timeframes. In *Community In-Power & Development Association v. Pruitt*, Judge Jackson ordered the EPA to complete overdue rulemakings setting emissions standards for nine categories of hazardous air pollutants over three and a half years.[90] The EPA admitted that it violated the Clean Air Act's prescriptions but requested another seven years to complete rulemakings that were already between six and eight years late. While Judge Jackson found that the plaintiffs' two-year timeline was unrealistic, she could "not accede to the agency's proposed timeline" because the agency had not shown it was impossible to meet an earlier deadline.[91]

In another case, *Sierra Club v. United States Army Corps of Engineers*, Judge Jackson determined that plaintiffs were wrong to insist that federal agencies had an obligation under the National Environmental Policy Act (NEPA) to conduct an environmental review of a 589-mile oil pipeline that traversed mostly privately owned land.[92] NEPA mandates that certain agencies evaluate the environmental consequences of any "major Federal action [ ] significantly affecting the quality of the human environment."[93] NEPA regulations define "major Federal actions" as "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies."[94] Because the pipeline would operate over approximately 27 miles of federal land and waterways, the private company constructing the pipeline sought, and obtained, various approvals from several federal agencies who had jurisdiction over those particular lands and waterways. In light of the text of the governing statute and regulations, the record evidence, and controlling precedent, Judge Jackson found that the plaintiffs "mistakenly view NEPA … as a mechanism for instituting federal evaluation and oversight of a private construction project that Congress has not seen fit to authorize the federal government to regulate," instead of "as an appropriate means of informing agency officials about the environmental consequences of major actions that the federal government is poised to take."[95] But she declined to adopt the agencies' position that "as a matter of law [] agency actions such as … the approval of a mandated oil spill response plan can never rise to the level of major federal action for NEPA purposes."[96]

B. ADDITIONAL ISSUES OF SIGNIFICANCE

Sitting as a federal judge in the nation's capital, Judge Jackson considered many cases involving the Constitution's balance of powers among the three branches of government and challenges to agency action. She has also authored decisions on whether plaintiffs can seek redress in federal court. With respect to Article III standing challenges, Judge Jackson carefully considers whether plaintiffs have a concrete and cognizable injury and provides a careful analysis of the facts.

With respect to statutory interpretation, Judge Jackson has invalidated agency action as an abuse of discretion and has been careful to ensure that agencies followed proper procedures.

1. Separation of Powers

In a number of cases, Judge Jackson has been called upon to consider a cornerstone of democracy: the proper role that each branch of government plays in ensuring a free and just society. As Judge Jackson explained, "the United States of America has a government of laws and not of men. The Constitution and federal law set the boundaries of what is acceptable conduct."[97] According to Judge Jackson, "[w]hen one of the three branches exceeds the scope of either its statutory or constitutional authority, it falls to the federal courts to reestablish the proper division of Federal power."[98] Judge Jackson's opinions demonstrate a commitment to ensuring that the executive branch operates within its constitutional and statutory grant of power and that those harmed by executive branch action have an opportunity to address their grievances in some form if they meet established standing requirements.

(a) Interbranch Disputes

One of Judge Jackson's most noteworthy cases involved the judiciary's role in adjudicating a dispute between the other two branches of government. In *Committee on the Judiciary v. McGahn*, Judge Jackson held that former White House Counsel Don McGahn was not absolutely immune from compliance with a congressional subpoena.[99] In an 118-page, exhaustively reasoned opinion, Judge Jackson reviewed the Federalist Papers and "prior precedents of the Supreme Court, the D.C. Circuit, and the U.S. District Court for the District of Columbia," all of which had "articulated plainly" that individuals subject to a congressional subpoena "cannot ignore or defy congressional compulsory process, by order of the President or otherwise."[100] According to Judge Jackson, the President's view that Congress and the federal courts were powerless to do anything was "exactly backwards."[101]

Fundamentally,

> it is a core tenet of this Nation's founding that the powers of a monarch must be split between the branches of the government to prevent tyranny. Thus, when presented with a case or controversy, it is the Judiciary's duty under the Constitution to interpret the law and to declare government overreaches unlawful. Similarly, the House of Representatives has the constitutionally vested responsibility to conduct investigations of suspected abuses of power within the government, and to act to curb those improprieties, if required. Accordingly, DOJ's conceptual claim to unreviewable absolute testimonial immunity on separation-of-powers grounds—essentially, that the Constitution's scheme countenances unassailable Executive branch authority—is baseless, and as such, cannot be sustained.[102]

Reversing Judge Jackson's decision on standing grounds, a panel of the D.C. Circuit held that this "interbranch quarrel" was neither "'consistent with a system of segregated powers'" nor was it "'traditionally thought to be capable of resolution through the judicial process.'"[103] Article III, the panel opined, "forbids federal courts from resolving this kind of interbranch information dispute … because it has no bearing on the 'rights of individuals' or some entity beyond the federal government."[104] The panel wrote that although "the legal issue in this case is quite narrow," "future disagreements may be complicated and fact-intensive" and put the court "in the awkward position of evaluating the Executive's claims of confidentiality and autonomy against Congress's need for information."[105] But the full D.C. Circuit, sitting en banc, reversed the panel because "the judiciary, in exercising jurisdiction over the present lawsuit, does not arrogate any new power to itself at the expense of the other branches but rather plays its appropriate constitutional role."[106] On remand, the panel disagreed with Judge Jackson's separate conclusion that the Judiciary Committee had a cause of action.[107] The en banc court granted review again, but the parties settled before the case was heard. Over a year later, while on a panel

of the D.C. Circuit, Judge Jackson considered the related question whether separation of powers concerns prohibited Congress from viewing White House records related to the January 6, 2021 Capitol insurrection.[108] The unanimous panel concluded it did not.

(b) Delegation of Authority

In addition to adjudicating interbranch disputes, Judge Jackson has considered whether one branch's delegation of authority to another impermissibly eroded the Constitution's limits on the powers of each branch. In *Center for Biological Diversity v. McAleenan*, Judge Jackson rejected a nondelegation doctrine challenge to the Secretary of Homeland Security's waiver of environmental assessments during construction of the wall along the southwest border.[109] The nondelegation doctrine provides that the Constitution vests the power to legislate in Congress, and Congress cannot generally delegate this power to another branch. Nevertheless, as Judge Jackson found under a long line of Supreme Court cases, "Congress *can* confer its powers within limits … so long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform."[110] Judge Jackson found such an intelligible principle in the Illegal Immigration Reform and Immigrant Responsibility Act: Congress directed the Secretary of Homeland Security "to construct fencing only in the vicinity of the United States border to deter illegal crossing in areas of high illegal entry into the United States" and gave the Secretary "authority to waive all legal requirements" as "necessary to ensure expeditious construction of the barriers and roads under this section."[111]

Judge Jackson also addressed whether Congress granted the President authority to take particular action relating to federal employee collective bargaining activities. In *American Federation of Government Employees, AFL-CIO v. Trump*, Judge Jackson confronted a challenge to executive orders regarding collective bargaining for federal employees under the Federal Service Labor-Management Relations Act (FSLMRS).[112] The orders placed limits on the ability of federal employees to engage in labor organization activities, required agencies to remove certain matters from collective bargaining negotiations, suggested that agencies implement unilateral agreements if an agreement with the union could not be reached, and guided the agencies to follow certain approaches when disciplining or evaluating employees in the civil service. Multiple federal employee unions challenged the President's authority to issue the executive orders, while the President maintained that he had both statutory and constitutional authority to do so. On that point, Judge Jackson concluded that the President has certain constitutional and statutory authority to act with regard to federal employment contracts, but that he exceeded his authority in this case. She found that this authority was not a "blank check … to fill in at his will."[113] Rather, where Congress confers the President with statutory authority, the President's executive orders "must be consistent with Congress's pronouncements."[114]

Once again, Judge Jackson undertook a careful and thoughtful review of the provisions in the FSLMRS that expressly protected the collective bargaining rights of federal employees and the D.C. Circuit caselaw that defined the contours of those rights. Ultimately, Judge Jackson concluded that the executive orders "conflict with the right to good-faith collective bargaining that the FSLMRS seeks to protect."[115] The D.C. Circuit later reversed on another ground, holding that Judge Jackson lacked jurisdiction to consider the plaintiffs' claims based on its interpretation of precedent concerning administrative exhaustion requirements.[116]

2. Standing

Judge Jackson's standing cases focus appropriately on whether there is a concrete, particularized, and imminent injury sufficient to confer Article III standing. As elsewhere, she thoughtfully applies the facts of each case to the law to reach her conclusion.

Where there is record evidence of concrete harm, Judge Jackson does not hesitate to find Article III standing. In *Nucor Steel-Arkansas v. Pruitt*, Judge Jackson held that a steel company had standing to sue the Administrator of the EPA under the Clean Air Act over a challenge to the EPA's issuance of a permit to the plaintiff's competitor and neighbor that authorized construction and operation of a manufacturing

facility.[117] The EPA's authorization of the neighboring manufacturing plant caused Nucor's planned project to be subject to more stringent emissions standards. Judge Jackson found that under the agency's guidelines, "if one facility is allowed to emit a given pollutant in a given region, its action meaningfully constrains many of the future construction projects of its pollution-emitting neighbors."[118] Accordingly, Judge Jackson found that plaintiff suffered a concrete and particularized injury that was imminent such that it was able to obtain review in federal court.

In *New England Anti-Vivisection Society v. United States Fish & Wildlife Service*, by contrast, Judge Jackson concluded that an animal welfare organization did not have standing to challenge the U.S. Fish & Wildlife Service's decision to allow a research center to export chimpanzees to a zoo in exchange for a financial donation.[119] Although skeptical of the U.S. Fish & Wildlife Service's "broad interpretation" of its authority to export endangered species and its decision to "'sell' its permits in this fashion," Judge Jackson concluded she was bound by precedent to decide that the "constraints of Article III standing prevent [the court] from reaching the merits of the important questions of statutory interpretation and administrative law" that were presented in the case.[120] In an extensively reasoned opinion, Judge Jackson found that D.C. Circuit precedent foreclosed a finding that the New England Anti-Vivisection Society suffered an informational injury based on the agency's failure to disclose how it reached its decision. In her view, precedent also "confirm[ed] that organizational standing requires more than a sincere and strong objection to the challenged government action and a stated intention to use the organization's resources to oppose it."[121] Judge Jackson's "review of the record evidence" caused her to reach the "lamentable" conclusion that plaintiffs' concerns "cannot be vetted by a federal court" because the New England Anti-Vivisection Society had "not demonstrated anything more" than an "ideological opposition" to the chimpanzees' captivity in a zoo.[122]

3. Statutory Interpretation

Judge Jackson's approach to statutory interpretation is to start with the plain text of the statute. She has written that "the North Star of any exercise of statutory interpretation is the intent of Congress, as expressed in the words it uses."[123] Consistent with this principle, Judge Jackson has rejected attempts by parties to inject ambiguity into an otherwise plain statutory provision and refused to defy the unambiguous terms of a statute. But where a statute is ambiguous, Judge Jackson will look to statutory context and legislative history. As a district court judge, Judge Jackson frequently confronted cases requiring that she interpret a statute as a matter of first impression. In *Alliance of Artists and Recording Companies v. General Motors Co.*, for example, Judge Jackson ruled on a narrow but complex question of statutory interpretation from the Audio Home Recording Act.[124] That Act requires manufacturers and distributors of digital audio recording devices to implement certain technologies and pay-per-device royalties pursuant to the Audio Home Recording Act. At issue in the case was whether in-vehicle systems produced digital audio copied recordings by reproducing a digital music recording. Looking at the statute's plain text, dictionary definitions, the context of the statute, and the legislative history, Judge Jackson determined that the devices at issue could constitute digital audio recording devices such that they give rise to a statutory obligation to pay royalties, but only if the devices did in fact produce digital audio copied recordings.

In *Watervale Marine Co. v. United States Department of Homeland Security*, Judge Jackson followed a similar approach.[125] She looked to the text, structure, and purpose of the Act to Prevent Pollution from Ships and determined that the Coast Guard had authority to detain and impose non-financial conditions on ships that had been suspected of violating environmental laws. The D.C. Circuit agreed with Judge Jackson's statutory interpretation.[126]

In *Rothe Development, Inc. v. Department of Defense,* Judge Jackson upheld a statute (Section 8(a) of the Small Business Act) that employs certain "race conscious provisions" to determine eligibility for exclusive federal contract opportunities, concluding that the statute satisfied strict scrutiny.[127] She recognized the government's compelling interest in remedying the effects of past or present racial discrimination, especially in the face of evidence showing

that qualified and eligible minority-owned businesses were awarded contracts less often than similarly situated non-minority counterparts. Judge Jackson also concluded that the statute was narrowly tailored because (1) alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted by the statute, (2) the statute was flexible because it did not set quotas or rigid metrics, and (3) the agency was required to conduct an individualized inquiry into social disadvantage before a minority-owned business qualified for preferential treatment.[128]

As a circuit court judge, Judge Jackson wrote an opinion disagreeing with another circuit and adopting an interpretation of a statute based on the language and structure of the provision, a leading treatise, and the legislative history. The case, *Wye Oak Technology, Inc. v. Republic of Iraq*, presented the question whether the second clause of the Foreign Sovereign Immunity Act's commercial activities exception (which abrogates the sovereign immunity of foreign states in certain circumstances relating to their commercial activity) requires the foreign state to perform an act in the United States in connection with its commercial activities abroad.[129] The panel concluded that it does. "The first clue that this is the correct interpretation," Judge Jackson wrote, "is the language and structure of that provision, taken as a whole."[130] Judge Jackson then relied on a leading treatise to support the view that the panel's understanding of the provision "is not an unusual position."[131] She also referenced other cases that had frequently focused on whether the foreign state performed acts within the United States when "undertaking the second-clause commercial activities exception inquiry."[132] Finally, Judge Jackson remarked that, even if "one might think that the second clause is ambiguous … the legislative history … leaves no doubt."[133]

4. Review of Administrative Action

Judge Jackson has decided a variety of administrative law cases both during her tenure as a district court judge and as a judge on the D.C. Circuit. The subject matter of these opinions is wide-ranging, from food labeling regulations promulgated by the Department of Agriculture to immigration policies promulgated by the Department of Homeland Security. Judge Jackson routinely applies the *Chevron* analysis in evaluating whether agency action is consistent with its implementing statute and undertakes a searching review rather than rubber stamping agency action. Under *Chevron*, a reviewing court must first ask whether the statute speaks to the precise question at issue.[134] If it does not, the court must next ask whether the agency's interpretation is a reasonable one. If so, the agency's interpretation is entitled to deference. Judge Jackson's jurisprudence reflects her willingness to invalidate agency action and make the agency follow proper procedures while following binding case precedent.

In her debut opinion on the D.C. Circuit, *American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority*, Judge Jackson wrote a decision invalidating an agency action that raised the threshold for when collective bargaining is required from a *de minimis* effect on working conditions to a substantial impact.[135] Writing for a unanimous panel, Judge Jackson held that the "cursory policy statement" of the Federal Labor Relations Authority was insufficient to "justify its choice to abandon thirty-five years of precedent," and therefore was arbitrary and capricious.[136]

In one of Judge Jackson's earliest administrative law decisions, *American Meat Institute v. United States Department of Agriculture*, she declined to enjoin a Department of Agriculture (USDA) regulation that required country-of-origin labeling and banned the commingling of certain meat cuts.[137] Applying *Chevron*, Judge Jackson carefully reviewed the text of the implementing statute and concluded that it did not speak to the precise question at issue. She then concluded that the USDA's interpretation was reasonable, while noting that "the arduousness of the second step of the well-worn *Chevron* trek is so well established that Plaintiffs are hard-pressed here to provide the necessary assurances of their likely success on the merits."[138]

Judge Jackson has also considered cases relating to the Trump Administration's decision to cut grant funding for teen pregnancy prevention programs. In *Policy & Research LLC v. United States Department of Health & Human Services,* for example, Judge Jackson ruled that the Department of Health and Human Services' (HHS) decision to terminate a

previously awarded five-year grant under the Teen Pregnancy Prevention Program after just three years was arbitrary and capricious.[139] HHS issued its decision to withdraw the funding in a single-sentence notice, and provided no explanation or justification for the decision. HHS argued that the decision to withdraw funding was "committed to agency discretion by law" and thus unreviewable, but Judge Jackson disagreed.[140] While acknowledging that an agency's allocation of grant funding is presumptively unreviewable, Judge Jackson found that in this case, HHS's own regulations provided applicable standards for reviewing the agency's decision to withdraw funding. Citing D.C. Circuit precedent, she explained that while an administrative agency can amend or appeal its own regulations, it cannot ignore or violate those regulations while they remain in effect. And because HHS failed to comply with its own procedures, the decision to withdraw funding was both reviewable and "easily qualifie[d]" as arbitrary and capricious.[141] She then vacated HHS's decision to shorten the project period and ordered HHS to accept and process applications as if it had never terminated the award. The appeal was dismissed on the parties' joint motion.[142]

5. Immigration

Judge Jackson decided three notable cases involving immigration and asylum policies implemented by the Trump Administration. Her immigration-related decisions address all the facts of the case relevant to the analysis, including its real-world effect, to make sure that the legal determinations take into account individual asylum-seekers' experiences if they are legally relevant. To that end, she extensively describes asylum-seekers' particular circumstances and factual allegations, including the conditions the plaintiffs faced while detained and seeking asylum, and the trauma they experienced in their home countries that prompted them to seek refuge in the United States.

Perhaps most significantly, in *Make the Road New York v. McAleenan*, Judge Jackson issued a nationwide preliminary injunction enjoining Department of Homeland Security (DHS) from enforcing expedited removal expansion because the plaintiff immigrants' rights organizations were likely to establish that DHS's action was arbitrary and capricious.[143] In explaining why plaintiffs were likely to succeed on their challenge, Judge Jackson noted: "it is important to understand that a key component of the Administrative Procedure Act is Congress's requirement that an agency provide notice to the public, and an opportunity for members of the public to comment, prior to agency rulemaking."[144] Then, after finding that a preliminary injunction was warranted, Judge Jackson rejected the government's argument that the court must limit any injunctive relief solely to the parties before it and reminded the government of the "authority that the Constitution's Framers have vested in the judicial branch."[145]

A divided panel of the D.C. Circuit agreed with Judge Jackson that the court had jurisdiction to consider the plaintiffs' claims.[146] But the D.C. Circuit reversed the injunction, finding that plaintiffs had no cause of action under the Administrative Procedure Act because Congress committed the judgment of whether to expand expedited removal to the Secretary's "sole and unreviewable discretion."[147] Judge Jackson had acknowledged that the expedited removal statute limited a federal court's ability to review agency action, but she held that the statute only barred courts from reviewing the substance and merits of policies, not the procedures they used to arrive at their decision.

In *Kiakombua v. Wolf,* Judge Jackson vacated a 2019 U.S. Citizenship and Immigration Services manual governing credible fear determinations used by immigration authorities to assess whether asylum claims of persons placed in expedited removal proceedings could be subject to further review.[148] Assessing the challenged manual under *Chevron*, Judge Jackson held that some provisions—such as a provision increasing the evidentiary burden the asylum-seeker must carry to pass a credible fear screening—were "manifestly inconsistent with the two-stage asylum eligibility framework" established by the Immigration and Nationality Act (INA), and that others, though not directly foreclosed by the INA, were nonetheless "unreasonable interpretations of the … statutory scheme."[149] The appropriate remedy was also a contested issue, as the government argued that the only available recourse was the issuance of a declaratory judgment. Judge Jackson rejected this contention, invoking her "equitable power to order the vacatur of unlawful agency conduct," and ordered the agency

"to make new credible fear determinations with respect to each Plaintiff."[150]

In *Las Americas Immigrant Advocacy Center v. Wolf,* issued shortly after *Kiakombua*, Judge Jackson upheld the DHS's policy of placing asylum-seekers subject to expedited removal proceedings in the custody of U.S. Customs and Border Protection (CBP) rather than U.S. Immigration and Customs Enforcement (ICE).[151] Plaintiffs alleged that CBP facilities significantly restricted asylum-seekers' ability to consult with advocates, and that placing asylum-seekers in CBP rather than ICE custody thus violated their statutory and regulatory right to consult with a person of their choosing prior to their credible fear interview. Plaintiffs alleged that while asylum-seekers in ICE custody have the benefit of in-person visitation areas and are listed in a database that allows advocates to locate and contact particular asylum-seekers, those held in CBP custody have only the time-limited use of an outgoing telephone with no call-back number, and in-person visits are prohibited.

After resolving all justiciability issues in plaintiffs' favor, Judge Jackson sided with the government on the merits, applying both *Chevron* and *Auer* deference in her analysis. Largely because the challenged policy was applicable only to asylum-seekers designated for expedited removal, Judge Jackson concluded that the policy did not run afoul of any statutory or regulatory requirements. She noted that the text, structure, and legislative history of expedited removal provisions all make clear that expedited proceedings are intended to provide fewer procedural safeguards than "full" or "formal" removal proceedings.[152] Judge Jackson determined that the limited consultation right available to asylum-seekers detained at CBP facilities was thus not inconsistent with the law governing expedited removal and therefore not arbitrary and capricious.

VI. POSITIONS TAKEN IN OTHER CAPACITIES

In addition to reviewing Judge Jackson's jurisprudence, the Lawyers' Committee also evaluated her legal work and scholarship prior to joining the bench. While the Lawyers' Committee believes that judicial opinions should be the primary source of information about a nominee such as Judge Jackson, who has served on the federal bench for nearly a decade, it is also appropriate to consider a judge's prior work to understand her approach to the law and other intangible qualities such as integrity and judicial temperament.

Judge Jackson's legal career prior to becoming a federal judge was robust. She served as a staff attorney and later Vice Chair of the Sentencing Commission, joined the Office of the Federal Public Defender in Washington, D.C., and represented clients in private practice. She also authored articles on the sentencing of, and other punitive measures against, those convicted of crimes. In each of these roles, Judge Jackson consistently demonstrated a commitment to advancing civil rights and to ensuring the fundamental fairness of our criminal justice system. By all accounts, Judge Jackson is a consensus-builder who is driven by a pragmatism reflecting that the law can, and should, be used to protect the rights of all against government intrusion and unduly harsh outcomes.

A. SENTENCING COMMISSION

Judge Jackson was a staff attorney with the bipartisan Sentencing Commission from 2003 to 2005 and returned as Vice Chair and Commissioner from 2010 to 2014. During both her terms on the Commission, Judge Jackson worked to establish changes to the Sentencing Guidelines that better reflected the severity of the committed crime and required greater justification for sentences that deviated from the recommended range. Of the Commission's 60 votes during the time Judge Jackson served as a Commissioner, 57 were unanimous. As her fellow Commissioners explain, that was in large part due to Judge Jackson.[153] Her ability to facilitate unity and compromise among her colleagues on both sides

of the aisle led President Biden to tout her as a "proven consensus builder."[154]

Judge Jackson appears to favor adherence to the Sentencing Guidelines even though they are no longer mandatory. In 2005, the Supreme Court issued its landmark decision in *United States v. Booker*.[155] In a 5-4 opinion authored by Justice Breyer, the Court invalidated the provision of the Federal Sentencing Act that made the Sentencing Guidelines mandatory and said that the Guidelines would now be advisory such that judges could impose particular sentences after taking case-specific facts into account. Following *Booker* and her return to the Commission as Vice Chair, Judge Jackson oversaw the publication of a report to Congress that expressed concern with the number of judges deviating from the Guidelines and recommended measures to ensure uniformity of sentences nationwide. Specifically, the Commission noted that the number of people convicted of federal offenses had "substantially increased" and most still received "substantial sentences of imprisonment," but that the "influence of the guidelines … varied by circuit."[156]

After running a multivariate regression analysis, the Commission also found that demographic factors—like race, gender and citizenship—were more frequently associated with higher sentence lengths than when the Guidelines were mandatory.[157] This led the Commission to conclude that sentencing outcomes increasingly depended on the judge to whom the case was assigned and that appellate review had "not promoted uniformity in sentencing to the extent the Supreme Court anticipated in *Booker*."[158] Because this state of affairs strayed from the purpose of the Sentencing Reform Act, the Commission recommended that Congress (1) require courts to give substantial weight to the Guidelines at sentencing, and (2) develop a presumption of reasonableness on appellate review of within Guidelines range sentences and heightened review of sentences based on policy disagreements with the Guidelines.[159]

Concurrent with the Commission's efforts to ensure greater uniformity in sentencing across the United States, Judge Jackson also recommended reducing sentencing guidelines for people serving prison time for crack cocaine convictions because it disproportionately punished Black people and other people of color. In 2010, Congress passed the Fair Sentencing Act to reduce the sentencing disparities between offenses for crack and powder cocaine. In 2011, the Commission considered whether to make those reductions retroactive. Judge Jackson's emphatic answer was yes: During a Commission hearing, Judge Jackson explained that the "crack/powder [cocaine] disparity has cast a long and persistent shadow" and "has spawned clouds of controversy and an aura of unfairness that has shrouded nearly every federal crack cocaine sentence that was handed down" prior to the Fair Sentencing Act.[160] In Judge Jackson's view, the "Commission ha[d] no choice but to make this right. [The] failure to do so would harm not only those serving sentences pursuant to the prior guideline penalty, but all who believe in equal application of the laws and the fundamental fairness of our criminal justice system."[161] As Judge Jackson explained during her district court confirmation hearing, she and the Commission considered a variety of factors in coming to this decision, including: whether retroactive application would result in administrative or financial burdens on the judicial system, the available data on the number of inmates eligible for such relief, and the obligation of the courts to consider the risks to public safety before granting each application.[162]

Judge Jackson continued to support reducing drug sentencing guidelines in a manner that considered the views of various stakeholders. In 2014, the Commission considered the "Drug Minus Two" Amendment, which reduced the possible sentence applicable to most drug trafficking offenses by lowering the base offense levels assigned in the Drug Quantity Table. This table, in turn, largely dictated the sentencing guideline range applicable to drug trafficking offenses. Many on the Commission supported the amendment because it helped the Commission fulfill its statutory obligation to address prison overcrowding in a manner consistent with public safety. Judge Jackson, however, wanted to make clear that her vote was "based on a slightly different concern": namely, her "strong belief that lowering the Base Offense Levels for drug penalties is necessary in order for the guideline system to work properly."[163] As Judge Jackson explained, the base level is supposed to account for the seriousness of the offense. When the base level is too high, there is less opportunity for

a sentencing judge to mete out sentences for drug-related offenses proportionately and to distinguish between those engaged in serious and dangerous drug trafficking compared to low-level involvement.[164]

Later that year, the Commission considered whether to make the amendment retroactive. Judge Jackson took seriously the Department of Justice's concern that people who posed a danger to society might have their sentences reduced, and arrived at the conclusion that it is "nearly impossible to make the dangerousness determination ... as a categorical matter."[165] Judge Jackson therefore consulted with sentencing judges who were willing to take up the task of evaluating each individual sentenced under the prior regime in order to determine whether his or her sentence should be reduced because of the dangerousness of the offense or other circumstances. Accordingly, Judge Jackson voted to make the amendment retroactive.[166]

Judge Jackson voted against amendments when doing so would create, rather than resolve, sentencing disparity. In one of the few non-unanimous decisions of the Commission during this time, Judge Jackson opposed an amendment to the Guidelines that would have supported reductions of sentences for certain cooperating defendants. The amendment was complicated and would have allowed someone who previously received a substantial assistance departure for cooperating with the government (resulting in a sentence below the statutory mandatory minimum) to be considered for another substantial assistance discount at resentencing. In defending her vote against the amendment during a Commission meeting, Judge Jackson explained that she interpreted the plain text of the Guidelines and the retroactivity statutes to apply only to individuals who were sentenced based on the Guidelines, and not based on the extent of their cooperation.[167] And because the amendment only gave courts authority to disregard the statutory mandatory minimum for cooperating defendants who were being resentenced in the retroactivity context, she believed that a defendant who provided substantial assistance under the new sentencing regime would be at a significant disadvantage.[168] The amendment nevertheless passed in a 4-3 vote.[169]

B. FEDERAL PUBLIC DEFENDER

From 2005 until 2007, Judge Jackson served as an Assistant Federal Public Defender for the District of Columbia, where she represented indigent criminal appellants and filed petitions on behalf of Guantanamo detainees. In this role, Judge Jackson litigated important questions concerning the Fourth, Fifth and Sixth Amendments. She defended clients against intrusions on their liberty in recognition that doing so ultimately protects the rights of all Americans.

1. Representation of Criminal Defendants

A few examples help illustrate the breadth and depth of Jackson's appellate work and demonstrate Judge Jackson's ability to identify the nuances that go to the heart of the constitutional violation that occurred at trial. In *United States v. Littlejohn*, Judge Jackson successfully vindicated the Sixth Amendment right of her client who had been convicted of unlawfully possessing a firearm as a felon after police found a gun hidden in a laundry basket while searching the house he lived in with his mother.[170] Judge Jackson argued that the trial judge had posed a compound question to potential jurors in a way that could have masked whether some might be biased against the defense. Judge Jackson's biggest obstacle was a D.C. Circuit case that had found no constitutional violation where jurors were asked "precisely the same compound question."[171] Judge Jackson distinguished the prior case on the facts to explain why the outcome in her client's case should be different. The D.C. Circuit agreed, finding that there were "important" factual differences and concluding that "under the particular circumstances of this case," the district court's questioning violated the defendant's Sixth Amendment right to an impartial jury.[172]

Judge Jackson also successfully argued that the facts of a case were sufficiently similar to Supreme Court precedent to implicate another client's Fifth Amendment right against self-incrimination. In *United States v. Ponds*, the government subpoenaed records of Judge Jackson's client, a criminal defense attorney, related to the whereabouts of property that the attorney's own client had turned over to him.[173] The attorney produced the documents pursuant to statutory

act-of-production immunity, but the government later used the documents to charge the attorney with tax evasion and fraud. Whether that act of production was testimonial in character fell somewhere in between factual scenarios covered by existing Supreme Court precedent. Judge Jackson argued that because the government needed the attorney's assistance to identify potential sources of information and to produce those documents, the case was more like cases where the Supreme Court found the act of producing documents sufficiently testimonial, and less like cases where no Fifth Amendment protection applied. The D.C. Circuit adopted much of the reasoning of Judge Jackson's opening brief and reversed the judgment of conviction and remanded the case to the district court for a determination on whether the error was harmless.[174]

Reminiscent of her later rulings on the federal bench that executive branch members should not skip procedural steps, Judge Jackson argued in *United States v. McCants* that judges also cannot sidestep procedural requirements at sentencing.[175] There, Judge Jackson argued successfully that the district court's summary adoption of a presentence investigative report's recommended sentence, without conducting its own analysis of the facts related to her client's fraud crimes, violated the Federal Rules of Criminal Procedure requirement for on-the-record resolution of factual disputes. The D.C. Circuit agreed and ordered the district court to resentence Judge Jackson's client and give due consideration to the facts of his case.

2. Representation of Guantanamo Detainees

The Office of the Federal Public Defender in Washington, D.C. is also charged with representing individuals designated as enemy combatants and detained at Guantanamo Bay. One of Judge Jackson's most notable assignments was the representation of detainee Khiali-Gul, who was held at Guantanamo for more than a decade before being repatriated to Afghanistan in 2014 by the Obama administration. During this representation, Judge Jackson sought habeas review both of Khiali-Gul's classification as an enemy combatant and of his detention at Guantanamo as a result of that classification.

In the petition, Judge Jackson pointed out that Khiali-Gul was not, nor had been, an "enemy alien, lawful or unlawful belligerent, or combatant of any kind under any definition" under the law.[176] Relying on reported news sources, Judge Jackson argued that the interrogation techniques used at Guantanamo "include not only direct physical and psychological abuse but also impermissible conduct intended to undermine the detainees' due process rights, such as representing to detainees that government agents are their habeas lawyers for the express purpose of extracting information from the detainees."[177] Accordingly, Judge Jackson argued that the "prolonged, indefinite, and restrictive detention of Petitioner Khiali-Gul without due process is arbitrary and unlawful and a deprivation of liberty without due process" in violation of common law principles, the Due Process Clause, the regulations of the United States military, the treaties of the United States, and customary international humanitarian law.[178] In 2014, and after Judge Jackson had left the Office, the government determined that Khiali-Gul posed little threat, and he was transferred to his home country of Afghanistan.[179]

When undertaking the representation of Khiali-Gul and other detainees, Judge Jackson has said she was "keenly and personally mindful of the tragic and deplorable circumstances that gave rise to the U.S. government's apprehension and detention of the persons who were secured at Guantanamo Bay."[180] She nevertheless honored her "duty to represent her clients zealously."[181] And she explained, more broadly, that her desire to become a public defender stemmed from her belief that "the government cannot deprive people ... of their liberty without meeting its burden of proving its criminal charges," and "that every person who is accused of criminal conduct by the government, regardless of wealth and despite the nature of the accusations, is entitled to the assistance of counsel."[182]

C. PRIVATE PRACTICE

During her time in private practice, Judge Jackson contributed to several notable amicus curiae briefs on civil rights issues important to the Lawyers' Committee.[183] Although the views set forth in the briefs reflect the views of

her clients and not necessarily herself, the briefs are consistent with Judge Jackson's other work, both in terms of subject matter, attention to detail, ability to grapple with facts and recognize practical realities under the law, and commitment to supporting positions of those who might not otherwise have adequate representation.

Writing on behalf of the National Association of Federal Defenders in *Arizona v. Grant*, for example, Judge Jackson argued that a police officer cannot automatically search a vehicle upon an arrest—the position the Supreme Court adopted in that case.[184] The brief emphasized data showing that police officers were no more likely to be assaulted in jurisdictions that did not allow the automatic searches than in those that did, and explained that the justifications for automatic searches disappeared when an arrestee is secured away from his vehicle.

Writing on behalf of several women's rights organizations in *McGuire v. Reilly*, Judge Jackson argued that the court should uphold a Massachusetts law creating a space barrier between protesters and patients of reproductive clinics.[185] The arguments centered around the need to balance the constitutional freedom of speech enjoyed by the protesters with the patients and health care providers' right to access the clinic unhindered. Noting that the case benefited from "exemplary briefing by the parties and the various amici," the First Circuit upheld the statute as lawfully regulating the time, place, and manner of speech without discriminating based on content or viewpoint.[186]

Judge Jackson also worked on several Supreme Court amicus curiae briefs related to Guantanamo Bay detention, which she has explained she was asked to do based on her knowledge of the military tribunal processes acquired during her time as a federal public defender. In *Boumediene v. Bush*, the Supreme Court considered the constitutionality of the Detainee Treatment Act ("DTA") and Military Commission Act, which circumscribed habeas review in federal court.[187] Judge Jackson represented 20 former federal judges "who dedicated their judicial careers to promoting the rule of law."[188] On behalf of these former judges, Judge Jackson argued that the DTA was unconstitutional because it limited courts' review of a final decision by Combatant Status Review Tribunals, which were known to rely on statements solicited through torture. The English common law courts and the Founding Fathers, she explained, denounced torture as illegal and refused to rely on statements extracted by torture or other impermissible coercion. As such, the Act's review mechanism "corrupts the judicial function."[189] The Supreme Court held that the DTA impermissibly circumscribed the scope of review by Article III courts.[190]

In *Al-Marri v. Pucciarelli*, Judge Jackson represented the Cato Institute, The Constitution Project, and The Rutherford Institute in a brief that argued the executive branch has no authority neither in statute nor under the Constitution to use the military to detain, without charge or trial, persons who are lawfully in the United States but who have allegedly engaged in terrorism-related activities.[191] The case was dismissed as moot after President Obama ordered Al-Marri's release and transfer to civilian custody for a trial on criminal charges in federal court.

D. SCHOLARSHIP

Judge Jackson's early writings offer a preview into her approach to issues seen later in her work in public and private practice and in her judicial decision making. In particular, her writings have touched on questions concerning the criminal justice system and constitutional issues of interest to the Lawyers' Committee, including the history and ethics of plea bargaining and the theoretical justifications of punishment. Similar to the cornerstones of her professional work, Judge Jackson's writings illustrate her desire to advocate on behalf of the least powerful in society for greater access to justice, and for fair and equal treatment for all.

Judge Jackson's first significant contribution to legal history, theory, and policy was her 1992 undergraduate thesis, "*The Hand of Oppression": Plea Bargaining and the Coercion of Criminal Defendants*.[192] Surveying both the legal history and the theoretical justifications and critiques of plea bargaining, and incorporating her own firsthand observations as an intern at the Neighborhood Defender Service of Harlem in New York City, Judge Jackson discussed the government's practice

of using a variety of coercive methods to pressure defendants into accepting a guilty plea, even when they insisted on their innocence. To rid the system of unacceptable forms of coercion, Judge Jackson explained, we "must commit ourselves, as free citizens of a democratic government, to insisting that the criminal justice system be as fair as possible—for all of our sakes."[193]

Judge Jackson's Harvard Law Review Note, P*revention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, also tackled how to determine whether legislation serves the American criminal justice system's "dichotomous objectives—to punish wrongdoers and to prevent future harm."[194] Because "legislative power in pursuit of punishment represents a greater threat to individual liberty," Judge Jackson argued that courts should take care to distinguish between statutes that serve a punitive rather than preventive purpose through the lens of sex offender registration laws.[195] According to Judge Jackson, the courts had developed unwieldy tests to determine whether a statute was punitive or not. She proposed a principled approach that weighed whether the right subject to the statute was protected by another law and whether the statute's goal was to facilitate rehabilitation or to display moral condemnation for those convicted of the offense.

VII. CONCLUSION

The Lawyers' Committee's standard for analyzing Supreme Court nominees specifically requires the Lawyers' Committee to evaluate whether the nominee's record demonstrates that the nominee possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

Following a review of Judge Jackson's record on civil rights issues—as a judge, a member of the Sentencing Commission, a federal public defender, an advocate in private practice, and in her scholarship—the Lawyers' Committee enthusiastically supports the nomination of Judge Ketanji Brown Jackson as an Associate Justice of the Supreme Court of the United States.

ENDNOTES

[1] President Joseph R. Biden, *Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court* (Feb 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/ [hereinafter Remarks].

[2] Marc Fisher, Ann E. Marimow, and Lori Rozsa, *How Ketanji Brown Jackson found a path between confrontation and compromise*, Wash. Post (Feb. 25, 2022), https://www.washingtonpost.com/politics/2022/02/25/ketanji-brown-jackson-miami-family-parents/.

[3] *Remarks, supra* note 1.

[4] *See Dred Scott v. Sanford*, 60 U.S. 393 (1857) (holding that Black people were not citizens and that enslaved people were the property of their masters); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state-enforced racial segregation); *Bradwell v. People of State of Illinois*, 83 U.S. 130 (1872) (upholding the constitutionality of a state refusal to admit women to practice law); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that segregation in public education was a denial of the Equal Protection Clause of the Fourteenth Amendment); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) (affirming the federal government's power to impose desegregation through the Civil Rights Act of 1964); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that classifications based upon sex are inherently suspect).

[5] Fisher et. al, *supra* note 2.

[6] Judge Ketanji Brown Jackson, *Ketanji Brown Jackson remarks on her nomination to the Supreme Court*, ABC News (Feb. 25, 2022), https://abcnews.go.com/Politics/video/ketanji-brown-jackson-remarks-nomination-supreme-court-83114548.

[7] Fisher et. al, *supra* note 2.

[8] *Transcript of Remarks by Judge Ketanji Brown Jackson* (Feb. 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/.

[9] *Ann E. Marimow and Aaron C. Davis, Possible Supreme Court nominee, former defender, saw impact of harsh drug sentence firsthand*, Wash. Post (Jan. 30, 2022), https://www.washingtonpost.com/politics/courts_law/ketanji-brown-jackson-uncle-prison/2022/01/30/669c5f68-8116-11ec-bf02-f9e24ccef149_story.html.

[10] Ketanji Brown Jackson, "*The Hand Of Oppression": Plea Bargaining Processes and the Coercion of Criminal Defendants* (March 1992) (senior thesis, Harvard College) (on file with the Harvard College Archives) (Attachment to Senate Judiciary Questionnaire, *infra* note 16).

[11] Note, *Prevention Versus Punishment: Toward A Principled Distinction in the Restraint of Released Sex Offenders*, 109 Harv. L. Rev. 1711, 1711 (1996) [hereinafter *Prevention Versus Punishment*].

[12] *S. Comm. on the Judiciary, 117th Cong.*, Responses to Questions for the Record to Judge Ketanji Brown Jackson, Nominee to the U.S. Court of Appeals for the D.C. Circuit (2022) https://www.judiciary.senate.gov/imo/media/doc/Brown%20Jackson%20Responses1.pdf [hereinafter Circuit Court Questionnaire] (response to Senator Ben Sasse's question 2).

[13] *Id.*

[14] American Bar Association, *Standard 4-1.2(b) Functions and Duties of Defense Counsel* (2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

[15] *Board of Overseers*, Harvard Elections, https://elections.harvard.edu/board-overseers.

[16] *S. Comm. on the Judiciary, 118th Cong.*, Questionnaire for Nominee to the Supreme Court at 121 (2022).

[17] Dr. Martin Luther King Jr., Sermon at the National Cathedral, Washington, D.C. (Mar. 31, 1968) (paraphrasing Theodore Parker, *Justice and the Conscience* in Ten Sermons on Religion 66, 84-85 (1853)).

[18] Lawyers' Committee for Civil Rights Under Law, On the Nomination of Judge Sonia M. Sotomayor as an Associate Justice of the United States Supreme Court 66 (2009).

[19] The first Black Justice, Justice Thurgood Marshall, was confirmed in 1967; the first woman Justice, Justice Sandra Day O'Connor, in 1981.

[20] *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 112th Cong., S. Hrg. 112-72, Pt. 9 at 348 (2012) (statement of Paul Ryan, Congressman) [hereinafter District Court Questionnaire].

[21] *Id.* at 347 (statement of Eleanor Holmes Norton, Congresswoman).

[22] Senator Dick Durbin's question 1, Circuit Court Questionnaire.

[23] *Id.*

[24] Brendan Morrow, *Biden to nominate Ketanji Brown Jackson to be 1st Black Woman on Supreme Court*, The Week (Feb. 25, 2022), https://theweek.com/supreme-court/1010623/biden-to-nominate-ketanji-brown-jackson-to-be-1st-black-woman-on-supreme.

[25] Response to Senator Ted Cruz's question 2, Circuit Court Questionnaire.

[26] Response to Senator Chuck Grassley's question 24, Circuit Court Questionnaire; Response to Senator Thom Tillis's question 2, Circuit Court Questionnaire.

[27] Responses to Senator Mike Lee's questions 2 & 23, Circuit Court Questionnaire.

[28] Response to Senator Chuck Grassley's question 29, Circuit Court Questionnaire.

[29] *Id*.

[30] Response to Senator Amy Klobuchar's question 3, District Court Questionnaire.

[31] Response Senator Mike Lee's question 3, Circuit Court Questionnaire.

[32] Response to Senator Ted Cruz's question 1, Circuit Court Questionnaire.

[33] Response to Senator Ted Cruz's question 3, Circuit Court Questionnaire.

[34] Responses to Senator Tom Coburn's Questions 1 & 2, District Court Questionnaire.

[35] *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary,* 111th Cong., S. Hrg. 111-695, Pt. 4 at 102 (2009) (response to Senator Jeff Sessions' written question 1.b).

[36] Response to Senator Ben Sasse's additional question 3, Circuit Court Questionnaire.

[37] *Senate Judiciary Committee Holds Hearing on Pending Judicial Nominations*, CQ Congressional Transcripts (Apr. 28, 2021) [hereinafter Circuit Court Hearing Tr.].

[38] Response to Senator Mike Lee's question 28, Circuit Court Questionnaire.

[39] Circuit Court Hearing Tr.

[40] *Id*.

[41] Response to Senator Ted Cruz's question 9, District Court Questionnaire.

[42] *Id*.

[43] Response to Senator Chuck Grassley's question 34, Circuit Court Questionnaire; Response to Senator Tom Cotton's question 12, Circuit Court Questionnaire.

[44] Response to Senator Tom Cotton's question 19, Circuit Court Questionnaire.

[45] *Committee on Judiciary, United States House of Rep. v. McGahn*, 415 F. Supp. 3d 148, 214-15 (D.D.C. 2019) (vacated and remanded); *see infra* notes 99-107 and accompanying text (describing procedural history).

[46] Responses to Senator Chuck Grassley's questions 19-23, Circuit Court Questionnaire.

[47] Circuit Court Hearing Tr.

[48] *Id*.

[49] *Id*.

[50] 121 F. Supp. 3d 143 (D.D.C. 2015).

[51] *Id.* at 163.

[52] *Id.* at 155.

[53] 306 F. Supp. 3d 365 (D.D.C. 2017); *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (requiring pro se filings be liberally construed).

[54] 271 F. Supp. 3d 119 (D.D.C. 2017).

[55] 267 F. Supp. 3d 174 (D.D.C. 2017).

[56] 564 U.S. 338 (2011).

[57] *See Ross*, 267 F. Supp. 3d at 179, 204.

[58] *Id*. at 198.

[59] *Id*. at 179-80.

[60] *Id*. at 180.

[61] *Id*. at 202-03. Three years later, the plaintiffs returned to Judge Jackson with a Second Amended Class-action Complaint, seeking authorization of pre-certification discovery. Judge Jackson denied the request, reiterating her prior holding and finding that discovery could not cure the defect. *Ross v. Lockheed Martin*, No. 16-cv-2508, 2020 WL 4192566 (D.D.C. July 21, 2020).

[62] *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 253 (D.D.C. 2015).

[63] *Id*. at 268.

[64] *Id*. at 269.

[65] 20 U.S.C. § 1400 *et seq*.

[66] 502 F. Supp. 3d 102 (D.D.C. 2020).

[67] *Id*. at 108.

[68] 36 F. Supp. 3d 120 (D.D.C. 2014).

[69] *Id*. at 129.

[70] *Id*.

[71] 999 F. Supp. 2d 300 (D.D.C. 2013).

[72] *Id*. at 312.

[73] 227 F. Supp. 3d 57 (D.D.C. 2017).

[74] *Id*. at 72.

[75] *Id*.

[76] *Id*. at 78.

[77] *Id*. at 70, 78. Judge Jackson subsequently upheld the government's superseding indictment correcting the errors. *United States v. Hillie*, 289 F. Supp. 3d 188 (D.D.C. 2018).

[78] 330 F. Supp. 3d 424, 426 (D.D.C. 2018).

[79] *Id*. at 434-37.

[80] No. 16-CR-232 (D.D.C. 2017).

[81] Senate Judiciary Questionnaire, *supra* note 16.

[82] *United States v. Wiggins,* No. 19-cr-258, 2020 WL 1868891, at *1 (D.D.C. Apr. 10, 2020).

[83] *Id*.

[84] *See, e.g., United States v. Dunlap*, 485 F. Supp. 3d 129, 132 (D.D.C. 2020); Wiggins, 2020 WL 1868891.

[85] 341 F. Supp. 3d 74 (D.D.C. 2018), *rev'd and remanded*, 950 F.3d 104 (D.C. Cir. 2020), *rev'd and remanded sub nom. Territory of Guam v. United States*, 141 S. Ct. 1608 (2021), *and vacated*, 852 F. App'x 14 (D.C. Cir. 2021), *and aff'd*, 852 F. App'x 14 (D.C. Cir. 2021).

[86] *Id*. at 85.

[87] *Id*. at 85-92.

[88] *Id*. at 90.

[89] *Territory of Guam v. United States*, 141 S. Ct. 1608 (2021).

[90] 304 F. Supp. 3d 212 (D.D.C. 2018).

[91] *Id*. at 225.

[92] 64 F. Supp. 3d 128 (D.D.C. 2014), *aff'd*, 803 F.3d 31 (D.C. Cir. 2015).

[93] 42 U.S.C. § 4332(C).

[94] 40 C.F.R. § 1508.18(a).

[95] *Sierra Club*, 64 F. Supp. 3d at 157.

[96] *Id*. at 140.

[97] *McGahn*, 415 F. Supp. 3d at 214-15.

[98] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 394 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir.

2019).

[99] 415 F. Supp. 3d 148; *see supra* note 97 and accompanying text.

[100] *Id*. at 214.

[101] *Id*. at 154.

[102] *Id*. at 154-55.

[103] *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 951 F.3d 510, 516 (D.C. Cir. 2020) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

[104] *Id*. at 513, 516.

[105] *Id*. at 516 (internal citations omitted).

[106] *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 968 F.3d 755, 769 (D.C. Cir. 2020) (en banc).

[107] *Comm. on Judiciary, U.S. House of Rep. v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020).

[108] *Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021).

[109] 404 F. Supp. 3d 218, 225 (D.D.C. 2019).

[110] *Id*. at 244 (quotation omitted).

[111] *Id*. at 246 (quoting IIRIRA § 102(a), 102(c)(1)).

[112] 318 F. Supp. 3d 370 (D.D.C. 2018), *rev'd and vacated*, 929 F.3d 748 (D.C. Cir. 2019).

[113] *Id*. at 417 (internal citations omitted).

[114] *Id*. at 435 (internal citations omitted).

[115] *Id*. at 439.

[116] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

[117] 246 F. Supp. 3d 288 (D.D.C. 2017).

[118] *Id*. at 303.

[119] 208 F. Supp. 3d 142 (D.D.C. 2016).

[120] *Id*. at 177.

[121] *Id*. at 165, 176.

[122] *Id*. at 169.

[123] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 56 (D.D.C. 2013), *aff'd, 746 F.3d 1065 (D.C. Cir. 2014), reh'g en banc granted, opinion vacated*, 2014 WL 2619836 (D.C. Cir. Apr. 4, 2014), *and judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014) (internal citations omitted).

[124] 162 F. Supp. 3d 8 (D.D.C. 2016).

[125] 55 F. Supp. 3d 124 (D.D.C. 2014).

[126] 807 F.3d 325, 330-31 (D.C. Cir. 2015).

[127] 107 F. Supp. 3d 183, 205 (D.D.C. 2015).

[128] *Id*. at 208-11.

[129] 24 F.4th 686 (D.C. Cir. 2022).

[130] *Id*. at 700.

[131] *Id*. at 701 (citing Ernesto J. Sanchez, *The Foreign Sovereign Immunities Act Deskbook* 137 (2013) and relying on treatise author's views).

[132] *Id*.

[133] *Id*. at 702.

[134] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[135] 25 F.4th 1 (D.C. Cir. 2022).

[136] *Id*. at 12.

[137] 968 F. Supp. 2d 38 (D.D.C. 2013).

[138] *Id*. at 59.

[139] 313 F. Supp. 3d 62, 70 (D.D.C. 2018).

[140] *Id*. at 67-68, 75-76.

[141] *Id*. at 68.

[142] *Pol'y & Rsch, LLC v. U.S. Dep't of Health and Hum. Servs.*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018).

[143] 405 F. Supp. 3d 1, 44 (D.D.C. 2019), *rev'd and remanded sub nom. Make the Rd. New York v. Wolf,* 962 F.3d 612 (D.C. Cir. 2020).

[144] *Id*.

[145] *Id*. at 66.

[146] *Make the Rd. New York v. Wolf,* 962 F.3d 612 (D.C. Cir. 2020).

[147] *Id*. at 619.

[148] 498 F. Supp. 3d 1, 38 (D.D.C. 2020), *appeal dismissed sub nom. Kiakombua v. Mayorkas*, 2021 WL 3716392 (D.C. Cir. July 19, 2021).

[149] *Id*.

[150] *Id*. at 24, 50.

[151] 507 F. Supp. 3d 1 (D.D.C. 2020).

[152] *Id*. at 29-31.

[153] *What Ketanji Brown Jackson Could Bring to the Supreme Court*, Time (Feb. 25, 2022), https://time.com/6151590/ketanji-brown-jackson-supreme-court-profile/.

[154] Lisa Hagen, *Biden Praises Ketanji Brown Jackson as 'Proven Consensus Builder,' Democrats Aim for Swift Confirmation,* U.S. News (Feb. 25, 2022), https://www.usnews.com/news/politics/articles/2022-02-25/biden-praises-ketanji-brown-jackson-as-proven-consensus-builder-democrats-aim-for-swift-confirmation.

[155] 543 U.S. 220 (2005).

[156] U.S. Sentencing Commission, *A Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing* 4, 6 (2012).

[157] *Id*. at 108-10.

[158] *Id*. at 8.

[159] *Id*. at 9, 114-15.

[160] U.S. Sentencing Commission Transcript at 16 (June 30, 2011).

[161] *Id*. at 17.

[162] Confirmation Hearings on Federal Appointments, *supra* note 35.

[163] U.S. Sentencing Commission Transcript at 59-60 (Apr. 10, 2014).

[164] *Id*. at 60.

[165] U.S. Sentencing Commission Transcript at 25 (July 18, 2014).

[166] *Id*. at 26.

[167] U.S. Sentencing Commission Transcript at 18-26 (Apr. 10, 2014).

[168] *Id*.

[169] *Id*. at 30-31.

[170] 489 F.3d 1335 (D.C. Cir. 2007).

[171] *Id*. at 1343.

[172] *Id*. at 1344.

[173] 454 F.3d 313 (D.C. Cir. 2006).

[174] *Id*. at 329.

[175] 34 F.3d 557 (D.C. Cir. 2006).

[176] Amended Petition for Writ of Habeas Corpus, *Khiali-Gul v. Bush*, Case No. 05-cv-877 (D.D.C. Dec. 8, 2005).

[177] *Id*. at 11.

[178] *Id*. at 28.

[179] *See* Helen Cooper, *Four Afghans Released from Guantánamo Bay*, Wash. Post (Dec. 20, 2014), https://www.nytimes.com/2014/12/21/world/americas/four-afghans-released-from-guantnamo-bay.html.

[180] Response to Senator Ben Sasse's additional question 4, Circuit Court Questionnaire.

[181] Response to Senator Chuck Grassley's question 14, Circuit Court Questionnaire.

[182] Response to Senator Ben Sasse's question 2, Circuit Court Questionnaire.

[183] Between 1998 and 2003, Judge Jackson worked as an associate at several law firms, including Miller, Cassidy, Larroca & Lewin LLP, Goodwin Procter LLP, and the Feinberg Group, LLP. She was Of Counsel at Morrison & Foerster LLP from 2007 until 2010.

[184] Brief for the Nat'l Assoc'n of Fed. Defs. as Amicus Curiae Supporting Respondents, *Arizona v. Gant*, 556 U.S. 332 (2009) (No. 07-542).

[185] Brief in Support of Defendants-Appellants by Amici Curiae Women's Bar Association of Massachusetts, *McGuire v. Reilly,* 260 F.3d 36 (1st Cir. 2001).

[186] *McGuire v. Reilly*, 260 F.3d 36, 36 (1st Cir. 2001).

[187] 553 U.S. 723 (2008).

[188] Brief for Former Fed. Judges as Amici Curiae Supporting Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

[189] *Id*. at *5.

[190] 553 U.S. at 795-98.

[191] Brief for Cato Inst., The Constitution Project, and The Rutherford Inst. as Amici Curiae Supporting Reversal, *Al-Marri v. Pucciarelli*, 555 U.S. 1066 (2008) (No. 08-368).

[192] Jackson, *supra* note 10.

[193] *Id*. at 6.

[194] *Prevention Versus Punishment, supra* note 11, at 1711.

[195] *Id*.

APPENDIX A. LETTER OF SUPPORT FOR JUDGE KETANJI BROWN JACKSON

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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March 18, 2022

United States Senate
Washington, DC 20510

Re: Support for the Confirmation of Judge Ketanji Brown Jackson to the Supreme Court of the United States

Dear Senator:

We, the undersigned members of the Board of Directors of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), urge you to support the nomination of Judge Ketanji Brown Jackson to serve on the Supreme Court of the United States. The Lawyers' Committee is one of the nation's leading nonprofit civil rights legal organizations, founded in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and securing equal justice under law. For nearly sixty years, the Lawyers' Committee has been at the forefront of many of the most significant cases to advance racial equality and secure equal justice. Our mission and history make our organization uniquely qualified to comment on this nomination.

Judge Ketanji Brown Jackson possesses extraordinary qualifications and a breadth of experience in her legal career, and she is exceptionally well-qualified to serve as an Associate Justice on the Supreme Court. As a judge on both the United States District Court for the District of Columbia and the United States Court of Appeals for the D.C. Circuit, where she has spent the last nine years of her career combined, she has authored nearly six-hundred opinions and has received only fourteen reversals from higher Courts.[1] Before taking the federal bench, Judge Jackson served for six years, including one term as Vice Chair, on the U.S. Sentencing Commission, an independent judicial government agency responsible for issuing and amending sentencing guidelines. Judge Jackson also has experience in both private practice and as an Assistant Federal Public Defender, which enables her to bring depth and experience in both criminal and civil law to a role as an Associate Justice. Earlier in her career, Judge Jackson clerked for judges on the District Court for the District of Massachusetts, the First Circuit Court of Appeals, and, eventually, for Supreme Court Justice Stephen Breyer. A graduate of a public high school, Judge Jackson obtained her undergraduate degree in Government, *magna cum laude*, from Harvard-Radcliffe College. She then graduated from Harvard Law School, where she was a supervising editor on The Harvard Law Review.

Based on our review of her nearly 600 opinions, her significant legal career, and her writings and speeches, it is evident that Judge Jackson possesses both the exceptional

[1] *Ketanji Brown Jackson Fact Sheet*, ALL. FOR JUST. (last updated Feb. 25, 2022), https://www.afj.org/document/judge-ketanji-brown-jackson-fact-sheet/.

competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. Judge Jackson's remarkable career demonstrates a measured judicial temperament, keen intellect, and dedication to the rule of law. She is known to promote consensus among her colleagues, and to ensure that her opinions are accessible to the public, promoting a greater understanding of the law. In her adjudication of cases, she demonstrates a profound respect for precedent and the Constitution, meticulously weighing the facts, circumstances, and legal arguments presented in each individual case, and ensuring that the law is applied equally to all. Her record reflects that she does indeed have, in the words of President Biden, a "pragmatic understanding that the law must work for the American people" and that she would "bring extraordinary qualifications, deep experience and intellect, and a rigorous judicial record to the Court."[2]

In reviewing Judge Jackson's record, we are particularly struck by her rulings across various contexts that support access to courts and justice and holding the government to a high standard when one's liberty is at stake—a key indicator of her fair-mindedness when faced with civil rights cases on the bench. In particular, Judge Jackson's time as a federal public defender and service as Vice Chair of the Sentencing Commission clearly inform her approach to cases touching on the criminal justice system, which she views as working best when the parties have every reasonable opportunity to present their cases at every stage of the proceedings.

In addition to her careful application of civil rights laws and the Constitution, Judge Jackson would also bring significant diversity to the Supreme Court. To ensure that federal courts remain impartial, committed to the rule of law and trusted by the American public, the Senate must confirm highly qualified justices from across the legal profession that represent the vast diversity present in the United States. If confirmed, Judge Jackson would be the first Black woman Justice, third Black Justice, and sixth woman Justice to have served on the Court in its 232-year history. Upon her confirmation, the Supreme Court would have four women Justices, two Black Justices, and three Justices of color serving together for the first time in our history, bringing us ever closer to our nation's highest Court reflecting the diversity of America.

Diversity on the Supreme Court—be it race, ethnicity, gender, or professional background—is valuable in and of itself. A mix of backgrounds, perspectives, and professional expertise lends credibility to the Court's deliberations on important legal questions and inspires confidence in the American people. Further, a diversity of experiences among the justices enriches their deliberation and discussion in cases that come before the Court. Judge Jackson would bring much-needed professional diversity to the Supreme Court. She would join Justice Sonia Sotomayor as the second sitting Justice to have served as a trial court judge. Judge Jackson would be the first Justice to have served as a federal public defender and the first since Justice Thurgood Marshall to

[2] President Joseph R. Biden, *Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, WHITEHOUSE.GOV (Feb. 25, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/.

bring significant criminal defense experience to the Court. She also shares a distinction with Justice Breyer as having served as a member of the United States Sentencing Commission. Upon her confirmation, the Supreme Court would better reflect the diversity of the legal profession, as Judge Jackson has experience representing and protecting the rights of people who are marginalized in our society and grappling with how to ensure that our criminal justice system treats individuals justly and equitably.

Thank you for your consideration of our support of the nomination of Judge Ketanji Brown Jackson to serve on the Supreme Court of the United States. We urge the Senate to swiftly confirm Judge Jackson, as it has during her three prior Presidential nominations and Senate confirmations. We welcome the opportunity to discuss her nomination with your office further; if you have any questions or concerns, please contact Demelza Baer, Director of Public Policy, at dbaer@lawyerscommittee.org.

Sincerely,

Executive Committee Members

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