



HUMAN  
RIGHTS  
CAMPAIGN®

## REPORT ON THE NOMINATION OF JUDGE KETANJI BROWN JACKSON TO THE SUPREME COURT OF THE UNITED STATES

# JUDGE KETANJI BROWN JACKSON: A HISTORIC NOMINEE AND DEFENDER OF MARGINALIZED COMMUNITIES

**“[N]ot only the post-Civil War Reconstruction Amendments to the Constitution and the Civil Rights Acts of the 1960s, but all subsequent civil rights gains—from *women’s rights to gay marriage*—rely, in part, on the trailblazing work of black civil rights leaders, including black women . . .”**

- Judge Ketanji Brown Jackson, "Courage / Purpose / Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond." January 19-21, 2020: **Martin Luther King Jr. Day Celebration, University of Michigan Law School**

## INTRODUCTION

President Biden’s recent nomination of Judge Ketanji Brown Jackson to serve on the Supreme Court of the United States marks a historic development for the country and the Court. In the 232 years since the Supreme Court was first established in post-revolutionary America, and the 115 justices that preceded her, not a single justice on the high court has included a Black woman. This is no accident. Nationally, while much work remains to address structural racism and broader barriers to equal protection, this nomination represents a significant step towards establishing judicial institutions that reflect – and do justice by – the people of the United States.

There is also no denying that Judge Jackson’s nomination also comes at a fraught moment for the Supreme Court as an institution and for the rule of law. In several areas, a 6-3 conservative majority of the Court seems all-too-ready to roll back longstanding precedents and imperil fundamental constitutional protections, such as a woman’s right to choose or every American’s right to vote. So while the selection and confirmation of Justice Breyer’s successor arise in a different context than the last three Supreme Court appointments, the standard by which the Human Rights Campaign assesses nominees remains the same:



HUMAN  
RIGHTS  
CAMPAIGN®

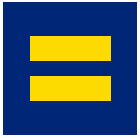
Justices of the Supreme Court need not be well-liked. We may not always agree with their rulings. But we must have faith in their impartiality, openness to legal advocacy, and adherence to reaching decisions based upon legal arguments and established facts—rather than political ideologies or personal biases. The LGBTQ+ community depends on the Court to enforce constitutional protections and civil rights statutes and to fairly interpret them in ways that protect our community. We must insist that any Supreme Court justice maintain due respect for the dignity and equality of LGBTQ+ people. We are confident that Judge Jackson would surpass this bar and would be an exceptionally qualified and influential addition to the Court.

Overall, Judge Jackson's record on the bench and as a practicing attorney reveals several significant and encouraging qualities that are relevant to the mission of the Human Rights Campaign and to the LGBTQ+ community.

- First, her tenure on the federal judiciary and in government service evinces a deep commitment to defending the accused, advocating on behalf of marginalized communities, and protecting individual and constitutional rights.
- Second, in key discrimination cases, her rulings demonstrate a keen appreciation of why government officials have a compelling interest in remedying discriminatory measures and legacies -- and of how federal anti-discrimination statutes can apply to new technologies and situations.
- Third, in the face of arbitrary and lawless actions by the Trump Administration, Judge Jackson maintained a steadfast commitment to the rule of law.
- While Judge Jackson's docket has not touched directly upon issues of LGBTQ+ rights, in other public remarks, she has highlighted the historical connections between LGBTQ+ rights and civil rights for other marginalized groups and rightly framed the *Obergefell* decision alongside Supreme Court precedents about constitutional protections involving privacy and interracial marriage.

The Human Rights Campaign also proudly supports her nomination for yet another reason: because of the unique depth and diversity of professional skills and experiences that she would bring to the Supreme Court as a former public defender, pro bono practitioner, and trial court judge. Each embodies a valuable perspective that is often missing from the highest court in the land. In the years ahead, Judge Jackson's professional background may inform her prospective decisions as an Associate Justice, as well as her private deliberations with her fellow justices.

In the end, LGBTQ+ Americans deserve a justice who will be open-minded on constitutional rights and who will safeguard the promise of equality for all. Judge Jackson will bring these qualities, and other important qualities and skills to the Court.



HUMAN  
RIGHTS  
CAMPAIGN®

## BACKGROUND

Judge Ketanji Brown Jackson served on the U.S. District Court for the District of Columbia for eight (8) years, having been nominated by President Obama in 2012 and confirmed by the Senate in 2013. She was nominated to serve on the U.S. Court of Appeals for the D.C. Circuit by President Biden and confirmed by the Senate in 2021.

She obtained her bachelor's degree from Harvard University *magna cum laude* and her law degree from Harvard Law School *cum laude*, serving as a Supervising Editor of the *Harvard Law Review*. She completed three federal clerkships, including for Judge Pani B. Saris on the U.S. District Court for the District of Massachusetts and for Judge Bruce M. Selya on the Court of Appeals for the First Circuit. After one year in private practice, she then clerked for Justice Stephen G. Breyer on the Supreme Court of the United States.

Before joining the bench, Judge Jackson served in a number of positions in government and private practice: from 2010 to 2014, as Vice Chair and Commissioner of the U.S. Sentencing Commission; from 2005 to 2007 as Assistant Federal Public Defender in the Office of the Federal Public Defender; and from 2003 to 2005 as Assistant Special Counsel of the United States Sentencing Commission. She also did stints at several law firms, most recently in the Washington D.C. office of Morrison & Foerster LLP from 2007 to 2010. She also taught workshops and seminars at Harvard Law School and George Washington University Law School various times from 2011 to 2019.

## REPRESENTING THE ACCUSED AND DEFENDING RIGHTS OF ALL PERSONS

Before joining the federal judiciary, then-Ms. Jackson spent a good part of her career focusing on representing individuals accused of federal crimes -- and advocating for the rights of marginalized communities in other ways.

Specifically, as an Assistant Federal Public Defender in the District of Columbia, Jackson advocated on behalf of indigent defendants who had been charged with federal criminal violations but could not afford legal representation.<sup>1</sup> She “filed briefs and motions in the court of appeals, argued cases, and monitored criminal law developments nationwide.”<sup>2</sup> In this position, “100% of [her] time was devoted to the disadvantaged.”<sup>3</sup> Jackson argued a number of appeals before the U.S. Court of Appeals for the D.C. Circuit.<sup>4</sup>

More broadly, it is worth contextualizing Jackson's decision to become a federal public defender in the first place. Overall, “[f]ormer prosecutors and corporate lawyers make up nearly 7 in 10 judges on the federal district courts,” including “about 45% of [President] Obama's [judicial nominees,

1 See UNITED STATES SENATE COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 127 (March 1, 2022), <https://www.judiciary.senate.gov/imo/media/doc/Jackson%20Public%20SJO.pdf> (hereinafter “SJO”).

2 *Id.*

3 SJO, *supra* note 1, at 148.

4 SJO, *supra* note 1, at 129. See, e.g., *United States v. Littlejohn*, No. 05-3081, 489 F.3d 1335 (D.C. Cir. 2007); *United States v. Ponds*, Nos. 03-3134, 03-3135, 454 F.3d 313 (D.C. Cir. 2006); *United States v. McCants*, No. 04-3064, 434 F.3d 557 (D.C. Cir. 2006).

who] had served as prosecutors at the state or federal level.”<sup>5</sup>

Over the last five presidential administrations,<sup>6</sup> this pattern has born out too: essentially the safest way to become a federal judge was to be a federal prosecutor first. Both at the time Jackson became a public defender -- and until quite recently -- this was not only an unconventional path to the federal judiciary, but also seen as a potential political liability for an aspiring judge.<sup>7</sup> Indeed, recent Senate hearings have involved spurious accusations and fearmongering about nominees who represented the accused.

In private practice too, Jackson continued to advocate on behalf of the accused and individuals who had been mis-treated at the hands of the state. She filed several amicus briefs on behalf of the National Association of Criminal Defense Lawyers,<sup>8</sup> which is “the preeminent [non-profit] organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing,” with “approximately 10,000 direct members . . . [90-plus] affiliate organizations totaling up to 40,000 attorneys.”<sup>9</sup> Jackson filed two briefs in an appeal that challenged the detention system at Guantanamo Bay following the Supreme Court’s decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).<sup>10</sup> From 2005 to 2007, she also “represented a detainee seeking habeas review of his classification as an ‘enemy combatant’ and his resulting detention at the United States Naval Station in Guantanamo Bay, Cuba,” drafting a petition for a writ of habeas corpus and a series of related motions,<sup>11</sup> and successfully obtaining a Secret security clearance to review classified documents related to his claims.<sup>12</sup> Additionally, she has worked on other Supreme Court litigation involving criminal law.<sup>13</sup>

While Jackson’s work at the U.S. Sentencing Commission involved policy work (rather than litigation or individual representations) and more technical matters around the system for calculating federal criminal sentences, she spoke several times about the application of fair sentencing legislation. Jackson played a key role in modifying the federal sentencing guidelines and addressing the

- 
- 5 Carrie Johnson, *Corporate Lawyers Who Become Judges Less Likely To Side With Workers, Study Says*, NPR (Feb. 24, 2021), <https://www.npr.org/2021/02/24/970538084/how-judges-work-experience-can-impact-court-rulings-and-legal-precedent>.
  - 6 Bob Egelko, *Obama Nominations Heavy on Ex-Prosecutors*, SF GATE (Feb. 3, 2013), <https://www.sfgate.com/nation/article/Obama-nominations-heavy-on-ex-prosecutors-4248122.php> (“In Reagan’s two terms, 40.8 percent of the judges he appointed had once been prosecutors. Bush, who like Reagan sought to move the judiciary in a more conservative direction, chose ex-prosecutors for 44.7 percent of his judicial appointments. The figures were 37.3 percent for Bush’s father, George H.W. Bush, and 40.7 percent for Bill Clinton.”).
  - 7 See, e.g., Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INSTITUTE (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates#introduction-summary-findings> (“[W]hat we found confirms the conventional wisdom: former government lawyers—and more specifically, lawyers whose formative professional experiences include serving as courtroom advocates for government—are vastly overrepresented on the federal bench.”); see also *id.* (“[E]x prosecutors outnumbered public defenders and other defense attorneys by over ten to one [10:1] among Trump appointees.”).
  - 8 Amicus Brief of National Association of Criminal Defense Lawyers in Support of Petitioner, 2009 WL 1864008, in *Bloate v. United States*, 559 U.S. 196 (2010); Amicus Brief of National Association of Criminal Defense Lawyers in Support of the Defendant, 2008 WL 2958118, in *Arizona v. Gant*, 556 U.S. 332 (2009).
  - 9 See, e.g., Brief of Amicus Curiae The National Association of Criminal Defense Lawyers, *White v. Woodall* (12-794) at 2, <https://www.scotus-blog.com/wp-content/uploads/2018/03/Amicus-Resp-NACDL.pdf>.
  - 10 See Amicus Brief on Behalf of Former Federal Judges, 2007 WL 2441585, in *Boumediene v. Bush* and *Al-Odah v. United States*, 553 U.S. 723 (2008).
  - 11 *Khiali-Gul v. Bush*, No. 1:05-cv-877 (D.D.C., 2005).
  - 12 SJO, *supra* note 1, at 141.
  - 13 See Petition for Certiorari, 2008 WL 960667, *cert. denied United States v. Bussell*, 555 U.S. 812 (2008); *Kosh v. United States*, 549 U.S. 940 (2006).

100-to-1 disparity for crack versus powder cocaine sentencing.<sup>14</sup> In particular, Jackson voted to retroactively apply changes to the sentencing guidelines and stressed that if the Commission “fail[ed] to do so [apply the reductions retroactively, it 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.*”<sup>15</sup> This change alone meant that over ten thousand individuals could apply for reduced sentences under the new, fairer sentencing guidelines.<sup>16</sup> More generally, Jackson publicly and carefully addressed the racial disparities inherent to the federal carceral system.<sup>17</sup>

Jackson’s record demonstrates a longstanding commitment to defending the rights of all persons, including the accused, and upholding the overarching principle of equal justice under law.

## LGBTQ PRECEDENTS AND PROGRESS ARE CRITICAL

While Judge Jackson’s appellate and trial dockets have not touched directly upon claims involving LGBTQ+ rights, she has made several public remarks that suggest she has an appropriate appreciation for the importance of marriage equality and the equal dignity of all persons -- including the LGBTQ+ community. Most noticeably, in 2020 remarks delivered as part of Martin Luther King, Jr. celebration at the University of Michigan, Judge Jackson comprehensively surveyed the contributions of black women lawyers over the history of the civil rights movement. In so doing, she favorably highlighted the connections between LGBTQ+ rights and other civil rights and expressly praised the work of such “trailblazing” civil rights advocates:

“And, indeed, as [acclaimed investigative journalist Nikole Hannah-Jones] points out in the podcast, not only the post-Civil War Reconstruction Amendments to the Constitution and the Civil Rights Acts of the 1960s, but all subsequent civil rights gains—**from women’s rights to gay marriage**—rely, in part, on the trailblazing work of black civil rights leaders, including black women like the ones I have profiled [in this speech].”<sup>18</sup>

Separately, Judge Jackson carefully addressed recent Supreme Court decisions about LGBTQ+ rights in her colloquy with members of Congress. In her responses to Senate questions about whether the Constitution “protect[s] rights that are not expressly enumerated in the Constitution,” Jackson cited *Obergefell* and rightly framed it alongside longstanding precedent

14 See generally UNITED STATES SENT’G. COMM’N., PUB. MEETING (July 18, 2014), video available at <http://www.uscc.gov/videos/public-meeting-july-18-2014> and minutes available at <http://www.uscc.gov/sites/default/files/pdf/amendmentprocess/public-hearings-and-meetings/20140718/meeting-minutes.pdf> at 8; UNITED STATES SENT’G. COMM’N., PUB. MEETING (Apr. 10, 2014), video available at <http://www.uscc.gov/videos/public-meeting-april-10-2014> and minutes available at <http://www.uscc.gov/sites/default/files/pdf/amendmentprocess/public-hearings-and-meetings/20140410/meeting-minutes.pdf> at 16; UNITED STATES SENT’G. COMM’N., PUB. MEETING (Apr. 6, 2011), minutes available at <https://www.uscc.gov/policymaking/meetingshearings/april-6-2011> at Pgs. 11-12.

15 UNITED STATES SENT’G. COMM’N., PUB. MEETING (June 30, 2011), Notice of meeting, minutes, and transcript available at <https://www.uscc.gov/policymaking/meetings-hearings/june-30-2011> at 17, video available at <http://www.c-spanvideo.org/program/300289-1> (emphasis added).

16 Brian Mann, *Crack Cocaine Case Review May Free Inmates*, NPR (Nov. 1, 2011), <https://www.npr.org/2011/11/01/141904202/inmates-may-be-freed-by-crack-cocaine-case-review>.

17 See, e.g., Ketanji Brown Jackson, *Disparity, Discretion, and Debate: Understanding the Federal Sentencing Dilemma*, HLR Keynote (Apr. 2017), SJQ Attachments at 869.

18 See Ketanji Brown Jackson, “Courage / Purpose / Authenticity: Black Women Leaders in the Civil Rights Movement Era and Beyond,” January 19-21, 2020: Martin Luther King Jr. Day Celebration, U. MICHIGAN L. SCH. (keynote) at 25 (SJQ Attachments at 620) (emphasis added); see generally SJQ Attachments at 596 et seq.

about marital privacy and interracial marriage:

“The Supreme Court has determined that the Constitution protects certain rights that are not specifically enumerated in the Constitution. Cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), recognize an unenumerated right to privacy that encompasses the right to marital privacy and to use contraception. *Obergefell v. Hodges*, 576 U.S. 644 (2015), and *Loving v. Virginia*, 388 U.S. 1 (1967), affirm a constitutional right to marry . . .”<sup>19</sup>

When asked squarely if *Obergefell* was correctly decided, Judge Jackson referred back to her answer about whether *Roe v. Wade* was correctly decided:

“As a sitting federal judge, all of the Supreme Court’s pronouncements are binding on me, and under the Code of Conduct for United States Judges, I have a duty to refrain from critiquing the law that governs my decisions, because doing so creates the impression that the judge would have difficulty applying binding law to their own rulings. Consistent with the positions taken by other pending judicial nominees, it is my testimony that it would be inappropriate for me to comment on the merits or demerits of the Supreme Court’s binding precedents.”<sup>20</sup>

She separately confirmed that *Loving* was correctly decided.<sup>21</sup> Additionally, Judge Jackson was asked a question that briefly cited *Bostock v. Clayton County*,<sup>22</sup>-- although the question was mainly aimed at soliciting her views on Free Exercise. In response, she affirmed, in appropriately generalized terms, that the “Free Exercise Clause is a fundamental and foundational constitutional right.”<sup>23</sup> Judge Jackson was asked about her association with a private school that had posted statements about opposing “sexual immorality” including “homosexuality.”<sup>24</sup> She responded that she “was not aware that the school had a public website or that any statement of beliefs was posted on the school’s website,” and that her “service on the board [from 2010 to 2011] primarily involved planning for school fund-raising activities for the benefit of enrolled students.”<sup>25</sup> While the personal religious beliefs of any given nominee are primarily a personal matter, the Senate Judiciary Committee has previously and rightly examined how a nominee would approach equality under the law.

In sum, Judge Jackson’s recent remarks about marriage for same-sex couples, both in public speeches and Senate testimony, suggest that she has a serious appreciation for the significance of LGBTQ+ rights, as well as their connection to civil rights more generally.

---

19 S.JQ Attachments at 448.

20 *Id.* at 461-462.

21 *Id.* at 419, 461.

22 590 U.S. \_\_\_\_ (2020).

23 S.JQ Attachments at 417.

24 S.JQ Attachments at 436.

25 *Id.*



HUMAN  
RIGHTS  
CAMPAIGN®

## RECOGNIZING THE IMPORTANCE OF ANTI-DISCRIMINATION PROTECTIONS

While serving on the D.C. District Court, Judge Jackson adjudicated several discrimination claims at various stages of the litigation process. Two stand out insofar as they tend to reveal Judge Jackson's broader approach to anti-discrimination protections:

The first case involved a facial constitutional challenge to Section 8(a) of the Small Business Act, which establishes a business development program for "socially and economically disadvantaged small business concerns." Rothe Development, Inc., a small business in Texas, sued the Department of Defense and Small Business Administration, arguing that the Section 8(a) constitutes a racial classification and violates the right to equal protection under the Due Process Clause of the Fifth Amendment.<sup>26</sup> (This is sometimes referred to as a 'reverse-discrimination' claim.)

Applicable federal regulations define "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."<sup>27</sup> It also creates a rebuttable presumption that members of particular groups, for example Black Americans, Hispanic Americans, Native Americans, and other minorities, are "socially disadvantaged." If a business owner is not a member of a presumptively socially disadvantaged group, then she or he must present other individualized evidence of social disadvantage, which has several elements. Section 8(a) is one of many government programs aimed at supporting certain small businesses, for example, owned by women, veterans, or minorities, through procurement and incentives.<sup>28</sup>

Judge Jackson concluded that Section 8(a) was constitutional and ruled in favor of the government, after applying the "strict scrutiny" standard. Specifically, she held that the "government ha[d] articulated an established compelling interest for the program—namely, remedying 'race-based discrimination and its effects,'"<sup>29</sup> and had presented strong evidence that "furthering this interest requires race-based remedial action—specifically, evidence regarding discrimination in government contracting. . . ."<sup>30</sup> Judge Jackson examined expert evidence about how minority-owned small-business encounter statistically significant disadvantages in government contracting that cannot be explained by non-discriminatory factors. And she ruled that the 8(a) program was narrowly tailored along "six dimensions."<sup>31</sup> Judge Jackson also carefully analyzed some of the Supreme Court's key precedents about affirmative action, for example, *Grutter v. Bollinger*, 539 U.S. 306 (2003).<sup>32</sup>

A divided panel of the D.C. Circuit affirmed Judge Jackson's decisions on somewhat different -- arguably narrower grounds -- that Section 8(a) was facially race neutral and so rational basis

26 *Rothe Dev., Inc. v. Dep't of Def.*, 107 F. Supp. 3d 183 (D.D.C. 2015), *aff'd sub nom. Rothe Dev., Inc. v. US. Dep't of Def.*, 836 F.3d 57 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (2017).

27 *Id.* at 189 (citation omitted).

28 *Id.* (citations omitted).

29 *Id.* at 208.

30 *Id.*

31 *Id.*

32 *Id.*



review -- not strict scrutiny -- applied and the D.C. Circuit need not decide whether a race-based regulatory presumption is constitutionally permissible. The Supreme Court denied certiorari.<sup>33</sup>

Judge Jackson's underlying ruling in *Rothe* is revealing for several reasons. She laid out why remedying past racial discrimination constitutes a "compelling" governmental interest. Moreover, the *Rothe* lawsuit is typical of the sort of constitutional challenges that are brought against government policies that remedy recent or past discrimination, and promote diversity. Jackson's decision suggests she would be generally supportive of such policies if carefully designed to comply with existing precedent.

The second case involved a cutting-edge lawsuit brought by the Equal Rights Center, a civil rights organization in Washington, D.C., against Uber Technologies, the popular ride-sharing company. Equal Rights Center had tested and documented certain discriminatory policies and practices related to Uber's services for customers in wheelchairs. Namely, Uber allegedly excluded wheelchair users entirely or offered them inferior services that were more expensive (almost twice as great), slower (as much as eight times greater), and less reliable. The Equal Rights Center sued Uber, arguing these actions violated the Americans with Disabilities Act (ADA) as well as the D.C. Human Rights Act (DCHRA).

Uber put forward a number of procedural and substantive arguments as to why the Equal Rights Center did not have standing to sue and why Uber was not subject to the ADA or DCHRA because it was a software company. Judge Jackson denied the motion, carefully examined the purpose and text of the ADA, and analyzed how they would apply to the relatively novel context of ride-sharing application and service.<sup>34</sup>

Specifically, Judge Jackson held that the ADA and DCHRA set out anti-discrimination provisions that apply to "public transportation services" and/or "places of accommodation" and that Uber plausibly qualified under either provision. She explicitly rejected Uber's "narrow" reading of the relevant statutes. And she meticulously distinguished Uber's argument that it was a mere "conduit" between passengers and users, more analogous to Expedia.com than a traditional place of public accommodation (like a hotel):

"By contrast, Uber's drivers are part of the Uber workforce, and they operate within a market that Uber itself created; Uber drivers do not exist independent of Uber's app, and this Court is hard-pressed to imagine how Uber drivers could continue to operate without the Uber app (or a competitor's service). Uber also controls the pricing of its drivers' services, and it allegedly asserts far more control over its drivers than any traditional brokering service has over the relevant service providers. Thus, based on the allegations in ERC's complaint, Uber is much more than a mere "conduit" between riders and drivers."<sup>35</sup>

33 *Rothe Dev., Inc. v. US. Dep't of Def.*, 836 F.3d 57 (D.C. Cir. 2016), cert. denied, 138 S. Ct. 354 (2017).

34 See *Equal Rights Ctr. v. Uber Techs., Inc.*, 17-cv-1272, --- F. Supp. 3d ---, 2021 WL 981011 (D.D.C. Mar. 15, 2021).

35 *Id.* at 84-85.





HUMAN  
RIGHTS  
CAMPAIGN®

At bottom, Judge Jackson systematically rejected Uber's attempts to avoid anti-discrimination protections in the disability context and allowed the plaintiff's important discrimination claims to move forward.

Beyond the *Rothe* and *Uber* cases, Judge Jackson has also handled a variety of other employment discrimination matters, often involving former government employees suing a federal agency. Some are fact-intensive or unique to the context of federal employment. That, taken together with the fundamentally different roles of district court, circuit court,<sup>36</sup> and Supreme Court, mean that some of Judge Jackson's other trial court orders (issued early in litigation) are often limited to the facts of the case.

## UPHOLDING THE RULE OF LAW

In addition to crafting carefully reasoned and well-organized legal analyses, Judge Jackson demonstrated an unwavering commitment to the rule of law, particularly in the face of recent threats and *de facto* lawlessness by the Trump Administration. Two examples bear this out:

The first involves the Trump Administration's attempt to stymie Congress's power to conduct investigations by invoking a sweeping vision of executive power. The case of *Committee on the Judiciary v. McGahn*<sup>37</sup> stemmed from a Congressional investigation into Russia's interference in the 2016 election and President Trump's potential obstruction of justice. When the House Judiciary Committee subpoenaed the White House Counsel Donald F. McGahn, President Trump instructed McGahn to refuse to appear at all. The Committee sued McGahn and the Trump Administration (representing McGahn) argued that senior aides to the President are absolutely immune from being compelled to testify before Congress and that the district court did not have jurisdiction to hear the dispute (due to separation of powers concerns).

Judge Jackson rejected the Trump Administration's position and held that their theory of "unreviewable absolute testimonial immunity" and "unassailable Executive branch authority" was "baseless."<sup>38</sup> She noted that in fact Congress has a "constitutionally vested responsibility to conduct investigations of suspected abuses of power within the government."<sup>39</sup> Judge Jackson ruled that the district court had jurisdiction because "it is 'emphatically' the role of the Judiciary to say what the law is," citing *Marbury v. Madison*.<sup>40</sup> In one especially memorable passage, Judge Jackson highlighted that:

"The primary takeaway from the past 250 years of recorded American history is that

---

36 Judge Jackson has only participated in a handful of D.C. Circuit rulings to date. E.g., *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686 (D.C. Cir. 2022); *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, No. 20-1396, 2022 WL 287906 (D.C. Cir. Feb. 1, 2022); *I.A. v. Garland*, No. 20-5271 (D.C. Cir. Feb. 24, 2022) (concurrency with per curiam order).

37 *Comm. on Judiciary, United States House of Representatives v. McGahn*, 415 F. Supp. 3d 148 (D.D.C. 2019), *vacated and remanded sub nom. Comm. on Judiciary v. McGahn*, 951 F.3d 510 (D.C. Cir. 2020), reh'g en banc granted, opinion vacated sub nom. *United States House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020), and on reh'g en banc sub nom. *Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), and aff'd in part, remanded in part sub nom. *Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020), and rev'd and remanded sub nom. *Comm. on Judiciary of United States House of Representatives v. McGahn*, 973 F.3d 121 (D.C. Cir. 2020), reh'g en banc granted, judgment vacated (Oct. 15, 2020).

38 *Id.* at 155.

39 *Id.*

40 *Id.* at 154.



HUMAN  
RIGHTS  
CAMPAIGN®

Presidents are not kings . . . Rather, in this land of liberty, it is indisputable that current and former employees of the White House work for the People of the United States, and that they take an oath to protect and defend the Constitution of the United States.<sup>41</sup>

The D.C. Circuit ultimately affirmed *en banc*, and McGahn ultimately testified before the House Judiciary Committee after reaching a settlement.

In a second case, *Policy and Research LLC v. U.S. Department of Health and Human Services*,<sup>42</sup> Judge Jackson examined the Trump Administration's decision to suddenly cut off federal funding to Teen Pregnancy Prevention Program. Several public health organizations brought suit and claimed that the Administration's decision violated Administrative Procedure Act. The Trump Administration argued that its funding decision was unreviewable by any federal court because it had merely withheld funding (under a vaguely defined grant policy), not actually "terminated" the grant. Judge Jackson rejected that argument and granted summary judgment to the plaintiffs, holding that "[b]ecause [Health and Human Services] HHS terminated plaintiffs' grant funding within the meaning of the HHS regulations without any explanation and in contravention of its own regulations, HHS's action easily qualifies as an arbitrary and capricious act under the [Administrative Procedure Act]"<sup>43</sup>

## BRINGING UNIQUE PROFESSIONAL SKILLS AND EXPERIENCE

Finally, as a former public defender, pro bono practitioner, and trial court judge, Judge Jackson would bring a distinctive set of legal skills and perspectives to the Supreme Court. Her work on behalf of the accused, described above, would be particularly meaningful because none of the current Supreme Court justices have served as a public defender, although two have worked as federal prosecutors and this was generally thought to be the safest professional course to becoming a federal judge. The last justice who had had experience representing defendants in the criminal justice system was Thurgood Marshall, who was confirmed in 1967 and retired 31 years ago. Relatedly, Judge Jackson "developed expertise in administrative procedure and the specific regulations (the federal sentencing guidelines) that federal district court judges use at sentencing."<sup>44</sup> This too, would prove quite useful for the high court, which regularly reviews sentencing-related petitions that are technical in nature and can have complex, collateral, and/or retroactive effects.

Judge Jackson's record in private practice is also replete with pro bono matters, which evinces both her commitment to the public interest as well as her openness to new perspectives. Approximately "15 to 20% of the time that [she] spent at each of the general litigation firms that [she has] affiliated with involved pro bono litigation work or services,"<sup>45</sup> including child custody proceedings, asylum petitions, educational opportunity in low-income communities, and indigent

---

41 *Id.* at 213.

42 *Pol'y & Rsch., LLC v. United States Dep't of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 68 (D.D.C. 2018).

43 *Id.*

44 SJO, *supra* note 1, at 128-29.

45 SJO, *supra* note 1, at 148.

criminal defendants. In addition to the amicus briefs on behalf of NACDL, describe above, she also filed a brief in the Supreme Court on behalf of the libertarian think-tank the Cato Institute,<sup>46</sup> of retired judges,<sup>47</sup> and of a national nature conservancy organization.<sup>48</sup> In 2001, she filed a brief on behalf of the Women's Bar Association and a number of other signatories in a First Circuit case about the regulation of "buffer zones" around reproductive health care facilities.<sup>49</sup>

Last, but certainly not least, Judge Jackson's trial experience would be a considerable asset to the Court in practical and legal terms. Her years on the district court yielded "578 opinions, dispositive orders, and orders affecting injunctive relief,"<sup>50</sup> about 482 of which are published on WestLaw. She "presided over twelve trials: nine jury trials and three bench trials," roughly half civil and half criminal.<sup>51</sup> Moreover, while in private practice, Jackson worked as "associate counsel in approximately 15 cases being litigated in state and federal courts."<sup>52</sup> This in-depth, hands-on experience with district court litigation, trials, and motion practice will be valuable knowledge and a special perspective that is often missing from the highest court in the land. For example, only one other justice (Sotomayor) in recent memory has had experience as a trial court judge. Since the Supreme Court regularly reviews the outcome of trials, motions for summary judgment, and mixed legal issues that depend on long factual records, this sort of practical experience could be immensely useful in any context.

In less tangible terms too, what Judge Jackson's experiences and expertise would add to the Court are evocative of what Justice Sandra Day O'Connor once said about Justice Thurgood Marshall:

"At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth. Although I was continually inspired by his historical achievements, I have perhaps been most personally affected by Justice Marshall as raconteur."<sup>53</sup>

All told, Judge Jackson's diverse professional background and skills will add great value to the Court and likely inform her private deliberations with her fellow justices.

46 Amicus Brief of Cato Institute et al., 2009 WL 230960, in *Al-Marri v. Spagone*, No. 08-368, cert. granted, 555 U.S. 1066 (2009), cert. dismissed as moot, 555 U.S. 1220 (2009). See also Amicus Brief of The Constitution Project et al., 2008 WL 4735243, in *Al-Marri v. Spagone*, (cert. stage amicus brief).

47 Amicus Brief on behalf of Former Federal Judges, 2007 WL 2441585, in *Boumediene v. Bush* and *Al-Odah v. United States*, 553 U.S. 723 (2008).

48 Oral argument in support of the government, *Ladd v. United States*, No. 1:07-cv-271 (Fed. Cl., Oct. 14, 2009).

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

50 SJQ, *supra* note 1, at 58.

51 SJQ, *supra* note 1, at 57.

52 SJQ, *supra* note 1, at 130.

53 Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217-18 (1992), <https://www.jstor.org/stable/1229051>.



HUMAN  
RIGHTS  
CAMPAIGN®

## CONCLUSION

Even before confirmation hearings begin, Senate leadership on both sides of the aisle are already acknowledging that there is “no question” that Judge Jackson is qualified for the Supreme Court.<sup>54</sup> The Human Rights Campaign determines that she has a strong record, both on and off the bench, for the core legal issues that impact LGBTQ+ rights. The Senate -- which has thrice confirmed Judge Jackson for other positions, including twice without objection by voice vote<sup>55</sup> -- must give her a fair and respectful hearing and a prompt vote. Ultimately, we expect that she will be confirmed as the 116th associate justice of the Supreme Court of the United States and the first Black woman to serve on the highest court in the land.

---

54 Weston Blasi, Mitch McConnell Says ‘No Question’ Ketanji Brown Jackson is Qualified for the Supreme Court, MARKET WATCH (Mar. 4, 2022), <https://www.marketwatch.com/story/mitch-mcconnell-says-no-question-ketanji-brown-jackson-is-qualified-for-the-supreme-court-11646415030>.

55 PN802 — Ketanji Brown Jackson — United States Sentencing Commission, 111th Congress (2009-2010), <https://www.congress.gov/nomination/111th-congress/802>; PN18 — Ketanji Brown Jackson — The Judiciary, 113th Congress (2013-2014), <https://www.congress.gov/nomination/113th-congress/18>.